

NO. A10-478

State of Minnesota
In Court of Appeals

Elaine M. Wesely,

Appellant,

vs.

A. David Flor, DDS, an individual,
A. David Flor, DDS, d/b/a Uptown Dental,

Respondents.

APPELLANT'S BRIEF AND APPENDIX

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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).

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LEGAL ISSUES

1. Whether the trial court abused its discretion when it failed to extend the 180 day affidavit of expert identification deadline for excusable neglect pursuant to Minn. R. Civ. P. 6.02.

The district court answered in the negative.

Apposite Authority:

Broehm v. Mayo Clinic Rochester, 690 N.W. 2d 721 (Minn. 2005).

Stroud v. Hennepin County Medical Center, 556 N.W. 2d 552 (Minn. 1996).

Maloney v. Fairview Community Hospital, 451 N.W. 2d 237 (Minn. App. 1990).

Mercer v. Anderson, 715 N.W. 2d 114 (Minn. App. 2006).

2. Whether Minn. Stat. §145.682, subd. 4 and subd. 6 permit the plaintiff to cure a deficient expert affidavit of identification by serving an affidavit signed by a substitute expert within the 45 day “safe harbor” period provided by Minn. Stat. §145.682, subd. 6.

The district court answered in the negative.

Apposite Authority:

Minn. Stat. §146.682, subd. 6(c)(3).

Both issues were raised in the trial court by Appellant in her Memorandum in Opposition to Defendant’s Motion to Dismiss Under Minn. Stat. §145.682 (A. 64), and preserved for appeal by Appellant’s Notice of Appeal. (A. 112 and A. 114).

STATEMENT OF THE CASE

This is a dental malpractice lawsuit. On February 23, 2005 Appellant Elaine Wesely went to see Respondent A. David Flor, D.D.S. for a routine dental visit. During that visit Dr. Flor displaced her jaw and temporal mandibular joint (TMJ), and, as a result, Ms. Wesely has been left with significant jaw and facial deformity.

At the time this lawsuit was commenced Ms. Wesely was represented by counsel. However, Ms. Wesely’s attorney withdrew from the case. He did so 83 days before the 180 day affidavit of expert identification deadline expired pursuant to Minn. Stat. §145.682,

subd. 4. In order to comply with the 180 day affidavit deadline, Ms. Wesely, acting *pro se*, secured the affidavit of one of her treating doctors, internal medicine physician Arvin M. Vocal, M.D., and served it upon defense counsel 11 days prior to the expiration of the 180 day affidavit deadline. Two days after the 180 day affidavit deadline expired Ms. Wesely met with attorney Michael A. Zimmer with the hope that Mr. Zimmer would provide her with representation. Mr. Zimmer informed her that Dr. Vocal's affidavit may not comply with the 180 day affidavit requirement because Dr. Vocal is not a dentist. Two days later Mr. Zimmer retained Dr. Scott Lingle, D.D.S. on Ms. Wesely's behalf to review the case. Fifteen days later the Respondent served a motion to dismiss claiming Dr. Vocal was not a qualified expert. Mr. Zimmer, who had since been formally retained by Ms. Wesely, served an expert affidavit of identification signed by Dr. Lingle which complied with Minn. Stat. §145.682, subd. 4. Dr. Lingle's affidavit was served 54 days after the expiration of the 180 day deadline and 10 days prior to the expiration of the 45 day "safe harbor" period provided by Minn. Stat. §145.682, subd. 6. The trial court heard the Respondents' motion to dismiss on October 29, 2009, and issued an Order dated January 21, 2010 dismissing the Appellant's claims with prejudice.

STATEMENT OF THE FACTS

On February 23, 2005, Plaintiff Elaine Wesely went in to see Dr. A. David Flor for what she thought was going to be a routine twenty minute appointment to fix her upper left eye tooth. (A. 40).¹ During the appointment Dr. Flor was distracted and damaged some of

¹The Appellant signed an affidavit dated October 15, 2009, stating that the facts set forth in Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss Pursuant to Section 145.682 were true and correct. Therefore, Appellant will reference the facts outlined in that Memorandum. (A. 62).

the Appellant's teeth. He attempted to repair the damage and in the process he displaced the Appellant's jaw and TMJ. The Appellant left that appointment with severe jaw pain. She now has significant jaw and facial deformity. (A. 42).

In January of 2009 the Appellant retained Attorney Richard A. Dahl to represent her in reference to a claim against Dr. Flor for medical malpractice. Mr. Dahl practices in Austin, Minnesota. (A. 42). On February 24, 2009, Mr. Dahl served a summons and complaint and affidavit of expert review required by Minn. Stat. §145.682, subd. 3 upon Dr. Flor. (A.42). The date of service meant that the 180 day deadline for the affidavit of expert identification required by Minn. Stat. §145.682, subd. 4 would expire on August 23, 2009.

On June 1, 2009, 83 days prior to the expiration of the 180 day affidavit deadline, Mr. Dahl withdrew as Ms. Wesely's attorney. He sent a notice of withdrawal letter to Ms. Wesely via certified mail. Ms. Wesely received the letter on June 3, 2009. Mr. Dahl informed Ms. Wesely that he was withdrawing for financial reasons. Further, he sent Ms. Wesely's file out to an attorney in Michigan to see whether or not that attorney would be interested in handling the case. (A. 42).

On July 28, 2009, 26 days prior to the expiration of the 180 day affidavit deadline, Mr. Dahl sent a letter to Ms. Wesely notifying her that he was waiting to receive her medical records back from the attorney in Michigan. (A. 42).

On August 3, 2009, 20 days prior to the expiration of the 180 day affidavit deadline, Ms. Wesely received her medical records back from Mr. Dahl. She was aware that she was required to serve an affidavit of expert identification pursuant to Minn. Stat. §145.682, subd. 4 by August 23, 2009. Further, she was aware that Minn. Stat. §145.682 requires a physician to sign an affidavit of expert identification, but she was not aware that a medical

doctor may not be qualified to testify in a case involving allegations against a dentist. She had no legal training and had never been involved in a legal malpractice case before. (A. 43).

On August 10, 2009, 13 days prior to the expiration of the 180 day affidavit deadline, Dr. Arvin M. Vocal, MD, Internal Medicine, signed an affidavit of expert identification pursuant to Minn. Stat. §145.682, subd. 4 prepared by Ms. Wesely, who was proceeding *pro se*. Ms. Wesely moved as quickly as possible to obtain the affidavit from Dr. Vocal. She attempted to speak with the expert that Mr. Dahl had spoken to earlier, but that expert would not speak with her since she was not represented by counsel. Therefore, Ms. Wesely turned to Dr. Vocal, a treating physician. She thought that he was familiar with the circumstances of the case and her condition, and felt that he would be qualified to sign an expert affidavit of expert identification. (A. 34-39 and A. 43).

On August 12, 2009, 11 days prior to the expiration of the 180 day affidavit deadline, Ms. Wesely served Dr. Vocal's affidavit of expert identification upon defense counsel. (A. 43).

The deadline for the 180 day affidavit of expert identification expired on August 23, 2009.

On August 25, 2009, two days after the expiration of the 180 day affidavit deadline, Ms. Wesely met with Attorney Michael A. Zimmer for the first time. She asked Mr. Zimmer to provide her with representation. Mr. Zimmer reviewed Dr. Vocal's affidavit of expert identification.² He informed Ms. Wesely that the affidavit may not comply with Minn. Stat.

²Mr. Zimmer signed an Affidavit dated October 16, 2009 stating that the facts set forth in the Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss

§145.682, subd. 4 since Dr. Vocal is a medical doctor involved in internal medicine, and she was making a malpractice claim against Dr. Flor, a dentist. Mr. Zimmer then called defense counsel, Barbara Zurek, that day and requested that the defense extend the 180 day affidavit deadline for 60 days in order to give Ms. Wesely an opportunity to have her case reviewed by a dentist. Ms. Zurek declined that request. Mr. Zimmer informed Ms. Wesely that he would not agree to provide representation until he located a dentist who was willing to review the file. (A. 43).

On August 27, 2009, four days after the expiration of the 180 day affidavit deadline, Mr. Zimmer contacted Dr. Scott Lingle, D.D.S. to determine whether or not Dr. Lingle would be willing to review Ms. Wesely's case. Dr. Lingle agreed to review the file. (A. 43).

On September 2, 2009, 10 days after the expiration of the 180 day affidavit deadline, Mr. Zimmer's office delivered Ms. Wesely's medical records to Dr. Lingle. (A. 43).

On September 11, 2009, 19 days after the expiration of the 180 day affidavit deadline, defense counsel served Ms. Wesely with a Notice of Motion and Motion to Dismiss Under Section 145.682. This is the first time Respondents raised the claim that Dr. Vocal's affidavit of expert identification was deficient. (A. 43). It triggered the "safe harbor" protection afforded to plaintiffs under Minn. Stat. §145.682, subd. 6, which would expire 45 days later on October 26, 2009.

On September 26, 2009, 34 days after the expiration of the 180 day affidavit deadline and 30 days before the expiration of the 45 day safe harbor deadline, Ms. Wesely formally retained Mr. Zimmer. (A. 43).

Pursuant to Section 145.682 are true and correct. (A. 51-52).

On September 30, 2009 Respondent served Ms. Wesely with their memorandum in support of their motion to dismiss pursuant to §145.682. (A. 44).

On October 5, 2009, 43 days after the expiration of the 180 day affidavit deadline and 21 days before the expiration of the 45 day safe harbor deadline, Dr. Lingle examined Ms. Wesely. (A. 44).

The next day, on October 6, 2009, Mr. Zimmer met with Dr. Lingle. Dr. Lingle opined that Dr. Flor was negligent and that there was causation and damages. Mr. Zimmer then sent defense counsel Barbara Zurek a letter disclosing Dr. Scott D. Lingle to Ms. Zurek. He further indicated that he was preparing Dr. Lingle's affidavit and hoped to serve the affidavit upon Ms. Zurek within a couple weeks. He suggested that Ms. Zurek cancel the hearing scheduled for October 29, 2009 and reschedule, if necessary, after she received Dr. Lingle's affidavit. (A. 44).

The next day, on October 7, 2009, Ms. Zurek sent a return letter to Mr. Zimmer informing Mr. Zimmer that in her opinion the service of Dr. Lingle's affidavit of expert identification would not cure the deficiencies of the original affidavit signed by Dr. Vocal. She indicated that the motion to dismiss would be heard as scheduled. (A. 44).

On October 16, 2009, 54 days after the expiration of the 180 day affidavit deadline and 10 days before the expiration of the 45 safe harbor deadline, Ms. Wesely served the affidavit of expert identification signed by Dr. Lingle upon defense counsel. (A. 45 and A. 53-58).

On October 26, 2009 the 45 day safe harbor deadline pursuant to Minn. Stat. §145.682, subd 6 (c) expired.

On October 29, 2009, Freeborn County District Court Judge Steven R. Schwab heard the Respondents' motion to dismiss. Judge Schwab issued an order dated January 21, 2010 dismissing Ms. Wesely's claims with prejudice. Judgment was entered on the same date. (A. 113-114).

STANDARD OF REVIEW

A trial court's decision to either deny an extension of the expert disclosure deadline in a medical malpractice case or to dismiss for noncompliance with the expert disclosure requirements must be reviewed using an abuse of discretion standard. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 725-727 (Minn. 2005).

The interpretation of statutes is a question of law reviewed de novo by the Court of Appeals. *Schlotz v Hyundai Motor Company*, 557 N.W.2d 613, 615 (Minn. App. 1997) (citing *Hibbing Educ. Ass'n v Public Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985)).

ARGUMENT

I. THE TRIAL COURT ABUSED IT'S DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO EXTEND THE 180 DAY AFFIDAVIT OF EXPERT IDENTIFICATION FOR EXCUSABLE NEGLIGENCE.

A. The Purpose of Minn. Stat. §145.682 .

The purpose of the expert review and disclosure requirements under Minn. Stat. § 145.682 is to prevent frivolous lawsuits, not deprive plaintiffs with legitimate claims. *Mercer v. Anderson*, 715 N.W.2d 114, 122 (Minn. App. 2006); *Maudsley v. Pederson*, 676 N.W.2d 8, 12 (Minn. App. 2004); *Hempel v. Fairview Hospitals and Healthcare Services, Inc.*, 504 N.W.2d 487, 493 (Minn. App. 1993).

The Appellant is not making a frivolous claim in this case. Dr. Lingle describes the facts surrounding the treatment Respondent Dr. Flor provided to the Appellant. Dr. Flor was performing routine dental work on Ms. Wesely when he became distracted by a power surge/outage. Dr. Flor slipped with the drill and damaged Ms. Wesely's front teeth and upper lip. During the next approximately two hours Dr. Flor attempted to fix the damaged teeth. During that time he used the left side of Ms. Wesely's jaw as a resting place for his finger/hand as he held his tools. He was constantly applying pressure to the left side of Ms. Wesely's jaw. (A. 54). As a result, he dislocated Ms. Wesely's temporal mandibular joint. (A. 56). In Dr. Lingle's opinion, Ms. Wesely has "temporal mandibular dysfunction, myofacial pain and gross malocclusion", all as "the direct result of Dr. Flor's deviation from the standard of care in severely displacing Ms. Wesely's jaw and TMJ and failure to refer her for immediate medical care to address the injury" (A. 57). Further, Dr. Lingle notes that Ms. Wesely reports being in "constant, consistent and persistent pain" and opines that there "is limited expectation that treatment will ever restore her jaw to its pre-trauma condition". (A. 57).

Judge Schwab appears to recognize that the Appellant's case has merit. He states:

"In this case, despite a deficient expert affidavit, it appears that the plaintiff has a reasonable suit on the merits. Plaintiff alleges that the defendants negligently damaged her teeth and/or jaw causing permanent injuries. The allegations in the Plaintiff's deficient expert affidavit coincide with a common-sense determination that displacing a patient's jaw and drilling into incorrect teeth is not the common practice in dentistry." (Ad. 11-Appellant's Addendum).

The Appellant has a meritorious claim. There is no need to use Minn. Stat. §145.682 to screen the case out as frivolous or lacking merit. Judge Schwab's dismissal of the claim frustrates the purpose of the statute.

B. Any Neglect on the Appellant's Part was Excusable.

The Minnesota Rules of Civil Procedure, Rule 6.02, permit the trial court to extend any time limit established by statute, both before and after the time limit has expired. If the time limit has expired, the party seeking the extension must move the trial court for an order and show that the failure to act was the result of excusable neglect. As such, time limits for serving expert affidavits pursuant to Minn. Stat. §145.682 may be extended, even after the time limits have expired, upon the showing of excusable neglect. *Stern v. Dill*, 442 N.W.2d 322, 324 (Minn. 1989).³ The policy behind the rules of civil procedure is to try cases on the merits and seek a just determination of every action. Those rules do not frustrate the primary purpose of Minn. Stat. §145.682, which is to eliminate nuisance malpractice suits. *Parker v. O'Phelen*, 414 N.W.2d 534, 537 (Minn. App. 1987). Excusable neglect exists where the plaintiff :

1. Has a reasonable suit on the merits;
2. Has a reasonable excuse for failure to comply with the time limits set forth by Minn. Stat. §145.682;
3. Acted with due diligence after receiving notice of the time limit; and

³The Court in *Dill* held that an oral motion for an extension made during a hearing was sufficient. 442 N.W.2d at 325. In the present case the Appellant submitted a memorandum to the trial court opposing the Respondent's motion to dismiss and requested that the trial court find excusable neglect and allow service of Dr. Lingle's affidavit beyond the 180 day affidavit deadline.

4. Has not caused substantial prejudice to the defendant.

Anderson v. Rengachary, 608 N.W. 2d 843, 850 (Minn. 2000); *Mercer v. Anderson*, 715 N.W. 2d 114, 123 (Minn. App. 2006). In the present case, all four conditions are satisfied.

1. **The Appellant has a Reasonable Suit on the Merits.**

This condition is discussed above. Judge Schwab found that it appeared that the Appellant “has a reasonable suit on the merits”. (A. 122)

2. **The Appellant has a Reasonable Excuse for her Failure to Comply with Minn. Stat. §145.682, subd. 4.**

The Appellant’s first attorney, Mr. Dahl, withdrew 83 days prior to the expiration of the 180 day affidavit deadline on August 23, 2009. (A. 42). That gave the Appellant a little over 2 months and 3 weeks to find a new lawyer and serve a detailed affidavit of expert identification upon the Respondents. Even though he was withdrawing, Mr. Dahl attempted to help the Appellant find a new lawyer. He sent her medical records to an attorney in Michigan. (A. 42). The records were not returned to the Appellant until August 3, 2009, 20 days prior to the expiration of the 180 day affidavit deadline. (A. 43). She had to move quickly at that point. She attempted to speak with the expert that Mr. Dahl had spoken to earlier in her case, but the expert refused to discuss the case with her since she was not represented by a lawyer. (A. 43). Despite all of that, and the fact that she had no legal training or experience with medical malpractice matters, she managed to secure an affidavit of expert identification from Dr. Arvin M. Vocal, an internal medicine specialist and one of her treating doctors, within 7 days after receiving her medical records back from Mr.

Dahl. She served it upon the Respondents 11 days prior to the expiration of the 180 day affidavit deadline. (A. 43). Appellant did her best to comply with Minn. Stat. §145.682.

Judge Schwab found that the Appellant was “at least partially to blame for the delay”. (Ad. 11). Judge Schwab notes that the Appellant could have done a number of things: she could have “obtained new counsel at an earlier date; she could have retained a copy of her own medical records prior to shipping them out-of-state; she could have refused to ship her medical records out-of-state”. (Ad. 11-12). In essence, Judge Schwab is critical of the Appellant for three reasons. First, she should have moved quicker to find a new lawyer. Second, she should have kept or prevented her medical records from being sent out of state, presumably so she would have been able to provide them to new counsel. Third, she selected the wrong expert. The first two ignore the realities associated with medical malpractice lawsuits. It can be very difficult to find a lawyer to take a medical malpractice case, especially when the case is in suit and an important deadline is looming. First you have to find a lawyer who handles medical malpractice cases. Then you have to convince that lawyer to spend a considerable amount of time reviewing voluminous file materials, which usually include a stack of medical records. That lawyer then faces the prospect of finding an expert, or working with an existing expert, to prepare a detailed affidavit of expert identification. In the present case all of that had to be done within 2 months and 3 weeks. It is not hard to imagine that most busy, experienced medical malpractice lawyers might be reluctant to take a case on in that situation. It was not unreasonable for the Appellant to accept Mr. Dahl’s help to find substitute counsel and allow Mr. Dahl to provide that lawyer with the medical records. Further, when the Appellant learned that the lawyer in Michigan was not going to be involved and her medical records

were returned to her 20 days before the expiration of the 180 day affidavit deadline she moved quickly to fulfill her obligation under Minn. Stat. §145.682. She managed to obtain an affidavit of expert identification from one of her treating physicians, Dr. Vocal. In doing so, the Appellant made a mistake. She selected the wrong expert. However, her conduct was not unreasonable. Dr. Vocal was familiar with her situation and it is not illogical to think that he would be able to express opinions regarding whether dislocating a patient's jaw while performing routine dental work might constitute malpractice. As Judge Schwab states: "The allegations in Plaintiff's deficient expert affidavit coincide with a common-sense determination that displacing a patient's jaw and drilling into incorrect teeth is not the common practice in dentistry". (Ad. 11). Given the common-sense liability issue in this case, it was not unreasonable for the Appellant to think Dr. Vocal was qualified.

The appellate courts have addressed the concept of "excusable neglect" a number of times. There is no clear definition. Instead, it appears to be a question of whether the plaintiff made a good faith effort. In *Maloney v. Fairview Community Hospital*, 451 N.W. 2d 237 (Minn. App. 1990) the plaintiff failed to serve an affidavit of expert identification and did not serve answers to the defendant's interrogatories until six months after the expiration of the 180 day affidavit deadline. Further, the plaintiff was represented by the same lawyer since the beginning and never made a motion to extend the deadline. The Court of Appeals held that the plaintiff failed to show a reasonable excuse for the failure to comply. *Id.* at 240. Likewise, in *Bellecourt v. U.S.*, 784 F. Supp. 623 (D. Minn. 1992) the plaintiff served his affidavit of expert identification approximately 11 months late. He was represented by the same lawyer from the beginning and made two motions for an extension of time, but failed to obtain a hearing on either motion. He also failed to respond

to the defendant's request for compliance. The Federal District Court held that the neglect was not excusable. *Id.* at 639. In *Mercer v. Anderson, supra*, the plaintiff, an inmate at a Minnesota correctional facility, served an affidavit of expert identification regarding a claim that he sustained second degree burns, but failed to serve an affidavit or answers to defendant's expert interrogatories establishing support for his claim for permanent eye injuries. The defendant notified the plaintiff of perceived deficiencies in the affidavit and later moved for partial dismissal for noncompliance with Minn. Stat. § 145.682. The plaintiff failed to serve an amended affidavit within the 45 day safe harbor deadline, and the trial court dismissed the claim for permanent eye injuries. The Court of Appeals rejected the plaintiff's claim that his neglect was excusable because he was subject to state control, noting that he had his medical records and access to his expert for approximately one and a half years prior to the 180 day affidavit deadline. *Id.* 715 N.W 2d at 123-124. In *Stroud v. Hennepin County Medical Center*, 556 N.W. 2d 552 (Minn. 1996) the plaintiff attempted to correct a deficient affidavit of expert identification approximately two and a half months after the expiration of the 180 day affidavit deadline expired by serving an amended affidavit for the first expert and an affidavit of a new expert. The Minnesota Supreme Court held that the trial court did not abuse its discretion in dismissing the plaintiff's lawsuit, noting that the defendant had put the plaintiff on notice that the original affidavit was deficient and the plaintiff had "ample opportunity to provide a legally sufficient expert affidavit" prior to the expiration of the 180 day affidavit deadline. *Id.* at 556. In *Broehm, supra*, the Minnesota Supreme Court upheld the denial of an extension of the 180 day deadline because the record showed that the plaintiff had been in possession of her

medical records and other relevant information from which to obtain a qualified expert “well before expiration of the 180-day deadline”. *Id.* 690 N.W. 2d at 727 - 728.

The cases cited above all involve a lack of effort on the part of the plaintiff to comply with Minn. Stat. §145.682 when they had reasonable opportunity to do so. However, the result appears to be different where the plaintiff is making a good faith attempt to comply. In *Parker v. O’Phelan, supra*, the defendant served the plaintiff with a demand for the affidavit of expert review. The affidavit was due 60 days later on January 20, 1986. After receipt of the demand the plaintiff’s original lawyer directed them to consult a second law firm. After obtaining their second lawyer that lawyer requested additional time to satisfy the demand and the defense denied the request. The 60 day limit expired without receipt of the affidavit. Six days later the second lawyer withdrew. The plaintiff’s then drove from their home in northern Minnesota to Minneapolis and retained their third lawyer, who subsequently served an affidavit on March 2, 1987, 41 days after the expiration of the 60 day deadline and 3 days prior to the defendants motion to dismiss for failure to comply with the 60 day limit . The plaintiff moved for an extension of time. The trial court granted the extension. The Court of Appeals held that there was a reasonable excuse for the delay. *Id.* 414 N.W. 2d at 537-538.

In the present case, the Appellant did make a good faith effort to comply with Minn. Stat. §145.682 and any neglect on her part should be excused.

3. The Appellant Proceeded with Due Diligence.

The Appellant proceeded with due diligence when she obtained her medical

records back from Mr. Dahl 20 days prior to the expiration of the 180 day affidavit deadline. She obtained and served the affidavit of expert identification signed by Dr. Vocal within 9 days after that date. Further, when Mr. Zimmer informed her that she needed an affidavit from a dentist she located a qualified expert, provided that expert with her medical records, was examined by that expert, prepared a detailed affidavit of expert identification and served it upon the defendant, all within 54 days after the expiration of the 180 day affidavit deadline and 10 days before the expiration of the 45 safe harbor deadline. She worked hard to do all of that. It would be inaccurate and unfair to describe her as acting without due diligence.

4. The 54 Day Delay has not Caused Substantial Prejudice to the Defendant.

The trial court should carefully evaluate the degree of prejudice that inadequate disclosures cause to the defendant. *Soren v. St. Paul Ramsey Medical Center*, 457 N.W. 2d 188, 193 (Minn. 1990). Here, the Respondents would have to show that they were substantially prejudiced by the 54 day delay between the end of the 180 day affidavit deadline and the date the Appellant served Dr. Lingle's affidavit. Although deficient in terms of qualification, the affidavit signed by Dr. Vocal, which was served within the 180 day affidavit deadline, gave the Respondents significant information regarding the nature and substance of the Appellant's claims against the Respondents. (A. 34-39). As such, the Respondents can hardly say they were surprised by new allegations when they later received Dr. Lingle's affidavit. The delay created no prejudice to the Respondents. Judge Schwab agreed, finding that there "is no substantial prejudice to the Defendants in allowing

Plaintiff to have an extension of the time period for serving the affidavit of expert review, other than the obvious prejudice of having to continue to defend against a suit that has been pending since February”. (Ad. 12). Of course, having to defend the lawsuit created prejudice for the Respondents the moment the complaint was served. It did not become more prejudicial with the 54 day delay. Further, assuming Dr. Vocal has been qualified, but his Affidavit was defective in terms of factual support or grounds for his opinion, the Respondent would have been entitled to make wholesale changes to the Affidavit within the 45 day safe harbor period. How has the Respondent been prejudiced by the mere change of identity?

II MINN. STAT. §145.682, SUBD. 4 AND SUBD. 6 PERMIT A PLAINTIFF TO CURE A DEFICIENT AFFIDAVIT OF IDENTIFICATION BY SERVING A SUBSTITUTE AFFIDAVIT WITHIN THE 45 DAY SAFE HARBOR PERIOD PROVIDED BY MINN. STAT. §145.682, SUBD. 6.

A. Interpretation of Minnesota State Statutes.

When interpreting statutes, a court’s function is to ascertain and effectuate the intention of the legislature. *Schlotz v Hyundai Motor Company*, 557 N.W.2d 613 (Minn.Ct.App. 1997)(citing Minn. Stat. §645.16 (1996)). If a statute is free from ambiguity, execution of this task requires courts to look only at the statute’s plain language. *Id.* (citing *Tuma v Commissioner of Econ. Sec.*, 386 N.W.2d 702, 706 (Minn. 1986)). If, however, a statute’s literal meaning leads to an absurd result that utterly departs from the legislature’s purpose, this court may look beyond the language and examine other indicia of legislative intent. *Marsden v Crawford*, 589 N.W.2d 804, 806 (Minn.Ct.App.1999)(citing *Wegener v Commissioner of Revenue*, 505 N.W.2d 612, 617 (Minn.1993)). The court should presume that the legislature did not intend a result that is absurd or unreasonable. Minn. Stat.

§645.17(1) (2002); *Wegener v. Commissioner of Revenue*, 505 N.W.2d 612, 617 (Minn. 1993).

B. Service of Dr. Lingle’s Substitute Affidavit Within the 45 Safe Harbor Deadline Cured Any Deficiencies Associated With The Original Affidavit Signed By Dr. Vocal.

Minn. Stat. §145.682, subd. 2 and subd 4 require the plaintiff in a medical malpractice to serve an affidavit of expert identification within 180 days after commencement of the lawsuit. Minn. Stat. §145.682, subd. 6 (c) creates a 45 day safe harbor. In short, if a plaintiff serves an affidavit of expert identification within the 180 day affidavit deadline and the defendant claims that the affidavit is deficient in some way, the plaintiff has 45 days to cure the deficiencies or face dismissal. Specifically, Minn. Stat. §145.682, subd. 6 (c)(3) provides that the plaintiff may “serve upon the defendant an amended affidavit or answers to interrogatories that correct the claimed deficiencies”. Judge Schwab held that the statute “does not state that a new affidavit by a new expert is an acceptable method of curing the deficiencies. The legislature could have provided, during the 45 day ‘cure’ period, for the submission of an amended affidavit (current law) or a substitute affidavit. However, the legislature failed to do so”. Judge Schwab felt that he must follow the “plain language of the statute”. (Ad. 9).

Judge Schwab’s reading of the statute is too restrictive. There are competing provisions in the statute that create ambiguity. Minn. Stat. §145.682, subd. 4(b) states: “Nothing in this subdivision may be construed to prevent either party from calling additional expert witnesses or substituting other expert witnesses” (emphasis added). However, in apparent contrast, Minn. Stat. §145.682, subd. 4 (c) states: “No additional experts may be

called by any party without agreement of the parties or by leave of court for good cause shown". The Court must look at legislative intent in light of what is reasonable.

The appellate courts in Minnesota have never addressed the issue of whether or not a plaintiff may cure a deficient affidavit by serving a substitute affidavit within the 45 safe harbor period established by Minn. Stat. §145.682, subd. 6 (c). In *Broehm, supra*, a case decided on the law as it existed prior to the enactment of the 45 day safe harbor provision, Justice Anderson wrote a concurring opinion and noted that Minn. Stat. §145.682 contains a number of contradictory provisions as to whether additional or substitute experts may be disclosed after the deadline for disclosure has passed, but he offered no insight on how those provisions would apply in cases involving the 45 day safe harbor period. *Id.* 690 N.W. 2d at 738. However, this Court has examined a similar statute for a similar purpose in the past. Minn. Stat. §544.42 is nearly identical to Minn. Stat. §145.682 in terms of content and timing requirements. In fact, the legislature enacted §544.42 with the goal of expanding the process created by §145.682 for medical malpractice cases to actions involving other professionals and used §145.682 as a blueprint. *House v. Kelbel*, 105 F. Supp. 2d 1045, 1051-1052 (D. Minn. 2000). Minn. Stat. §544.42, subd. 6(a) creates a 60 day safe harbor period for affidavits of expert review. In *Noske v. Friedberg*, 713 N.W.2d 866 (Minn. App. 2006) this Court addressed an issue very similar to the statutory question in this case. *Noske* was a legal malpractice case. Pursuant to Minn. Stat. §544.42, subd. 3 the plaintiff was required to serve an affidavit of expert review with the summons and complaint. The plaintiff did so, but the trial court found that the affidavit was defective because the expert lacked the necessary qualifications. However, the trial court allowed the plaintiff to serve a substitute affidavit by a new, qualified expert within the 60 day safe harbor period

provided by Minn. Stat. §544.42, subd. 6(a). This Court upheld, holding that the safe harbor provision does not prohibit the timely submission of a second affidavit of expert review by a new, substitute expert to replace an expert who has been determined to be unqualified. The Court reached that decision for two reasons. First, Minn. Stat. §544.42, subd. 6(a) does not explicitly prohibit a party from substituting one expert with another. Second, Minn. Stat. §544.42, subd. 4(b), which the Court concluded applied to both affidavits of expert review and expert identification, provides that nothing in subd. 4 “prevents any party from calling additional expert witnesses or substituting other expert witnesses”. *Id.* 713 N.W. 2d at 872-873.

Although the two statutes are very similar, and Minn. Stat. §544.42 was patterned after Minn. Stat. §145.682, some of the wording is not identical. Minn. Stat. §145.682, subd. 6(c)(3) allows a plaintiff to cure a deficient affidavit of identification by serving “an amended affidavit or answers to interrogatories that correct the claimed deficiencies”. Minn. Stat. §544.42, subd. 6 (c) gives the plaintiff 60 days “to satisfy the disclosure requirements in subdivision 4”. However, Minn. Stat. §145.682, subd.4(b) and Minn. Stat. 544.42, subd. 4(b) are virtually identical, both stating that nothing in that subdivision prevents substitution of expert witnesses. Despite minor differences in some of the language, the observations this Court made in *Noske* hold true in this case. Minn. Stat. §145.682, subsd. 4 and 6 do not explicitly prohibit substitution of experts within the 45 day safe harbor period. Further, Minn. Stat. §146.682, subd. 6 (c) specifically allows substitution of experts. As such, the same rule should apply and the Appellant should be allowed to cure an affidavit which is defective because the expert is not qualified by submitting a substitute affidavit by an expert who is qualified as long as she did so within the 45 day safe harbor deadline.

CONCLUSION

For the above stated reasons, Appellant respectfully requests that this Court overrule Judge Schwab's decision dismissing Appellant's case and allow service of Dr. Lingle's affidavit of expert identification to stand.

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