



STATE OF MINNESOTA
IN COURT OF APPEALS

No.: A09-683

Stacy Juetten,

Appellant,

vs.

David Whiting, M.D.,

Respondent,

and

LCA-Vision, Inc., d/b/a as LasikPlus Vision
Center, a Delaware Corporation,

Defendant.

APPELLANT'S BRIEF & APPENDIX

Wilbur W. Fluegel, #30429
FLUEGEL LAW OFFICE
Suite 3475, 150 South 5th St.
Minneapolis, MN 55402
(612) 238-3540
Co-Counsel for Appellant

Mark A. Hallberg, # 39639
HALLBERG & MCCLAIN
Suite 715, 380 St. Peter St.
St. Paul, MN 55102
(651) 255-6810
Attorneys for Appellant

William M. Hart, #150526
Cecilie Morris Loidolt, #233006
Damon L. Highly, #300044
MEAGHER & GEER, PLLP
Suite 4400
33 South 6th St.
Minneapolis, MN 55402
(612) 338-0661
Attorneys for Respondents

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ISSUES 1

STATEMENT OF THE CASE AND FACTS 3

ARGUMENT 16

 I. If Traditional Substantive and Procedural Laws are Applied, Dr. Whiting
 was Clearly Timely Served with an Affidavit of Expert Disclosure 16

 A. The 180-day Deadline Runs from Suit Commencement 16

 B. Suit Commencement Runs from Service of a Summons on the
 Individual Defendant whose Conduct is at Issue 16

 C. The Interval from Service of a Summons to Service of an Affidavit
 on Dr. Whiting was within 180 Days 16

 D. Under Traditional Rules, the Affidavit of Expert Disclosure was
 Timely and the Trial Court Committed an Error of Law by Finding to
 the Contrary, Requiring Reversal of Summary Judgment 17

 II. The “Relation Back” Rule does not Alter the Traditional Result 18

 A. Trial Court’s Ruling Combined “Relation Back” and “Law of the
 Case” Doctrines to reach a Contrary Result 18

 1. “Relation back” is applied to preserve claims under the
 statute of limitations and not to bar claims based on other
 deadlines 18

 2. No other court has taken the approach of the trial court ... 19

 B. The Trial Court misapplied the “Law of the Case” Doctrine
 as Well 20

1. "Law of the case" doctrine requires an issue to have already been decided by the same court 20
2. "Law of the case" is not a substantive rule, but rather only a procedural one 20
3. Here the trial court applied the "law of the case" as a substantive rule to bar consideration of a ruling that had in fact not been made before 21
4. A principal-agent relationship did not exist between Dr. Whiting and LCA-Vision, Inc. 22
5. When *res judicata* applies, it allows dismissal of a principal to extinguish claims against agents, but here LCA-Vision, Inc. was not the principal of anyone as it was actually the employer of neither doctor - - it was wrongly named 26

III. The Affidavits of Expert Disclosure were Adequate 29

CONCLUSION 30

APPENDIX

Affidavit of Mark Hallberg, dated September 29, 2008	A-001
Judgment, entered on March 27, 2008	A-102
Order and Memorandum of Hon. Deborah Hedlund, dated March 25, 2008	A-103
Findings of Fact, Conclusions of Law and Order For Judgment, of Hon. Robert A. Blaeser, dated February 23, 2009	A-113
Respondent's Notice of Review dated April 28, 2009	A-121
Respondent's Notice of Review dated May 4, 2009	A-123

TABLE OF AUTHORITIES

STATUTES AND RULES

MINN. STAT. § 145.682	7, 9-14, 16, 17, 21, 30, 31
MINN. STAT. § 145.682, subd. 2	7, 8, 12, 16, 17
MINN. STAT. § 145.682, subd. 3	7
MINN. STAT. § 145.682, subd. 4	8
MINN. STAT. § 145.682, subd. 6	8
MINN.R.CIV.APP.P. 103.03(a)	10
MINN.R.CIV.APP.P. 106	14
MINN.R.CIV.P. 3.01	16, 17
MINN.R.CIV.P. 15.03	18, 19, 30
MINN.R.CIV.P. 54.02	10

CASES

<i>Bigay v. Garvey</i> , 575 N.W.2d 107 (Minn. 1998)	19
<i>Bloomfield Mech. Contracting, Inc. v. Occupational Safety & Health Review Comm'n</i> , 519 F.2d 1257, 1262 (3d Cir. 1975)	20
<i>Braunwarth v. Control Data Corp.</i> , 483 N.W.2d 476, 476 n.1 (Minn. 1992)	1, 20
<i>Broehm v. Mayo Clinic Rochester</i> , 690 N.W.2d 721, 725 (Minn. 2005)	14, 31

<i>Brown v. Freds, Inc.</i> , 494 F.3d 736, 740 (8 th Cir. 2007)	24
<i>Busch v. Mann</i> , 397 N.W.2d 391, 395 (Minn. App. 1986), <i>overruled on other grounds</i>	24
<i>Carr v. Veteran's Admin.</i> , 522 F.2d 1355, 1356 (5 th Cir. 1975),	1, 19
<i>Falgren v. State Bd. of Teaching</i> , 545 N.W.2d 901, 905 (Minn. 1996)	27
<i>Hauschildt v. Beckingham</i> , 686 N.W.2d 829, 837 (Minn. 2004)	26, 28
<i>Hoffman v. Wiltscheck</i> , 411 N.W.2d 923 (Minn. App. 1987)	26
<i>Illinois Farmers Ins. Co. v. Reed</i> , 662 N.W.2d 529 (Minn. 2003)	27
<i>Johnson v. Hunter</i> , 435 N.W.2d 821, 823 (Minn. App. 1989), <i>rev'd in part on other grounds</i> , 447 N.W.2d 871, 876 (Minn. 1989)	27
<i>Krmpotich v. City of Duluth</i> , 449 N.W.2d 507 (Minn. App. 1989)	10
<i>L.K. v. Gregg</i> , 425 N.W.2d 813, 815 (Minn. 1988)	20
<i>Lange v. National Biscuit Co.</i> , 297 Minn. 399, 403, 211 N.W.2d 783, 785 (1973)	1, 23, 29
<i>Myers v. Price</i> , 463 N.W.2d 773, 776 (Minn. App. 1990), <i>review denied</i> (Minn. Feb. 4, 1991)	1, 26

<i>Olmanson v. LeSueur County</i> , 693 N.W.2d 876, 879 (Minn. 2005)	17
<i>Peterson v. BASF Corp.</i> , 675 N.W.2d 57, 65 (Minn. 2004), <i>vacated on other grnds</i> , 544 U.S. 1012, 1012 (2005)	20
<i>Pischke v. Kellen</i> , 384 N.W.2d 201 (Minn. App. 1986)	26
<i>Reedon of Faribault, Inc. v. Fidelity & Guar.</i> <i>Ins. Underwriters, Inc.</i> , 418 N.W.2d 488 (Minn. 1988)	26
<i>Rendall-Speranza v. Nassim</i> , 107 F.3d 913, 918 (D.C. Cir.1997)	20
<i>Sigurdson v. Isanti County</i> , 448 N.W.2d 62, 66 (Minn. 1989)	1, 20
<i>Sorenson v. St. Paul Ramsey Med. Ctr.</i> , 457 N.W.2d 188, 193 (Minn. 1990)	8
<i>Valspar Corp. v. Lukken Color Corp.</i> , 495 N.W.2d 408, 410-11 (Minn. 1992)	24
<i>Wicken v. Morris</i> , 510 N.W.2d 246, 249 (Minn. App. 1994) <i>rev'd on other grounds</i> , 527 N.W.2d 95 (Minn. 1995)	23

OTHER AUTHORITIES

3 J. MOORE, MOORE'S FEDERAL PRACTICE, § 15.19[3][a], 15-84 (3d ed. 1999)	1, 19
39 F.R.D. 82, 82-83 (1966)	1, 19
D. HERR & R. HAYDOCK, 1 MINNESOTA PRACTICE: CIVIL RULES ANNOTATED, 423 (4 th ed. 2002)	18

ISSUES

1. Did the trial court err as a matter of law by extending the “relation back” and “law of the case” doctrines to insulate a non-party from liability based on a procedural deficiency committed not toward the non-party, but rather toward an improvidently named party who bore no principal-agency relationship to the non-party?

The trial court held in the negative.

Apposite authority: *Braunwarth v. Control Data Corp.*, 483 N.W.2d 476, 476 n.1 (Minn. 1992)(the “law of the case” is not a limitation on the power of a court to reexamine an issue - it is “a rule of practice, not of substantive law.”); *Sigurdson v. Isanti County*, 448 N.W.2d 62, 66 (Minn. 1989) (law of the case is a rule of practice establishing that once an issue is considered and adjudicated, that issue should not be reexamined in that court or any lower court throughout the case); 3 J. MOORE, MOORE’S FEDERAL PRACTICE, § 15.19[3][a], 15-84 (3d ed. 1999)(“The purpose of [relation back under] Rule 15(c) is to provide the opportunity for a claim to be tried on its merits, rather than being dismissed on procedural technicalities, when the policy behind the statute of limitations has been addressed.”); *Myers v. Price*, 463 N.W.2d 773, 776 (Minn. App. 1990), *review denied* (Minn. Feb. 4, 1991) (elements of *res judicata* include identical parties or participation of their “privies”).

2. If no principal-agency relationship exists between two parties, is it an error of law to afford a procedural protection to the “agent” of the “principal”?

The trial court held in the negative.

Apposite authority: *Lange v. National Biscuit Co.*, 297 Minn. 399, 403, 211 N.W.2d 783, 785 (1973) (*respondeat superior* or vicarious liability depends on the existence of a principal-agent or employer-employee relationship relative to the agent or employee’s tortious conduct).

3. When a person is added as a party defendant, does a procedural rule regarding the timing of pleadings “relate back” to protect that newly added party as though the time limit for the procedure had commenced before the new party was added?

The trial court held in the negative.

Apposite authority: *See Carr v. Veteran’s Admin.*, 522 F.2d 1355, 1356 (5th Cir. 1975), quoting Advisory Committee’s Note, 39 F.R.D. 82, 82-83 (1966)(“Rule 15(c) is a reaction to a line of cases refusing to allow an amendment to relate back when a plaintiff sued and

served one government entity within the period prescribed by statute and later attempted to substitute the proper entity as a defendant. *Id.* at 82-83. The Advisory Committee stressed that the government received notice of the claim 'within the stated period,' and it stated, '[r]elation back is intimately connected with the policy of the statute of limitations.' *Id.* at 83.").

STATEMENT OF THE CASE AND FACTS

Underlying medical issues

The underlying issues in this medical malpractice case relate to whether it was negligent for Dr. David Whiting, M.D. to proceed with LASIK refractive surgery to treat Plaintiff Stacy Juetten's eye condition in August 2005, in light of the presence of some amount of superficial punctate keratitis ("SPK"), and whether there was a failure to disclose to her the risks of proceeding with LASIK in a patient whose contraindications for it included (1) SPK, (2) a history of diabetes, and (3) thyroid abnormalities. Following the surgery, Ms. Juetten developed a permanent dry eye condition and reduced visual acuity, which are among the risks of LASIK, particularly when undertaken in the face of these contraindications.

Genuine fact issues

Dr. Whiting disputes the improvidence of doing LASIK and has pointed to a pre-surgery assessment undertaken by a colleague named Dr. Scott Schirber, O.D., who works with Dr. Whiting at LasikPlus Vision Center, and who concluded prior to the LASIK procedure that there was (1) only a "trace" of SPK, (2) Ms. Juetten's diabetes was well controlled and stable, without ocular symptoms, and (3) her hyperthyroid condition was regulated with hormone therapy, without ocular symptoms. Dr. Whiting contends that he proceeded with the LASIK surgery based on his colleague's assessment that she was a good candidate for it, though regrettably the day after the surgery she suffered an unrelenting dry eye condition with reduced visual acuity.

The record included evidence from experts retained by Ms. Juetten that it was medically below the standard of care for Dr. Whiting to proceed with LASIK surgery because the standard of care “is to advise the patient of the presence of SPK and to attempt to treat the SPK with a variety of modalities and then re-check the cornea to make sure the cornea is completely clear before proceeding with the Lasik procedure,”¹ because “pre-existing SPK is known to result in an increased incidence of severe dry eye in connection with Lasik surgery.” *Affidavit of Dr. Carlson*, at 3 (Nov. 28, 2007)(A-005). Moreover,

[a]ccording to the medical record, there was no discussion between [Dr. Whiting and] Ms. Hunt-Juetten regarding the potential complications or adverse consequences that could occur to a patient with pre-existing SPK in the context of Lasik surgery. The failure to do so was a departure from accepted standards of care under the circumstances. Furthermore, the record and the deposition testimony establish that there was no attempt to treat the SPK prior to the Lasik surgery and no repeat slit lamp examination of the corneas prior to the surgery. The failure to do so was a departure from the accepted standards of care under the circumstances.

Affidavit of Dr. Carlson, at 3, ¶ 2 (Nov. 28, 2007)(A-005). Because it is “well recognized in the literature that Lasik surgery can aggravate underlying SPK and result in severe dry eye . . . [as] the Lasik procedure results in severing of the nerves of the cornea when the flap is prepared,”² the Lasik “patient does not have the necessary feedback in the presence of irritation and there can be a reduction in tear production leading to further injury or damage

¹ *Affidavit of Dr. Carlson*, at 3, ¶ 1 (Nov. 28, 2007)(A-005).

² *Affidavit of Dr. Carlson*, at 3, ¶ 3 (Nov. 28, 2007)(A-005).

to the eye.” *Affidavit of Dr. Carlson*, at 3-4 (Nov. 28, 2007)(A-005 - A-006).³

Nature and risks of LASIK

LASIK is the medical abbreviation for *laser-assisted in-situ keratomileusis*, a surgical procedure in which a tiny flap is cut in the top of the cornea and underlying corneal tissue is removed with an excimer laser, followed by putting the flap back in place to reshape the cornea and improve the way light is refracted or focused by the eye, as a way to correct near-sightedness without the need for corrective glasses or contact lenses.

One of the risks of Lasik is dry eye and vision problems. Certain pre-existing underlying medical conditions can predispose a patient to these complications and doctors assess the presence of absence of these conditions and of a patient’s susceptibility to adverse reactions as part of determining their eligibility for the procedure.

Ms. Juetten’s medical history included her diagnosis and treatment of Graves disease and thyroid problems that were regulated by hormone therapy, and she was also a non-insulin dependent diabetic whose diabetes was well-controlled by medication.

One way to assess the potential effects of Lasik on a patient is to conduct a dye or stain test for SPK. SPK is the medical abbreviation for *superficial punctate keratitis*. SPK is the inflammation of epithelial cells at pinpoint locations on the outer part of the cornea’s surface. SPK is graded on a scale that runs from “trace” to “four” and when stain is placed

³ See also *Affidavit of Dr. Lane*, 3-5 (Mar. 7, 2008) (A-011 - A-013) (outlining the requirements of the standard of care, their breach and how the breach caused the injury).

in a patient's eyes it collects in areas of irregularity on the eye's surface. When stain is retained in areas of the eye it is a fore-warning that the person may suffer "dry eye" as a consequence of the Lasik procedure. Here, Ms. Juetten's eyes retained stain in six areas of her right eye and four areas of her left and this was graded as "trace" staining.

Graves disease is a "contraindication" to undergoing a Lasik procedure according to FDA guidelines, meaning active Graves disease can "rule out" a patient having a Lasik procedure. Moreover, poorly controlled diabetes is a "relative contraindication" for undergoing Lasik according to FDA guidelines, which means the procedure is "inadvisable" for such a person, but the procedure is not "ruled out."

As Ms. Juetten had previously used contact lenses successfully, had only a "trace" reading for SPK, no prior history of dry eyes, an eye exam reflecting the ability to get her vision to 20/20 when her eyes were dilated, the Graves disease was a past condition and thyroid and diabetes conditions were controlled by medications, the fact that prior testing had shown no evidence of diabetic retinopathy or active evidence of Graves Disease in her eyes, she was deemed by Dr. Scott Schirber to be eligible to undergo the Lasik procedure.

Adverse Consequences and nature of claim

The procedure was conducted on August 5, 2005 by Defendant-Respondent Dr. David Whiting at LasikPlus. While Ms. Juetten had been advised in general about these risks, she had not been advised by Dr. Whiting that her history specifically may make her more susceptible to them and that she thus personally possessed higher risks of an adverse result

or complications than the general population would statistically face. Within 24 hours she developed blurred vision, dry eye and vision problems.

Ms. Juetten served a summons and complaint against LasikPlus on January 23, 2007. She did not sue Dr. Scott Shirber (the optometrist doing the candidacy assessment) or Dr. David Whiting (the ophthalmologist doing the Lasik procedure). She sued LCA-Vision, Inc. alleging that it had vicarious liability under the principal-agency doctrine of *respondeat superior* for the negligence of the two doctors. Alleging that her dry eye and loss of vision were the result of the doctors' failure to (1) recognize her pre-existing conditions were contraindications, (2) treat her SPK and (3) adequately inform her of her unique risk for the complications that arose, she went forward with the lawsuit against LCA-Vision, Inc.

Expert Affidavit Requirement

When a malpractice lawsuit is begun against a doctor or a medical institution, a plaintiff must comply with statutory requirements in the submission of two affidavits under § 145.682: (1) an affidavit of counsel at the outset of litigation reflecting that suit was not begun until an expert in the same field of medicine was first consulted and confirmed that the claim was valid in the sense that the accused professionals' failure to conform their conduct to standard medical practice caused injuries to the plaintiff,⁴ and (2) an affidavit or other sworn disclosure from plaintiff's expert within 180 days of the commencement of the

⁴ Minn. Stat. § 145.682, subd. 2, 3.

claim against the professional,⁵ attesting to “specific details concerning the[] experts’ expected testimony, including the applicable standard of care, the acts or omissions that plaintiffs allege violated the standard of care and an outline of the chain of causation that allegedly resulted in damage to them.”⁶ Failure to comply results in dismissal.⁷

Who were parties and who should have been

Ms. Juetten started her lawsuit on January 23, 2007, seeking to sue the employer of Dr. Whiting and Dr. Schirber, and she named “LCA-Vision, Inc.,” suing that entity for its vicarious liability as the employer of professionals she contended has caused her eye injury.

LCA-Vision, Inc., is a corporate entity that owns and operates its laser eye-surgery business at facilities called “LasikPlus Vision Centers,” including the one at which Dr. Whiting and Dr. Schirber worked. The name LasikPlus Vision Center is merely a trade name in which the business is conducted and is not a separate legal entity of any kind. Unknown to Ms. Juetten - - who simply went to a business address called LasikPlus Vision Center - - the doctors’ actually were not employed by LCA-Vision, Inc., or LasikPlus Vision Center, but by a subsidiary of LCA-Vision, Inc., known as “Columbus Eye Associates.” Ms. Juetten’s original complaint named only one entity and sought vicarious liability from it, making no direct claims that the business had done anything negligent directly. Regrettably,

⁵ Minn. Stat. § 145.682, subd. 2, 4.

⁶ *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 193 (Minn. 1990).

⁷ Minn. Stat. § 145.682, subd. 6.

the entity she named was not the employer of anyone, as the physicians with whom she had a complaint were actually employed by a different entity named "Columbus Eye Associates." Her initial cause of action was commenced by the service of the summons and complaint against the wrong company and named no individual doctors.

As that claim proceeded, the entity that had been sued, LCA-Vision, Inc., moved for dismissal of the claim against it. It did so not on the basis that it had no financial responsibility for the acts of the doctors, but on the basis that while Plaintiff was figuring out who was who, the 180 day time limit to provide expert witness affidavit disclosures against it had expired, seeking dismissal under § 145.682. As that motion was pending, Ms. Juetten decided to bring a direct claim against Dr. Whiting, and on February 1, 2008, she amended her complaint to do just that.

About a month later, the trial court heard the motion of LCA-Vision, Inc., and granted its dismissal on the basis that MS. Juetten had not furnished expert affidavits, saying what "its employees" had done wrong. *Order and Memorandum* (Mar. 25, 2008) (A-104). Dismissal was solely on the basis of § 145.682,⁸ and was solely in favor of LCA-Vision, Inc. - - the entity from whom vicarious liability was sought for its "employment" of the medical professionals involved, which it did in fact not employ.

Judgment for that dismissal was entered on March 27, 2008,⁹ but by that time, Dr.

⁸ *Order and Memorandum*, Order at 2, ¶ 1 (Mar. 25, 2008) (A-105).

⁹ *Judgment* (Mar. 27, 2008 (A-102)).

Whiting had been added as a party, so the judgment was a “partial judgment” in that it affected one, but less than all the defendants and was hence not appealable.¹⁰ The matter proceeded forward against Dr. Whiting, and upon LCA-Vision, Inc. being dismissed, Plaintiff immediately served Dr. Whiting with the copy an affidavit of expert disclosure in March of 2008 - - about two months after adding him as a party - - and well within the 180-day deadline from his having been added as a party through amendment.

Disposition of the Claim against the wrong entity - - LCA-Vision, Inc.

As a medical malpractice lawsuit, Plaintiff has the burden - - within 180 days of commencing suit - - to serve detailed affidavits identifying which expert witnesses will testify and what they will say about the breach of the standard of care and how it caused an injury, under Minn. Stat. § 145.682. Affidavits were due by June 23, 2007.

On June 7, 2007, Dr. Whiting’s attorney contacted Plaintiff to say that he had not actually been working for LCA-Vision, Inc. at the time he did his work, but for another entity called “Columbia Eye Associates” that was a subsidiary of LCA-Vision, Inc., such that a claim against LCA-Vision, Inc. was improper.

While a decision about how to recast the lawsuit against LCA-Vision, Inc. was pending, Plaintiff’s counsel inadvertently allowed the 180-day time limit to expire in

¹⁰ A partial judgment, which is one on less than all matters raised, is not appealable absent certain express findings by the trial court under Minn.R.Civ.P. 54.02. See Minn.R.Civ.App.P. 103.03(a); *Krmpotich v. City of Duluth*, 449 N.W.2d 507 (Minn. App. 1989).

furnishing affidavits to LCA-Vision, Inc..

In October 2007, LCA-Vision, Inc. moved to dismiss the claim against it - - not on the basis that it was the wrong party - - but on the basis that the expert affidavits had not been timely served under § 145.682. Plaintiff promptly secured affidavits and served them on December 5, 2007.

LCA-Vision, Inc. went forward with its motion to dismiss on December 12, 2007. While that motion had been fully submitted and was pending a decision, Plaintiff served an amended complaint on Dr. Whiting suing him directly for the first time on February 1, 2008.

On March 2, 2008, Hon. Deborah Hedlund dismissed the claim against LCA-Vision, Inc. - - the admittedly wrong employer of Drs. Schirber and Whiting - - and Plaintiff collected and served further expert disclosure affidavits throughout the balance of that month, intending to go forward with a claim against Dr. Whiting (the eye surgeon).

Timeliness of Affidavits Here

There is no dispute that Plaintiff complied with the requirement of giving an initial disclosure that she had first consulted an expert before suing anyone. There is also no dispute that she was tardy regarding the requirement of submitting a second affidavit of expert disclosure within 180-days thereafter, as to the entity LCA-Vision, Inc., to which she owed an affidavit of expert disclosure by July 23, 2007, but did not submit one until

November, 2007.¹¹ What is disputed here is whether the tardiness against LCA-Vision, Inc., also amounted to tardiness against Dr. Whiting or against his actual employer, Columbia Eye Associates.

Dr. Whiting's Motion

Somewhat creatively, Dr. Whiting argued in a motion to the trial court that since he could have been sued earlier at the time that the wrong entity was sued as his putative "employer," Plaintiff's claim against him did not commence (for purposes of the 180-day disclosure requirement of § 145.682) from the date he was actually added as a party, but rather "related back" to the time that Plaintiff had sued the wrong entity as his employer, making the time interval between commencement and affidavit service not the roughly 60 days it appeared to be (for the interval between February 1, 2008 and March 25, 2008), but rather much more than 180-days because suit against him should be deemed to be commenced back when the wrong employer was sued in January of 2007. The motion of Dr. Whiting was made as one for two forms of relief: (1) for summary judgment based on the relation-back argument about timeliness of disclosure, and (2) for the adequacy of the affidavit that Plaintiff had served him with.

¹¹ Under §145.682, subd. 2, the second affidavit is due within 180 days of commencing the claim against that party. Suit against LCA-Vision, Inc. was begun on January 23, 2007, making the affidavit due on July 23, 2007. One was not developed by Plaintiff until after motion practice was threatened in November 2007, as information was being learned about who Dr. Whiting really worked for.

Disposition Below

The matter initially came back on before Judge Hedlund for argument on October 6, 2008, but she recused herself after the hearing as Dr. Whiting had held a fund raiser for her during her run for election to the Minnesota Supreme Court. The matter was re-assigned to Hon. Robert A. Blaeser who heard argument on January 12, 2009, and issued his order on February 23, 2009, granting summary judgment in favor of Dr. Whiting - - not on the basis that the affidavits submitted against him were inadequate under § 145.682 - - but on the basis that Plaintiff's earlier failure to timely serve affidavits against the wrong employer had operated to effectively dismiss the claim against Dr. Whiting as well (even though he was not a named party when LCA-Vision, Inc. had brought its motion). Judge Blaeser's ruling asserted that this result was dictated by the "law of the case" as Dr. Whiting should be viewed as the benefactor of the ruling dismissing his putative employer (even though LCA-Vision, Inc. was not actually his employer).

The reasoning of Judge Blaeser was that by operation of the rules of civil procedure the defect posed by Plaintiff's untimely response to LCA-Vision, Inc. should "relate back" to create and irretrievably violate a duty to furnish affidavits to Dr. Whiting, even though Dr. Whiting had only been in the case as a named party for two months.

Judge Robert Blaeser accepted Dr. Whiting's first argument and granted summary judgment. He also ruled that the affidavits of expert disclosure were adequate under the affidavit of expert disclosure statute, §145.682, and thus had they been timely submitted,

there would have been a claim that merited further pursuit. This summary judgment order was entered on February 23, 2009, with judgment being entered on February 24, 2009. Since that judgment - - when merged with the earlier partial judgment, - - now disposed of the entire matter, it became final and appealable, and was timely appealed on April 15, 2009.

Respondent's Notices of Review

On April 28, 2009, Respondent Dr. Whiting timely filed a Respondent's Notice of Review under Minn.R.Civ.App.P. 106, seeking the Court of Appeals' reversal of the trial court's discretionary decision on the adequacy of the affidavits of expert disclosure,¹² should the Court grant the relief Appellant is requesting and determine that the affidavits as to Dr. Whiting were timely. On May 4, 2009, Respondent served a further Notice of Review from the judgment regarding the trial court's rejection of alternative grounds for summary judgment on the basis of *res judicata* and collateral estoppel.

Issues for Appeal

While shrouded in a somewhat complex procedural history, the matters that emerge for appeal are fairly simple and straight-forward: (1) was it an error of law for Judge Blaeser to grant summary judgment on the basis that the 180-day time limit from "commencement of suit" in § 145.682 begins to run not from the date a party is served, but rather 180-day from the date any other party was served, and (2) under the Notice of Review, were

¹² An appellate court reviews the dismissal of a medical-malpractice claim for noncompliance with the expert-review statute for an abuse of discretion. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 725 (Minn. 2005).

plaintiff's affidavits of expert disclosure adequate and do doctrines of *res judicata* or collateral estoppel provide Respondent alternative grounds for dismissal.

This brief will address the first issue and, once Respondent's brief articulates more fully the second ones, Appellant will use her Reply brief to respond to the other issues.

ARGUMENT

I. If Traditional Substantive and Procedural Laws are Applied, Dr. Whiting was Clearly Timely Served with an Affidavit of Expert Disclosure

A. The 180-day Deadline Runs from Suit Commencement

The issue for the court is the manner in which the 180-day time limit imposed by §145.682 is counted. The statute prescribes the 180-day interval in § 145.682, subd. 2, as “within 180 days after commencement of the suit.”¹³

B. Suit Commencement Runs from Service of a Summons on the Individual Defendant whose Conduct is at Issue

In Minnesota, a civil lawsuit such as a malpractice claim “is commenced against each defendant . . . when the summons is served upon that defendant,” under Minn.R.Civ.P. 3.01.

C. The Interval from Service of a Summons to Service of an Affidavit on Dr. Whiting was within 180 Days

Here the summons was served on Dr. Whiting, after amendment of the original complaint to name him as an additional defendant on February 1, 2008. A period of 180 days

¹³ The relevant subdivision of the statute provides in its entirety:

In an action alleging malpractice, error, mistake, or failure to cure, whether based on contract or tort, against a health care provider which includes a cause of action as to which expert testimony is necessary to establish a prima facie case, the plaintiff must: (1) unless otherwise provided in subdivision 3, paragraph (b), serve upon defendant with the summons and complaint an affidavit as provided in subdivision 3; and (2) serve upon defendant within 180 days after commencement of the suit an affidavit as provided by subdivision 4.

Minn. Stat. § 145.682, subd. 2.

from that date would expire on July 30, 2008. The Plaintiff's affidavits of expert disclosure was then served on Dr. Whiting on March 25, 2008 - - an interval of 53 days and thus well within the 180 day time limit.

D. Under Traditional Rules, the Affidavit of Expert Disclosure was Timely and the Trial Court Committed an Error of Law by Finding to the Contrary, Requiring Reversal of Summary Judgment

“On appeal from the grant of summary judgment, [the court must] determine . . . whether the lower court erred in its application of the law.” *Olmanson v. LeSueur County*, 693 N.W.2d 876, 879 (Minn. 2005).

If traditional legal means are applied to establish due dates and to count days, the service of the affidavits of expert disclosure as to Dr. Whiting were timely. The time limit of 180 days is measured from suit commencement.¹⁴ Suit commencement is defined as service of a summons on the individual defendant involved.¹⁵ Dr. Whiting is the defendant at issue here. Service of the summons on Dr. Whiting was on February 1, 2008. Service of the § 145.682 disclosures on him was 53 days later on March 25, 2008, making them timely. The trial court committed an error of law when it ruled the deadline was exceeded. Summary judgment finding to the contrary should be reversed.

¹⁴ Minn. Stat. § 145.682, subd. 2.

¹⁵ Minn.R.Civ.P. 3.01.

II. The “Relation Back” Rule does not Alter the Traditional Result

A. Trial Court’s Ruling Combined “Relation Back” and “Law of the Case” Doctrines to reach a Contrary Result

Since Dr. Whiting was added as a party by amendment, the trial court felt that the procedural rules on amendment of pleadings and thus of “relation back” were applicable. *See Order and Memorandum*, Memo at 4 (Feb. 23, 2009) (A-116).

The trial court, in reaching its conclusion, quoted Rule 15.03 of the Rules of Civil Procedure which establishes that when “the claim . . . asserted in [an] amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the original pleading.” Minn.R.Civ.P. 15.03, *see Order and Memorandum*, Memo at 4 (Feb. 23, 2009) (A-116).

Facially, this rule may imply that the deadlines established for original parties affect parties who are added later. Its sole application in civil practice from the founding of the state to the present however, is that “Rule 15.03 determines whether an amendment of a pleading relates back to the date of filing the original pleading as to the parties in the action.” D. HERR & R. HAYDOCK, 1 MINNESOTA PRACTICE: CIVIL RULES ANNOTATED, 423 (4th ed. 2002) (emphasis added).

1. “Relation back” is applied to preserve claims under the statute of limitations and not to bar claims based on other deadlines

“The rule is invoked most frequently if a new claim or defense is barred by the running of an applicable statute of limitations.” *Id.* “If the claim would be barred at the time

the amendment is made, but would not have been barred if it had been made in the original pleading, relation back would prevent the claim from being time-barred." *Id.* (emphasis added).

2. No other court has taken the approach of the trial court

Rather than apply the doctrine to **preserve** a claim as the rule is intended, the trial court applied the doctrine to **bar** a claim.¹⁶ This unique application of Rule 15.03 - - to bar rather than to preserve a claim based on other deadlines apart from the statute of limitations - - is the first of its kind in Minnesota or in the United States, based on Appellant's research. There is no parallel ruling anywhere.¹⁷

¹⁶ In so doing, the trial court looked at the three factors that traditionally apply to determine how the statute of limitations may be extended back to the date of an original commencement of the suit against others: (1) whether the defendant who is added as a party had notice of the lawsuit, (2) whether the evidence relied upon by plaintiff is similar, and (3) whether the newly added defendant would be unfairly surprised by being added. *Order and Memorandum*, Memo at 5 (Feb. 23, 2009)(A-117), *citing Bigay v. Garvey*, 575 N.W.2d 107 (Minn. 1998). The rule itself spells out these factors when a new party is added by amendment, *see* Minn.R.Civ.P. 15.03, but does so expressly only for purposes of judging the timeliness of "commencing the action against the party," *id.*, and not for purposes of any other deadline.

¹⁷ *See Carr v. Veteran's Admin.*, 522 F.2d 1355, 1356 (5th Cir. 1975), *quoting* Advisory Committee's Note, 39 F.R.D. 82, 82-83 (1966)("The present language of Rule 15(c) is a reaction to a line of cases refusing to allow an amendment to relate back when a plaintiff sued and served one government entity within the period prescribed by statute and later attempted to substitute the proper entity as a defendant. *Id.* at 82-83. The Advisory Committee stressed that the government received notice of the claim 'within the stated period,' and it stated, '[r]elation back is intimately connected with the policy of the statute of limitations.' *Id.* at 83."); 3 J. MOORE, MOORE'S FEDERAL PRACTICE, § 15.19[3][a], 15-84 (3d ed. 1999)("The purpose of Rule 15(c) is to provide the opportunity for a claim to be tried on its merits, rather than being dismissed on procedural technicalities, when the policy behind the statute of limitations has been addressed."); *see*

B. The Trial Court misapplied the “Law of the Case” Doctrine as Well

The trial court then combined the “relation back” rules with the “law of the case” doctrine to form the basis for its contrary ruling. *See Order and Memorandum*, Memo at 6 (Feb. 23, 2009)(A-118), *quoting Peterson v. BASF Corp.*, 675 N.W.2d 57, 65 (Minn. 2004), *vacated on other grnds*, 544 U.S. 1012, 1012 (2005).

1. “Law of the case” doctrine requires an issue to have already been decided by the same court

Law of the case is a rule of practice establishing that once an issue is considered and adjudicated, that issue should not be reexamined in that court or any lower court throughout the case. *See Sigurdson v. Isanti County*, 448 N.W.2d 62, 66 (Minn. 1989); *L.K. v. Gregg*, 425 N.W.2d 813, 815 (Minn. 1988).

2. “Law of the case” is not a substantive rule, but rather only a procedural one

The rule is not a limitation on the power of a court to reexamine an issue - - it is “a rule of practice, not of substantive law.” *Braunwarth v. Control Data Corp.*, 483 N.W.2d 476, 476 n.1 (Minn. 1992).

also Bloomfield Mech. Contracting, Inc. v. Occupational Safety & Health Review Comm’n, 519 F.2d 1257, 1262 (3d Cir. 1975) (purpose of relation back is to “ameliorate the effect of a statute of limitations where the plaintiff has sued the wrong party but where the right party has had adequate notice of the institution of the action”); *Rendall-Speranza v. Nassim*, 107 F.3d 913, 918 (D.C. Cir.1997) (the purpose of the rule is to “avoid the harsh consequences of a mistake that is neither prejudicial nor a surprise to the misnamed party. A potential defendant who has not been named in a lawsuit by the time the statute of limitations has run is entitled to repose - - unless it is or should be apparent to that person that he is beneficiary of a mere slip of the pen, as it were.”).

3. **Here the trial court applied the “law of the case” as a substantive rule to bar consideration of a ruling that had in fact not been made before**

The trial court here said that his predecessor, Judge Hedlund had already ruled that “the time limit issue also applies to the Amended Complaint.” *Order and Memorandum*, Memo at 7 (Feb. 23, 2009)(A-119). The prior ruling by Judge Hedlund - - which dismissed the wrongly named entity as Dr. Whiting’s employer, LCA-Vision, Inc. - - did not in fact rule that the time limit of § 145.682 applied to Dr. Whiting based on the same deadline as applied to LCA-Vision, Inc.

Judge Hedlund’s ruling merely denied a request for an amendment to the scheduling order to add even further parties, *Order and Memorandum*, Order at 2, ¶3 (A-105), whereas Judge Blaeser characterized it as much more broad, saying “The court [in the person of Judge Hedlund] has already found that Plaintiff had no reasonable excuse for failing to file her expert affidavit in support [of] her medical malpractice claims based on Dr.’s Schirber and Whiting’s negligence within the 180-day time limit.” *Order and Memorandum* , Memo at 7 (Feb. 23, 2009)(A-119).

Giving the greatest possible benefit of the doubt to Judge Hedlund’s ruling, there are comments in her Memorandum that do indeed suggest that the reason she is not allowing amendment of the scheduling order to permit the timely further amendment of the claim to sue Dr. Schirber directly is that “Plaintiff’s claim against LCA-Vision, Inc. is based on the alleged malpractice of Dr. Schirber, and this claim is being dismissed. Therefore, Plaintiff’s

request to extend the deadline for adding parties is denied.” *Memorandum and Order*, Memo at 9 (Mar. 25, 2008) (A-112).

Judge Blaeser applies this “ruling” of Judge Hedlund - - relative to Dr. Schirber - - not as a procedural rule to bar reconsideration of the ruling about Dr. Schirber, but as a substantive rule to bar Judge Blaeser’s consideration of the timeliness of claims against Dr. Whiting, under what sounds like some type of *res judicata* principle, that both doctors as agents of a dismissed principle should also be dismissed.¹⁸

4. **A principal-agent relationship did not exist between Dr. Whiting and LCA-Vision, Inc.**

It has been established that Dr. Whiting actually worked for Columbia Eye Associates of Columbus, Ohio and not LCA-Vision, Inc., a Cincinnati, Ohio firm.¹⁹ LCA-Vision

¹⁸ The trial court’s judgment called the resolution it selected summary judgment on grounds of the “law of the case” and “relation back,” but to the extent that these essentially ruled that Plaintiff-Appellant was barred from “re-litigating” the dismissal of LCA-Vision, Inc. for untimely expert affidavits, it operated similar to *res judicata*. Technically, the trial court did not rule on Dr. Whiting’s alternative summary judgment grounds of *res judicata* or collateral estoppel, and about a week ago Respondent served notice of review under Rule 106 on the latter issues. Appellant sets forth basic *res judicata* principles here merely to put the trial court’s unusual disposition into context. Appellant will reply to Respondent’s Notice of Review on those questions in her Reply Brief.

¹⁹ See Deposition of Dr. Whiting, *attached as Ex. C to Affidavit of Mark Hallberg*, at 10, f. 14 - 19; 11, f. 17- 12, f. 9 (A-028 - A-030) (“In 1999, they [LasikPlus (LCA-Vision, Inc.)] changed their business model LCA was a publicly-traded company based in Cincinnati. They had a surgery center in Edina [Minnesota] that was an open-access center for lasik surgery, so multiple physicians could use it and bring their own patients.” As of 2005 “I’m employed by an affiliate of [LCA-Vision, Inc.] called Columbus Eye Clinic Associates. I have paychecks from two different sources. One comes from LCA, where I’m their medical director, which is an administrative position, but my professional

operated eye clinics called LasikPlus Vision Centers around the country and formed independent medical companies to operate them. The surgery Dr. Whiting did, he did for a Columbus, Ohio company that was an affiliate of the Cincinnati company known as LCA-Vision, Inc.. He was not employed by LCA-Vision, Inc. for the rendering of the professional services for which the malpractice claim was made.²⁰ LCA-Vision, Inc. is not his employer or principal for the conduct for which he is being sued.

Respondeat superior or vicarious liability flows from the existence of a principal-agent, master-servant, or employer-employee relationship. See *Lange v. National Biscuit Co.*, 297 Minn. 399, 403, 211 N.W.2d 783, 785 (1973).

If there is no such relationship applicable to the conduct at issue, then the doctrine is inapplicable. The fact that LCA-Vision owned Columbia Eye Associates is interesting, but does not make employees of the latter into employees of the former for purposes of claim or issue preclusion or for the “law of the case” doctrine. Courts are supposed to respect the separateness of parent and subsidiary corporations. See *Wicken v. Morris*, 510 N.W.2d 246, 249 (Minn. App. 1994)(separate entities for jurisdictional purposes), *rev'd on other grounds*,

compensation comes - - and this is more to do with the Minnesota regulations for who can employ physicians, I'm employed by a PA [or professional association] that they [LCA-Vision, Inc.] own[s] out of Ohio called the Columbia Eye Associates [and]. . . [w]hen . . . performing surgery on patients such as Stacy [Juetten] in 2005, [I was] . . . doing that in [the] capacity as an employee of Columbus Eye Associates, PA.”).

²⁰ As noted in the footnote above, Dr. Whiting was employed by LCA-Vision, Inc. in an administrative capacity for running the local LasikPlus outlet, but it is not for that activity he is being sued. He was sued for conducting the surgery. His employer for that was Columbus Eye Associates. It is not LCA-Vision, Inc.

527 N.W.2d 95 (Minn. 1995). Absent a showing that the subsidiary is a mere instrumentality or alter ego of the parent, courts generally presume the subsidiary is a legally separate entity from the parent corporation. *Busch v. Mann*, 397 N.W.2d 391, 395 (Minn. App. 1986), *overruled on other grounds, Valspar Corp. v. Lukken Color Corp.*, 495 N.W.2d 408, 410-11 (Minn. 1992).

Thus, in *Brown v. Freds, Inc.*, 494 F.3d 736, 740 (8th Cir. 2007), the court ruled that a person may be an employee of the parent or of the subsidiary corporation, but not of both. While Dr. Whiting held a job with LCA-Vision, Inc. as an administrator, he was not sued in that capacity, but only in the capacity of a medical professional engaged in performing ophthalmologic surgery. He was not employed by LCA-Vision, Inc. for that. The employer for his professional services was Columbia Eye Associates.

Because Dr. Whiting's employer was Columbia Eye Associates and not LCA-Vision, Inc., the fact that a disclosure was untimely to LCA-Vision, Inc., does not have any affect on the timeliness of the disclosure to Dr. Whiting.

It is clear that in making his ruling below Judge Blaeser was led by Dr. Whiting's counsel to believe Dr. Whiting was in fact employed by LCA-Vision, Inc. for the performance of professional services.²¹ In fact, Dr. Whiting had testified that such was not

²¹ The following discussion at the oral argument before Judge Blaeser makes this clear:

THE COURT: It just seems like . . . [Judge Hedlund's earlier ruling is] kind of inconsistent. I wonder why she didn't address Whiting at the same time if she knew she had already authorized him [Plaintiff-Appellant's

the case.²² To the extent that no *respondeat superior* relationship existed between LCA-Vision, Inc. and Dr. Whiting for Dr. Whiting's performance of professional services, a disposition relative to the timing of a disclosure to LCA-Vision, Inc. has no legal implication on the deadline to make a disclosure to Dr. Whiting. Dismissal of the former is not dismissal

counsel] to add Whiting [as a party] and that complaint against him [Whiting] was the same [in alleging breach of professional duties] and the same expert affidavit [was submitted] as the one she just said was no good against LCA, why did she not address it?

Ms. LOIDOLT [counsel for Dr. Whiting]: I don't know the answer to that, Your Honor. She mistakenly - - I apologize for saying this - - she mistakenly says in her order that Dr. Whiting was not an employee of LCA, so that may explain it.

Transcript of Proceedings, at 19, f. 6-17 (Jan. 12, 2009) (emphasis added)(A-101).

²² In his deposition, Dr. Whiting explained that he was employed by Columbia Eye Associates in the rendering of professional services and was employed by LCA-Vision, Inc. only for a non-related administrative job. *See* Deposition of Dr. Whiting, *attached as Ex. C* to Affidavit of Mark Hallberg, at 10, f. 14 - 19; 11, f. 17- 12, f. 9 (A-028 - A-030) ("In 1999, they [LasikPlus (LCA-Vision, Inc.)] changed their business model LCA was a publicly-traded company based in Cincinnati. They had a surgery center in Edina [Minnesota] that was an open-access center for lasik surgery, so multiple physicians could use it and bring their own patients." As of 2005 "I'm employed by an affiliate of [LCA-Vision, Inc.] called Columbus Eye Clinic Associates. I have paychecks from two different sources. One comes from LCA, where I'm their medical director, which is an administrative position, but my professional compensation comes - - and this is more to do with the Minnesota regulations for who can employ physicians, I'm employed by a PA [or professional association] that they [LCA-Vision, Inc.] own[s] out of Ohio called the Columbia Eye Associates [and]. . . [w]hen . . . performing surgery on patients such as Stacy [Juetten] in 2005, [I was] . . . doing that in [the] capacity as an employee of Columbus Eye Associates, PA.").

as to the latter.²³

5. **When *res judicata* applies, it allows dismissal of a principal to extinguish claims against agents, but here LCA-Vision, Inc. was not the principal of anyone as it was actually the employer of neither doctor - - it was wrongly named.**

Under principles of vicarious liability dismissal of a principal also results in dismissal of claims against its agent,²⁴ and thus if claims against a principle have been adjudicated, *res judicata* would bar the litigation of those claims against its agents.²⁵

²³ By way of analogy, Plaintiff essentially sued the U.S. Navy for the way Capt. Ahab operated the *Pequod*, failing to recognize that it was in fact Quaker businessmen named Bildad and Peleg who owned the vessel that Ahab negligently operated. Dismissal of the Navy for an untimely disclosure - - even while alleging Ahab's negligence as the basis for the Navy's purported accountability - - has no effect on the amenability of Ahab to suit for his actions. His actual employers for the alleged misdeed were never sued. Even if he had consulted for the Navy on map making, his misdeeds related to his conduct on the *Pequod*, not in his developing navigational aids for the Navy. The disposition of the claim against the Navy is irrelevant to Ahab.

²⁴ See, e.g., *Reedon of Faribault, Inc. v. Fidelity & Guar. Ins. Underwriters, Inc.*, 418 N.W.2d 488 (Minn. 1988)(insurance agent and insurer); *Hoffman v. Wiltscheck*, 411 N.W.2d 923 (Minn. App. 1987)(driver and owner); *Pischke v. Kellen*, 384 N.W.2d 201 (Minn. App. 1986)(employee and employer).

²⁵ *Res judicata* is "claim preclusion," barring litigation of all claims that have been or could have been decided between certain specific parties, once a final judgment has been reached between them. See *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004). *Res judicata* applies as an absolute bar to a subsequent claim when: (1) the prior claim involved the same set of factual circumstances; (2) the prior claim involved the same parties or their privies; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter. *Id.* at 840; *Myers v. Price*, 463 N.W.2d 773, 776 (Minn. App. 1990), *review denied* (Minn. Feb. 4, 1991). It is a question of law reviewed *de novo*. *Hauschildt, supra*, 686 N.W.2d at 840.

In contrast, collateral estoppel is "issue preclusion" and applies to specific legal issues that have been adjudicated. *Hauschildt, supra*, 686 N.W.2d at 837. For collateral

Here, since LCA-Vision, Inc., was not the employer or otherwise “in privity” with Dr. Whiting (his employer was Columbia Eye Clinic), the dismissal of the LCA-Vision, Inc., could never justify dismissal of the claims against Dr. Whiting.

“Privity” has no precise definition, but rather “expresses the idea that as to certain matters and circumstances, people who are not parties to an action but who have interests affected by the judgment as to certain issues in the action are treated as if they were parties.” *Johnson v. Hunter*, 435 N.W.2d 821, 823 (Minn. App. 1989), *rev'd in part on other grounds*, 447 N.W.2d 871, 876 (Minn. 1989). “Privies” are those who are so connected with one another in law as to be identified with each other in interest. *Id.*

Whether persons are in privity is to be determined by the facts of each case.²⁶ Indisputably Plaintiff-Appellant’s tardiness in supplying expert disclosure affidavits to LCA-Vision, Inc. has been litigated to conclusion and may not be re-litigated. It is equally clear,

estoppel to apply, all of the following elements must be met: (1) the issue must be identical to one in a prior adjudication; (2) there must have been a final judgment on the merits in the prior adjudication; (3) the estopped party must have been a party or was in privity with a party to the prior adjudication; and (4) the estopped party must have been given a full and fair opportunity to be heard on the adjudicated issue. *Id.* Application of the doctrine of collateral estoppel is a mixed question of law and fact and as such, is subject to *de novo* review. *Falgren v. State Bd. of Teaching*, 545 N.W.2d 901, 905 (Minn. 1996).

²⁶ See, e.g., *Illinois Farmers Ins. Co. v. Reed*, 662 N.W.2d 529 (Minn. 2003) (victim of a criminal attack is not in “privity” with his assailant, such that she is not bound by a criminal adjudication of his assailant’s mental status or intent to injure her for purposes of a later civil insurance claim); *Johnson v. Hunter*, 447 N.W.2d 871, 874 (Minn. 1989) (holding family members are not necessarily in privity, such that a child may commence a second paternity action when she had been unrepresented in an earlier action, even though her mother had been and had sought the same determination).

however, that the disclosure requirements relative to Dr. Whiting were not litigated at all in the ruling by Judge Hedlund as he was not an employee of LCA-Vision, Inc., and a disclosure was given to him within two months of his being added as a party.

The disclosure requirements must be judged as to each person who is a party. If *Party A* is sued on day one, disclosure to that party is due by day 181. If *Party B* is added by amendment and thus sued on day 372, the disclosure deadline applicable to them expires 180 days later on day 552, making a disclosure to them on day 435 timely. While an exception may exist if *Party A* was *Party B*'s employer, such that the dismissal of *Party A* cuts the thread that tied the two together and also extinguished the claim against *Party B*, when the two parties are indisputably not employer and employee, that exception has no application.

Res judicata does not apply here, because LCA-Vision, Inc. and Dr. Whiting were not "in privity," so the ruling as to LCA-Vision, Inc. did not inure to Dr. Whiting's benefit. A similar disposition applies to collateral estoppel.²⁷

Even assuming that the "substantive" application of the "law of the case" was proper here (even though it is merely a procedural rule) and that Judge Hedlund actually had ruled on the issue of the impact of the dismissal of LCA Vision, Inc. on the amenability of Dr. Whiting to suit (even though *dicta* in her Memorandum only comments about Dr. Schirber), the fact that neither Dr. Schirber nor Dr. Whiting were in privity to or employees of the

²⁷ The "issue preclusion" of collateral estoppel bars re-litigation of an issue that is "identical to one in a prior adjudication." *Hauschildt, supra*, 686 N.W.2d at 837. The issue of whether Plaintiff was late in disclosing an expert affidavit to LCA-Vision, Inc. is not the same as whether she was late in disclosing expert affidavits to Dr. Whiting.

“principal” who was dismissed, makes the “law of the case” doctrine inapplicable to this case, and renders “relation back” inapplicable to the LCA-Vision ruling as well.

Here, it is conceded that LCA-Vision, Inc., did not employ either Dr. Whiting or Dr. Schirber, as they were actually employed by an entity that has not been named, Columbia Eye Associates. For vicarious liability to apply, the entity from which it is sought must hold some type of direct employment or agency type relationship with the actors.²⁸

Where concededly none existed, the dismissal of the non-“master” cannot result in the dismissal of the non-“servant.” The summary judgment ruling - - that dismissed the claim against Dr. Whiting because the claim against his putative employer had been dismissed - - must be reversed as it was an error of law to apply the unique combination of “relation back” and “law of the case” to bar rather than preserve a claim, where the dismissed entity was not in an employment relationship to Dr. Whiting.

III. The Affidavits of Expert Disclosure were Adequate

While presumably this issue - - which is raised under a Respondent’s Notice of Review - - will be more thoroughly developed in Respondent’s brief, it is clear that Judge Blaeser ruled the substance of the expert disclosure affidavits to be adequate. *Order and Memorandum*, Memo at 7-8 (Feb. 23, 2009)(A-119 - A-120). This ruling is not reviewed *de novo*, but under an abuse of discretion standard of review, and will be the subject of

²⁸ “*Respondeat superior* or vicarious liability is a principle whereby responsibility is imposed on the master who is not directly at fault. Its derivation lies in the public policy to satisfy an instinctive sense of justice.” *Lange v. National Biscuit Co.*, 297 Minn. 399, 403, 211 N.W.2d 783, 785 (1973).

Appellant's Reply Brief.

CONCLUSION

This procedurally unique case shows what happens when a mistake in identifying who are proper defendants is made by a plaintiff and what happens when that error is compounded by neglecting to serve timely expert disclosure affidavits after one has concluded that they've named the wrong party to start.

Having determined that LCA-Vision, Inc., was not the real employer of the doctors for whose conduct Plaintiff sought to impose vicarious liability on their employer, Plaintiff neglected to serve expert disclosure affidavits on the "wrong" defendant, but instead exercised her right to amend her Complaint and sue the individual physician she blamed for her eye injuries. While she served affidavits of expert disclosure in less than 60 of the 180-day deadline under § 145.682 on the newly added individual doctor defendant which the trial court ruled were adequate as to their substantive disclosure under § 145.682, she now faces the dismissal of her claim on summary judgment.

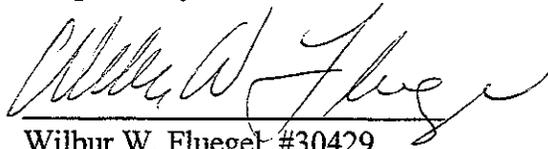
The reason: the trial court applied a unique combination of the "relation back" doctrine that barred rather than preserved her claim as Rule 15.03 is intended to do, applying it not just to the statute of limitations, but to a procedural deadline under § 145.682. Moreover, the trial court's ruling - - which has no parallel in any other application of rule 15 elsewhere in American courts - - is also unique in its substantive rather than procedural application of "the law of the case doctrine," which essentially ruled that the dismissal of the

case against a principal required dismissal against its agent. Except, everyone agreed that the doctor and the dismissed entity did not have an employment relationship.

The courts have held that § 145.682 should not be a procedural trap but be calculated to dismiss cases that have no merit. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 725 (Minn. 2005)(purpose is to “readily identify[] meritless lawsuits at an early stage of the litigation.”).

Appellant has a valid and meritorious claim against Respondent Dr. Whiting according to the trial court’s review of the affidavits of expert disclosure. The mistaken identification of his employer set in motion a problem that has snowballed to the point of burying her access to a remedy. Given the errors of law committed by the trial court, the Court of Appeals reversal of the grant of summary judgment should permit Ms. Juetten access to her day in court and to justice on the merits.

Respectfully submitted,



Wilbur W. Fluegel, #30429

FLUEGEL LAW OFFICE

150 South Fifth Street

Suite 3475

Minneapolis, MN 55402

(612) 238-3540

Co-Counsel for Plaintiff-Appellants

Mark A. Hallberg, # 39639

HALLBERG & MCCLAIN

Suite 715, 380 St. Peter St.

St. Paul, MN 55102

(651) 255-6810

Attorneys for Appellant

DATED:

5-11-09