

NO. A10-478

State of Minnesota
In Court of Appeals

Elaine M. Wesley,

Appellant,

v.

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

Respondents.

RESPONDENTS' BRIEF

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STATEMENT OF LEGAL ISSUES

1. Did the district court err when it concluded that the plain language of Minn. Stat. § 145.682, Subd. 6(c) — allowing a plaintiff to amend a substantively deficient medical expert affidavit during the 45-day safe-harbor period — prohibited substitution of medical experts during this time?

Respondents raised this issue in their reply brief in support of their motion to dismiss under Section 145.682 after plaintiff disclosed a substitute medical expert. (A.65). The district court rejected the substitute expert affidavit and dismissed this lawsuit with prejudice because plaintiff's initial expert affidavit failed to meet the substantive requirements in Section 145.682. (Ad. 4). Appellant preserved this issue for appeal in her Notice of Appeal. (A.112).

Apposite authority:

Minn. Stat. § 145.682 (2009).

Minn. Stat. § 645.16 (2009).

Stroud v. Hennepin Cty. Med. Ctr., 556 N.W.2d 552 (Minn. 1996).

2. Did the district court abuse its discretion when it concluded that plaintiff had failed to demonstrate excusable neglect as a basis for extending the 180-day medical-expert-disclosure deadline in Minn. Stat. § 145.682, Subd. 2(2)?

Appellant raised this issue in her memorandum in opposition to defendants' motion to dismiss under Section 145.682. (A.46). The district court declined to extend the 180-day deadline. (Ad 10). Appellant preserved this issue for appeal in her Notice of Appeal. (A.112).

Apposite authority:

Minn. Stat. § 145.682 (2009).

Anderson v. Rengachary, 608 N.W.2d 843 (Minn. 2000).

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

STATEMENT OF THE CASE

Plaintiff/Appellant Elaine M. Wesely¹ commenced this dental-malpractice lawsuit against Defendants Dr. A. David Flor, D.D.S. and Uptown Dental in February 2009. At that time, attorney Richard Dahl represented her. Dahl signed an affidavit of expert review stating that a qualified medical expert had reviewed Wesely's medical records, and that the expert would provide an admissible medical opinion at trial. On June 1, 2009, Dahl abruptly withdrew as counsel. Wesely then acted pro se for approximately four months. Aware of the requirement in Minn. Stat. § 145.682, Subd. 2(2) (2009) that she must disclose a qualified medical expert's opinion within 180 days of commencement — by August 23, 2009 — Wesely secured an expert opinion from internal medicine physician Dr. Arvin M. Vocal and disclosed it before this deadline. Soon after, she met for the first time with her current counsel, who informed Wesely that Dr. Vocal's affidavit was deficient because Dr. Vocal, an internist, was not qualified to establish the dental standard of care. Then, within the next six weeks, Wesely secured her current counsel's representation. During this time, she also met with Dr. Scott Lingle, who reviewed her medical and dental records and formed an opinion. Thus, during these six weeks, Wesely accomplished what she had neglected to do for three months.

Section 145.682 requires that in every medical-negligence lawsuit, a plaintiff must disclose a qualified medical expert articulating plaintiff's prima facie claim for medical

¹ According to plaintiff, "Wesely" is the correct spelling of her name. (A.62). However, she submitted her Notice of Appeal with the incorrect spelling (Wesley) and has not acted to correct this error in the caption. Defendants will continue to use the correct spelling of plaintiff's name in their brief.

negligence within 180 days of commencement of suit. The statute mandates that a pro se plaintiff is held to the same standards and statutory deadlines as if represented by counsel. After defendants received Dr. Vocal's deficient affidavit, they moved to dismiss this lawsuit under Minn. Stat. § 145.682, Subd. 6(c), based upon substantive deficiencies in his affidavit. Section 145.682 includes a 45-day safe-harbor provision whereby a plaintiff can amend a deficient expert affidavit for technical deficiencies. However, this subsection does not allow for substitution of medical experts. Here, Wesely impermissibly attempted to substitute Dr. Lingle's affidavit for Dr. Vocal's affidavit during the 45-day safe-harbor period. She had also requested that the court extend the 180-day deadline based upon excusable neglect due to her attempt to procure medical expert testimony without counsel.

The Freeborn County District Court, the Honorable Steven R. Schwab presiding, dismissed Wesely's lawsuit with prejudice under Minn. Stat. § 145.682, Subd. 6(c) because: (1) the plain language of Section 145.682 only permits a plaintiff to amend an affidavit within the 45-day safe harbor period, not to disclose substitute medical experts; and (2) Wesely had failed to demonstrate excusable neglect based on her pro se status and did not act with due diligence to obtain replacement counsel. This Court should affirm the district court's well-reasoned decision.

STATEMENT OF THE FACTS

Plaintiff/Appellant Elaine M. Wesely commenced this dental-malpractice lawsuit against Defendants/Respondents Dr. A. David Flor, D.D.S. and Uptown Dental in

February 2009. (A.22).² Attorney Richard Dahl represented her at that time. (A.31). She also served an affidavit of expert review under Minn. Stat. § 145.682, Subd. 2 (2009), confirming that Dahl had engaged a qualified medical/dental expert who reviewed Wesely's medical and dental records and would provide an opinion admissible at trial that defendants deviated from the standard of care. (A.33).

In her complaint, Wesely alleges dental malpractice against both defendants and that Uptown Dental³ negligently failed to supervise or train Dr. Flor and other assisting personnel. (A.28). These allegations are based upon a February 23, 2005 dental treatment involving tooth fillings. (A.26). The Uptown Dental office allegedly had either a power surge or failure, or it had a dental-equipment malfunction due to lack of maintenance or other negligence. (*Id.*). Plaintiff alleges that defendants knew about the possibility or certainty of the possible power surge or failure, but treated her without regard to the "announced" power surge or failure and/or malfunction of the dental equipment. (*Id.*). As a result, Wesely alleges that defendants permanently damaged many of plaintiff's teeth and the bridge in her mouth. (A.27). Plaintiff further alleges that when defendants attempted to fix the damage, they caused additional damage to her teeth and jaw. (*Id.*).

In early March, 2009, defendants served discovery upon Wesely. (A.85). Over two months later — long after the answers were due — defendants wrote to plaintiffs' counsel and requested responses to the March discovery. (A.86). In the meantime,

² "A." refers to Appellant's Appendix.

³ At that time, Dr. Flor owned Uptown Dental.

defendants responded to Wesely's interrogatories and request for production of documents. (A.87). Although Wesely had agreed to provide discovery responses in late May and had scheduled Dr. Flor's deposition, defendants never received discovery responses. (A.75, 88).

On June 1, 2009, defendants received a letter from Richard Dahl informing of his abrupt withdrawal as counsel. (A.89). Dahl gave no reason for the withdrawal. (*Id.*). Dahl did not provide an affidavit explaining his reasons for withdrawal in response to defendants' motion to dismiss. However, Wesely claims that Dahl informed her that he was withdrawing for financial reasons. (A.42).⁴

Wesely claims that Dahl "apparently" sent her file out to an attorney in Michigan to see whether or not that attorney would be interested in handling the case. (A.42). By late July, Dahl notified Wesely that he was waiting to get her medical records back. (*Id.*). Wesely was aware of the requirements in Minn. Stat. § 145.682 that she disclose an expert affidavit within 180 days of commencement of her lawsuit — here, August 23, 2009. (A.43). She claims, however, that she was not aware that "a medical doctor may not be qualified to testify in a case involving allegations against a dentist." (*Id.*).

⁴ Neither Wesely nor Dahl submitted affidavits directly stating the timeline of events after February 2009. Rather, plaintiff's counsel, Zimmer, recorded these events in plaintiff's brief and then submitted Wesely's and his own affidavits stating that all facts in the brief were true. (A.62). "Supporting and opposing affidavits shall be made on personal knowledge, shall *set forth such facts as would be admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Minn. R. Civ. P. 56.05 (emphasis added). Neither affidavit sets forth any facts and both are improper. Nevertheless, defendants have no choice but to cite to plaintiff's district court brief for Wesely's version of events.

Wesely served the expert affidavit of internal medicine physician Dr. Arvin M. Vocal, M.D. prior to the 180-day deadline. (A.34). Wesely states that she had attempted to speak with the expert that Dahl had spoken with at the time of commencement, but he would not speak with her because she was not represented by counsel. (A.43).

Wesely met with her current attorney, Michael Zimmer, for the first time on August 25, 2009. (*Id.*). Zimmer confirmed to plaintiff that Dr. Vocal's expert disclosure was not sufficient under Section 145.682 because an internal medicine physician was not qualified to establish the dental standard of care. (*Id.*). Wesely then contacted defense counsel and requested an extension of the lapsed deadline. (*Id.*). Defense counsel declined to grant this extension. (*Id.*).

Within the next month, Zimmer had procured the assistance of Dr. Scott Lingle DDS to review Wesely's medical records. (A.43). In the meantime, defendants served their Notice of Motion and Motion to Dismiss under Minn. Stat. § 145.682, Subd. 6(c) (2009). (A.1). After Wesely formally retained Zimmer in late September 2009, she requested that defendants cancel their motion based on Dr. Lingle's forthcoming opinion. (A.59). Defendants declined to do so. (A.60). In response to defendants' motion to dismiss, Wesely served Dr. Lingle's affidavit of expert review, arguing that this affidavit cured the deficiencies in Dr. Vocal's affidavit. (A.44; A.53).

Defendants' motion was heard in Freeborn County District Court on October 29, 2009, the Honorable Steven R. Schwab presiding. (A.91). The district court dismissed Wesely's lawsuit with prejudice based on Minn. Stat. § 145.682, Subd. 6(c). (Ad. 3). The Court concluded that: (1) the plain language of the 45-day safe-harbor provision in

Section 145.682, Subd. 6(c) allows a plaintiff to amend a deficient affidavit, but does not allow a plaintiff to substitute medical experts during this time; and (2) Wesely did not demonstrate excusable neglect as a basis for an extension of the 180-day deadline. (*Id.*). Wesely now appeals the judgment to this Court. (A.112).

ARGUMENT

I. Standard of Review

Statutory construction is a question of law, which the appellate courts review de novo. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998).

The Minnesota Court of Appeals reviews a district court's denial of an extension of the disclosure deadline for abuse of discretion. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 727 (Minn. 2005).

II. The district court properly ruled that Minn. Stat. § 145.682, Subd. 6(c)'s 45-day safe-harbor provision allows a plaintiff to amend a deficient affidavit, but prohibits a plaintiff from substituting medical experts during this period.

The Minnesota legislature enacted Section 145.682 to readily identify meritless lawsuits at an early stage of the litigation in order to reduce the costs associated with malpractice litigation. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 725-26 (Minn. 2005). The legislative purpose behind Section 145.682 is to require that plaintiffs disclose expert affidavits verifying that their medical negligence claims are well-founded. *Stroud v. Hennepin County Med. Ctr.*, 556 N.W.2d 552, 555 (Minn. 1996); *see also Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 191 (Minn. 1990) (holding that malpractice action without supporting expert testimony is frivolous per se). If a

plaintiff's medical expert cannot, at the very least, articulate a prima facie case of medical malpractice at the outset of litigation, the lawsuit should not continue.

Section 145.682 requires that a plaintiff produce two affidavits in support of a claim. The first affidavit accompanies the summons and complaint and states that the plaintiff's attorney has reviewed the facts of the case with an expert whose opinions will be admissible at trial and who opines that the defendant deviated from the standard of care and caused the injury. Minn. Stat. § 145.682, Subds. 2, 3 (2009). Here, Wesely, through counsel, timely submitted this first affidavit of expert review. (A.33).

Section 145.682 also requires a plaintiff to serve upon a defendant — within 180 days after commencement of the lawsuit — a second affidavit identifying each expert witness, the substance of the facts and opinions to which the expert is expected to testify, and a summary of grounds for the expert's opinion. Minn. Stat. § 145.682, Subds. 2, 4 (2009). The Minnesota Supreme Court has summarized the substantive requirements required in the second expert affidavit. The affidavit must disclose specific details about the expert's testimony, including: (1) the applicable standard of care; (2) the acts or omissions that allegedly violated the standard of care; and (3) an outline of the chain of causation between the alleged violation and plaintiff's damages. *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 428 (Minn. 2002). A failure to comply with these substantive requirements mandates dismissal with prejudice:

(c) Failure to comply with [the substantive requirements in subdivision 4] because of deficiencies in the affidavit or answers to interrogatories results, upon motion, in mandatory dismissal with prejudice of each action as to which expert testimony is necessary to establish a prima facie case, provided that:

(1) the motion to dismiss the action identifies the claimed deficiencies in the affidavit or answers to interrogatories;

(2) the time for hearing the motion is at least 45 days from the date of service of the motion; and

(3) before the hearing on the motion, the plaintiff does not serve upon the defendant an amended affidavit or answers to interrogatories that correct the claimed deficiencies.

Minn. Stat. § 145.682, Subd. 6(c) (2009). Section 145.682 also makes clear that there are no exceptions to the requirements for pro se plaintiffs:

If the plaintiff is acting pro se, the plaintiff shall sign the affidavit or answers to interrogatories referred to in this section *and is bound by those provisions as if represented by an attorney.*

Id. at Subd. 5 (2009) (emphasis added).

“So as not to undermine the legislative aim of expert review and disclosure, [the Minnesota Supreme Court has] stressed that plaintiffs must adhere to strict compliance with the requirements of Minn. Stat. § 145.682.” *Broehm*, 690 N.W.2d at 726. The supreme court has recognized that although this statute will have harsh results in some cases, “it cuts with a sharp but clean edge.” *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 578 (Minn. 1999). Here, Wesely served Dr. Vocal’s affidavit within the 180-day timeframe. (A.34). Yet it is undisputed that Dr. Vocal, an internist, was not qualified to establish the dental standard of care. Thus, defendants moved to dismiss this claim under Minn. Stat. § 145.682, Subd. 6(c) based on plaintiff’s failure to meet the statute’s substantive requirements. (A.1). Wesely responded by disclosing a substitute expert affidavit of dentist Dr. Scott Lingle during the 45-day safe-harbor period and

argued that Dr. Lingle's affidavit cured the deficiencies in Dr. Vocal's affidavit. (A.44; A.53). Yet the plain language of Section 145.682, Subd. 6(c) does not permit substitution of experts during the 45-day safe-harbor period.

- a. **The plain language of Section 145.682 provides a plaintiff with the opportunity to correct technical deficiencies in a previously disclosed expert affidavit.**

To determine the meaning of a statute, the courts look first and foremost to the language of the statute itself. Minn. Stat. § 645.16 (2009); *American Family Ins. Grp. v. Schroedel*, 616 N.W.2d 273, 277 (Minn. 2000). Plain meaning presupposes the ordinary usage of words, relies on accepted punctuation and syntax, and draws from the full context of the statutory provision. *American Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). Section 145.682 requires that a plaintiff identify medical experts articulating a prima facie case of medical malpractice no later than 180 days after plaintiff commences suit:

In an action alleging malpractice . . . the plaintiff *must* . . . serve upon defendant *within 180 days after commencement of the suit* an affidavit as provided in subdivision 4 [below].

Minn. Stat. § 145.682, Subd. 2(2) (2009) (emphasis added). Subdivision 4 requires that these experts be qualified and able to articulate plaintiff's prima facie claim of medical malpractice:

The affidavit required by subdivision 2, clause (2) [above], must . . . state *the identity of each person whom plaintiff expects to call as an expert witness* . . . [and] the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

Minn. Stat. § 145.682, Subd. 4(a) (2009) (emphasis added). An expert affidavit for the purpose of stating a prima facie case served after the 180-day deadline is untimely and cannot be considered. See *Stroud*, 556 N.W.2d at 554 n. 5 (refusing to consider new expert affidavit identified after 180-day deadline and discovery deadline). The Minnesota Supreme Court has consistently confirmed the statute’s strict deadline. See *Broehm*, 690 N.W.2d at 726 (recognizing that plaintiffs must adhere to strict compliance with the requirements of Minn. Stat. § 145.682); *Lindberg*, 599 N.W.2d at 573 (“while we certainly recognize that the statute may have harsh results in some cases, it cuts with a sharp but clean edge.”).

Wesely does not dispute that Dr. Lingle’s affidavit is untimely. Rather, she argues that as long as she disclosed an expert — any expert, no matter how unqualified — by the 180-day deadline, the 45-day safe-harbor provision allows for the substitution of medical experts. (App. Br. at 17). But the plain language of the statute reads differently. The 45-day safe-harbor provision is only triggered after a defendant makes a motion to dismiss for insufficiencies in an already disclosed affidavit. Minn. Stat. § 145.682, Subd. 6(c)(2). Although it allows the plaintiff to submit an “*amended* affidavit” to correct the deficiencies, it does not allow substitution of experts:

(c) Failure to comply with subdivision 4 because of deficiencies in the affidavit . . . results, upon motion, in mandatory dismissal with prejudice of each action as to which expert testimony is necessary to establish a prima facie case, provided that:

....

(2) the time for hearing the motion is at least 45 days from the date of service of the motion; and

(3) before the hearing on the motion, the plaintiff does not serve upon the defendant an *amended affidavit* . . . that correct[s] the claimed deficiencies.

Minn. Stat. § 145.682, Subd. 6(c) (emphasis added). By definition, the “amended affidavit” contemplated under the 45-day safe-harbor provision cannot be a brand-new affidavit from a previously undisclosed expert. To “amend” means: “1. To improve. 2. To remove the errors in; correct. 3. To altar . . . by adding, deleting, or rephrasing.” American Heritage Desk Dictionary at 27 (4th ed. 2003); *Vlahos v. R & I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 679 (Minn. 2004) (instructing that words in a statute are to be construed in accordance with common and approved usage). Additionally, it means: “To change the wording of . . . by striking out, inserting, or substituting words . . .” Black’s Law Dictionary at 89 (8th ed. 2004). So, by its very definition, the plain language of “amended affidavit” means a correction that relates back to the original source — here, an already disclosed expert’s affidavit. In other words, only an *amended* affidavit can correct the technical deficiencies in the previously disclosed expert affidavit.

The 45-day safe-harbor provision is not — as Wesely insists — additional time to substitute a previously submitted defective affidavit with the affidavit of an entirely new medical expert. *See, e.g., Maudsley v. Pederson*, 676 N.W.2d 8, 11 n.1 (Minn. App. 2004) (stating that subdivision 6(c) “gives a plaintiff 45 days to *amend an allegedly defective affidavit* in order to avoid mandatory dismissal”) (emphasis added). If the legislature had meant to allow for such a substitution of an affidavit by a brand-new

expert, it certainly would have been careful to draft the statutory language to say so. But, instead, the legislature restricted the additional affidavit to only an amendment, and courts “will not supply words that the legislature either purposely omitted or inadvertently left out.” *Vlahos*, 676 N.W.2d at 681. By its plain meaning, the term “amended” serves to limit the scope of “affidavit” to that which is allegedly deficient and was previously submitted within the 180-day deadline. The legislature purposefully used the word “amended” to describe the only correction that a plaintiff can make to an already submitted deficient affidavit after the 180-day deadline and within the 45-day safe-harbor period. Thus, the plain language of Subdivision 6(c) prohibits substitution of medical experts during the 45-day safe-harbor period for the purpose of stating a prima facie case.

Indeed, if Wesely’s interpretation of Section 145.682, Subdivision 6(c) was the law, it would not only nullify the plain language in Subdivision 6(c) by ignoring the word “amended,” thereby rendering the 180-day deadline to disclose experts who will establish a prima facie case meaningless. This result would contradict the time-honored mandate that, “the legislature intends the entire statute to be effective and certain.” Minn. Stat. § 645.17(2) (2009). Whenever possible, a statute should be interpreted to give effect to *all* of its provisions — “no word, phrase, or sentence should be deemed superfluous, void, or insignificant.” *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999). Wesely’s interpretation of the statute would lead to such an impermissible result. Furthermore, the following language: [i]n an action alleging malpractice . . . the plaintiff *must* . . . serve upon defendant *within 180 days after commencement of the suit* an

affidavit as provided in subdivision 4” must be interpreted as effective and certain. Minn. Stat. § 145.682, Subd. 2(2) (2009). Indeed, subdivision 6 mandates dismissal for a complete failure to comply with the 180-day deadline and does not allow any additional safe-harbor period to disclose additional experts after a defendant moves to dismiss. Minn. Stat. § 145.682, Subd. 6(b) (“Failure to comply with subdivision 2, clause (2), results, upon motion, in mandatory dismissal with prejudice . . .); and 6(c). Consistent with the statute, the Minnesota Supreme Court has — time and time again — recognized Section 145.682’s strict requirements. *See Broehm*, 690 N.W.2d at 726 (recognizing that plaintiffs must adhere to strict compliance with the requirements of Minn. Stat. § 145.682); *Lindberg*, 599 N.W.2d at 573 (“while we certainly recognize that the statute may have harsh results in some cases, it cuts with a sharp but clean edge.”). Thus, the 45-day safe-harbor provision cannot contradict the strict 180-day deadline and work to extend it. By its plain language, Subdivision 6(c) merely provides a plaintiff the opportunity to correct technical deficiencies in an affidavit by a previously disclosed expert.

Yet under Wesely’s interpretation — allowing for substitution of experts as long as defendant triggers the 45-day safe-harbor provision by moving to dismiss — any affidavit, no matter how deficient, would act as a “placeholder” in order to give a plaintiff additional time to procure expert testimony. Service of a placeholder affidavit would require a defendant to make a motion to dismiss this insufficient affidavit — which could occur at any time before the court-imposed dispositive-motion deadline. Indeed, a plaintiff could certainly use anyone’s affidavit as a placeholder — including a non-

medical lay opinion or even the plaintiff's own lay opinion — in order to force the defendant to bring a motion to dismiss, triggering the 45-day safe-harbor provision. If the defendant triggers the 45-day safe-harbor provision via motion and then a plaintiff is permitted to substitute medical experts during this time, a plaintiff can effectively add months to the initial 180-day deadline, allowing a plaintiff to disclose substitute expert testimony well past the 180-day deadline — eviscerating the legislature's intent by rendering the 180-day deadline meaningless.

Furthermore, under Wesely's interpretation — allowing anyone to submit a "placeholder" affidavit to trigger the 45-day safe-harbor provision, thereby adding months to the 180-day deadline — the statute's purpose as a cost-reducing mechanism would be lost. *See Broehm*, 690 N.W.2d at 725-26 (recognizing Section 145.682's purpose as litigation and cost-reducing measure). If plaintiffs were permitted to serve an insufficient affidavit as a placeholder in order to force a defendants' hand to trigger at least an extra 45 days to find a substitute expert, medical-negligence cases would always require this extra motion practice, adding extra cost through this additional litigation. The only way that Section 145.682 acts as a litigation and cost-reducing mechanism is for it to be interpreted through its plain language, requiring the disclosure of all medical experts who will establish a plaintiff's prima facie case of medical malpractice by the strict 180-day deadline.⁵ Thus, the 45-day safe-harbor provision is only meant to allow

⁵ Although a defendant could wait until immediately before trial to act to dismiss a deficient affidavit through a motion in limine, that would still require the parties to engage in costly pre-trial discovery practice — all to end immediately before trial.

an amended affidavit by the already disclosed expert to correct deficiencies in the original affidavit. As the district court properly recognized:

Subdivision 6 provides for a 45 day “cure” provision in which to correct deficiencies in the expert affidavit, but the plain language of that subdivision allows the plaintiff to amend the affidavit or answers. It 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” provision, for the submission of an amended affidavit (current law) or a substitute affidavit. However, the legislature failed to do so. As such, the Court must follow the plain language of the statute.

(Ad. 9). Subdivision 6(c) must be interpreted according to its plain language to preserve the 180-day deadline.

In sum, the 45-day safe-harbor provision is not an opportunity for plaintiff to hit the proverbial “snooze” button on the 180-day deadline so as to add another 45 days to find a qualified medical expert. Rather it is meant to give a plaintiff a chance to remedy technical defects in the original expert affidavits by submitting *amended, supplemental* affidavits *from the previously disclosed* experts. The medical experts who will establish a plaintiff’s prima facie case must be disclosed within 180 days. The 45-day safe-harbor provision cannot extend the 180-day deadline. The legislature did not design this safe-harbor provision as an opportunity for plaintiff to identify an expert for the first time after the 180-day deadline in order to circumvent the deadline. Therefore, the district court properly refused to consider Dr. Lingle’s newly submitted affidavit. This Court should affirm the district court’s dismissal of this lawsuit as mandatory under Section 145.692, Subdivision 6(c).

- b. **Section 145.682, Subdivisions 4(b) and 6(c), read together, do not create ambiguity that would require interpretation through legislative history.**

Wesely argues that the court's "reading of the statute is too restrictive" because "competing provisions" in the statute "create ambiguity."⁶ (App. Br. at 17). Yet Subdivisions 4(b) and 6(c), read together, do not create ambiguity. A court will only consider legislative history when the statute is ambiguous. Minn. Stat. § 645.16 (7). "When the language of the statute is unambiguous, 'the letter of the law shall not be disregarded under the pretext of pursuing the spirit.'" *Jackson v. Mortgage Elec. Registration Systems, Inc.*, 770 N.W.2d 487, 496 (Minn. 2009) (citing *Munger v. State*, 749 N.W.2d 335, 338 (Minn. 2008)). A statute is only ambiguous when the language is subject to more than one reasonable interpretation. *Occhino v. Grover*, 640 N.W.2d 357, 360 (Minn. App. 2002), *review denied* (Minn. May 28, 2002). Wesely argues that the second sentence in Subdivision 4(b) allows her to disclose a brand-new expert via affidavit during the 45-day safe-harbor period:

The parties or the court for good cause shown, may by agreement, provide for extensions of the time limits specified in subdivision 2, 3, or this subdivision. *Nothing in this subdivision [i.e., subdivision 4] may be construed to prevent either party from calling additional expert witnesses or substituting other expert witnesses.*

Minn. Stat. § 145.682, Subd. 4(b) (emphasis added). Yet this subdivision cannot be read so broadly as to encompass and undercut Subdivision 6(c). When interpreting the plain

⁶ Wesely did not argue to the district court that Section 145.682 was ambiguous, necessitating legislative history review. Thus, this court can disregard this new argument on appeal. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that Minnesota Court of Appeals will not hear issues raised for first time on appeal).

language of a statute, courts are instructed to harmonize potentially conflicting provisions and to give effect to all provisions. *See* Minn. Stat. §§ 645.16, 645.17(2) (directing courts to give effect to all statutory provisions, where possible). Subdivision 4(b) merely explains that a plaintiff can substitute and add medical experts *after a plaintiff has already met the 180-day statutory requirement disclosing qualified medical experts who will articulate her prima facie case*. For example, as long as a plaintiff has disclosed a qualified medical expert who articulates plaintiff's prima facie case within 180 days, the plaintiff is thereafter permitted to add additional experts, such as a damages expert, or an expert who will explain an additional medical nuance in plaintiff's case. Another example is where a plaintiff may need to substitute medical experts if the original expert should become unavailable. Subdivision 4(b), as read consistent with the statute as a whole, does not conflict with Subdivision 6(c).

Subdivision 4(b) cannot reach to extend to the 45-day safe-harbor provision contained in Subdivision 6(c) because to do so would nullify it as well as the 180-day deadline. To ignore the strict 180-day deadline for disclosure of medical experts who can establish plaintiff's prima facie case — allowing substitution of experts well beyond the 180-day deadline and possibly up until the date of trial — would render the 180-day deadline meaningless. *See Duluth Firemen's Relief Ass'n v. City of Duluth*, 361 N.W.2d 381, 385 (Minn. 1985) (stating the “basic maxim of statutory construction that a statute is to be construed, if possible, so that no word, phrase, or sentence is superfluous, void, or insignificant”). Furthermore, if Subdivision 4(b) undercut Subdivision 6(c) and permitted substitution of medical experts articulating plaintiff's prima facie case past the 180-day

deadline, there certainly would have been no need for the legislature to have added the 45-day safe-harbor provision to allow for an amendment to a deficient affidavit. Wesely's interpretation is simply not reasonable under the statute's plain meaning. This subsection, therefore, is not ambiguous when read together with the 45-day safe-harbor provision.

Finally, even if this Court were to consider legislative history, this history supports defendants' position that the legislature did not intend for a plaintiff to replace a defective affidavit with a substitute expert affidavit during the 45-day safe-harbor period. The purpose behind the Section 145.682 safe-harbor provision was explained in a case attempting to interpret the similar — but not identical — professional-malpractice statute, Minn. Stat. § 544.42. *See Brown-Wilbert v. Copeland Buhl & Co., P.L.L.P.*, 732 N.W.2d 209 (Minn. 2007) (declining to adopt “good faith” standard as a basis under which to satisfy 180-day deadline requirement in accountant-malpractice claim). In fact, Section 544.42 was modeled after Section 145.682, which is why courts have looked to the extensive caselaw interpreting Section 145.682 to interpret provisions in Section 544.42. *See, e.g., id.* at 217 (discussing Section 145.682's longstanding history). The *Brown-Wilbert* court explained that the legislative intent behind Subdivision 6:

[T]he amendment to section 145.682 was based on the perception that meritorious medical malpractice claims were being dismissed where the expert disclosure affidavit was only *missing some technical information that could be corrected*.

Id. at 217 (citing to Sen. Debate on S.F. 0936, 82nd Minn. Leg., May 16, 2001 (audio tape) (statement of Sen. Neuville, author of the bill)) (emphasis added). The legislative

history confirms that Subdivision 6(c) was meant only to provide a plaintiff the ability to correct inadvertent technical mistakes that could be easily corrected by an amended affidavit by the same medical expert. The purpose was not to allow substitution with a new medical expert. Hence the use of the word “amended.” Thus, even if Subdivision 6(c) could be considered ambiguous when read together with Subdivision 4(b), the legislative history supports defendants’ interpretation of Section 145.682, Subdivision 6(c) — that the purpose of the 45 day safe-harbor provision is to allow a plaintiff to submit an amended affidavit of an already disclosed expert, not to substitute medical experts.

- c. **The safe-harbor provision in Minn. Stat. § 544.42, Subd. 6 — containing different language than the safe-harbor provision in Section 145.682, Subd. 6 — does not control the result in this case.**

Even though Wesely begins her criticism of the district court’s decision by arguing that legislative history should be a component to this analysis, she does not cite to any legislative history to support her analysis. Instead, she argues that this Court’s interpretation of Minn. Stat. § 544.42, Subd. 6(c) in *Noske v. Friedberg*, 713 N.W.2d 866 (Minn. App. 2006), *review denied* (Minn. July 19, 2006), controls the outcome of this case. It does not. True, there are many similarities between Section 145.682 and the general professional-expert-affidavit statute, Section 544.42, but the statutes are not identical. And although courts interpreting Section 544.42 frequently look to cases involving Section 145.682 for clarification, courts have not relied upon Section 544.42 to clarify Section 145.682. Specifically, the safe-harbor provisions in the two subdivision

6's contain altogether different language. Section 145.682's 45-day safe-harbor provision only allows a plaintiff to submit an amended affidavit to cure a deficiency:

(2) the time for hearing the motion is *at least 45 days* from the date of service of the motion; and

(3) before the hearing on the motion, the plaintiff does not serve upon the defendant an *amended affidavit* or answers to interrogatories that correct the claimed deficiencies.

Minn. Stat. § 145.682, Subd. 6(c) (emphasis added). Section 544.42, however, appears to give the plaintiff an additional 60 days to satisfy the disclosure requirements after a defendant has moved for dismissal — and contains no language restricting the affidavit to an amendment as opposed to a substitution:

(c) Failure to comply with [the 180-day requirement] results, upon motion, in mandatory dismissal of each action with prejudice as to which expert testimony is necessary to establish a prima facie case, provided that an initial motion to dismiss an action under this paragraph based upon claimed deficiencies of the affidavit or answers to interrogatories shall not be granted unless, after notice by the court, the nonmoving party is given 60 days to satisfy the disclosure requirements in subdivision 4. In providing its notice, the court shall issue specific findings as to the deficiencies of the affidavit or answers to interrogatories.

Minn. Stat. § 544.42, Subd. 6(c) (2009). Thus, the plain language of the two safe-harbor provisions are entirely different. The fact that the safe-harbor provision in Section 544.42 is more liberal than that of Section 145.682 — without any restrictions on supplemental affidavits — cannot act to modify the plain language in Section 145.682.

Wesely cites to *Noske* to argue that because both Section 544.42, *Subd. 4* and Section 145.682, *Subd. 4* contain similar language — identifying the excusable-neglect

exception — the *Noske* analysis controls here. (App. Br. at 19). Both statutes contain similar language:

The parties or the court for good cause shown, may by agreement, provide for extensions of time limits specified in subdivision 2,3, or this subdivision. Nothing in this subdivision may be construed to prevent either party from calling additional expert witnesses or substituting other expert witnesses.

Minn. Stat. § 145.682, Subd. 4(b).

The parties by agreement, or the court for good cause shown, may provide for extensions of the time limits specified in subdivision 2, 3 or this subdivision. Nothing in this subdivision prevents any party from calling additional expert witnesses or substituting other expert witnesses.

Minn. Stat. § 544.42, Subd. 4(b). Yet the *Noske* Court's analysis interpreting Section 544.42, Subd. 4(b) cannot act to change the plain language of Section 145.682, Subd. 6(c).

Notably, the *Noske* court was charged with interpreting Minn. Stat. § 544.42, *Subd. 6(a)* — which provides that failure to serve an affidavit of expert review within 60 days after demand mandates dismissal — *not Subdivision 6(c)*, dealing with substantively deficient affidavits. The *Noske* court concluded that the plain language of Section 544.42, *Subd. 6(a)* does not prohibit the timely submission of a second affidavit of expert review after the court has concluded that the initial affidavit was inadequate. *Noske*, 713 N.W.2d at 872. Although the court of appeals concluded that Section 544.42, Subd. 4(b) — allowing substitution of substitute expert witnesses — applied to both the affidavit of expert review and to the affidavit of expert identification, this interpretation is consistent with the broad language in Section 544.42, Subdivision 6(c). *Id.* at 873. The *Noske*

analysis of Section 544.42, Subd. 6(c) cannot transfer to interpret Section 145.682, Subd. 6(c) because the plain language of the two safe-harbor provisions are entirely different. And, for the reasons discussed above, *supra IIb*, the *Noske* interpretation of Subdivision 6(c) is impermissible. In short, the *Noske* analysis is simply irrelevant here.

In sum, the plain language of Section 145.682, Subdivision 6(c) prohibits substitution of expert affidavits during the 45-day safe-harbor period. There is no ambiguity in Section 145.682 because all subsections can be read to preserve the strict 180-day deadline. But even if there were some ambiguity to the statute, the legislative history confirms that Subdivision 6(c) was meant to allow a plaintiff to correct missing technical information in an affidavit by an already disclosed expert, not to substitute medical experts during this time. Thus, this Court should affirm the district court's order rejecting Dr. Lingle's affidavit and holding that the 45-day safe-harbor provision allows for only an amended affidavit, not for substitution of medical experts.

III. The district court did not abuse its discretion when concluding that Wesley had failed to demonstrate excusable neglect as a basis for extending the 180-day deadline.

Wesely argues that the district court abused its discretion when it refused to extend the 180-day deadline based upon excusable neglect. (App. Br. at 10). Section 145.682 provides that a plaintiff may extend the 180-day deadline by agreement with the defendant or by order of the court for good cause. Minn. Stat. § 145.682, Subd. 4(b). For this purpose, Section 145.682 is read in conjunction with Minn. R. Civ. P. 6.02, requiring that after the 180-day deadline has passed, the plaintiff must make a formal motion to extend this deadline if a plaintiff has failed to meet this deadline:

When by statute, by these rules, by a notice given thereunder, or by order of court an act is required or allowed to be done at or within a specified time, the court for good cause shown may, at any time in its discretion, . . . (2) upon motion made after the expiration of the specified period permit the act to be done where the *failure to act* was the result of excusable neglect . . .

Minn. R. Civ. P. 6.02 (emphasis added); see *Anderson v. Rengachary*, 608 N.W.2d 843, 849 (Minn. 2000) (stating that Section 145.682 will be read in conjunction with Minn. R. Civ. P. 6.02). Wesely failed to make a formal motion to extend the 180-day deadline at all and, instead, only requested a belated extension in her brief in opposition to defendants' motion to dismiss. Furthermore, this is not a case where the plaintiff failed to act, as identified in Rule 6.02, but where a plaintiff acted — e.g., met the 180-day deadline — but still requests additional time. Wesely did meet the 180-day deadline when she disclosed Dr. Vocal's affidavit. Thus, the current situation is not what is contemplated in Rule 6.02. An excusable-neglect expansion of the 180-day deadline where a plaintiff has already acted — and needs no more time to comply with a statutory deadline — is not proper here. Rather, a plaintiff's only possible remedy after she has met the deadline — but done so by disclosing an insufficient affidavit — is amending that affidavit through the safe-harbor provision in Section 145.682, Subdivision 6(c). Thus, this court need not even consider Wesely's excusable-neglect argument.

Nevertheless, the district court considered and ruled upon Wesely's request, which this Court reviews only for an abuse of discretion. *Broehm*, 690 N.W.2d at 727. After the statutory deadline expires, a movant must show that the failure to submit an expert affidavit by the 180-day deadline was the result of excusable neglect. *Anderson*, 608 N.W.2d at 849. Although Wesely argues that all she needs to show is a "good faith

effort” to comply with Section 145.682’s requirements, longstanding Minnesota caselaw has set forth the particular requirements. Excusable neglect might exist where the plaintiff: (1) has a reasonable suit on the merits; (2) has a reasonable excuse for failure to comply with time limit set forth by Minn. Stat. § 145.682, Subd. 2; (3) acted with due diligence after receiving notice of the time limit; and (4) the defendant suffers no substantial prejudice. *Id.* at 850 (citations omitted). The district court must find that the plaintiffs meets all four requirements to allow extension of the time limits for excusable neglect. *See, e.g., Parker v. O’Phelan*, 414 N.W.2d 534, 537-38 (Minn. App. 1987) (holding that district court did not abuse discretion when it concluded that excusable neglect existed to extend 60-day deadline to produce initial affidavit of expert review based on all four elements of excusable-neglect test), *affirmed* 428 N.W.2d 361 (Minn. 1988).

Wesely argues that she made a “good faith” attempt to comply with the statute’s requirements. (App. Br. at 14). The district court, however, disagreed and concluded that Wesely did not meet two of the elements of the excusable-neglect test because: (1) Wesely did not have a reasonable excuse for her failure to comply with the 180-day deadline; and (2) she failed to act with due diligence after her attorney withdrew as counsel. (Ad. 11).

The basis of Wesely’s argument is the fact that she acted pro se for four months after her counsel withdrew from representation on June 1, 2009. But, as the district court recognized, there is no “pro se plaintiff” exception to the 180-day deadline in Section 145.682. In fact, the statute specifically prohibits this excuse:

If the plaintiff is acting pro se, the plaintiff shall sign the affidavit or answers to interrogatories referred to in this section *and is bound by those provisions as if represented by an attorney.*

Id. at Subd. 5 (2009) (emphasis added); see Minn. Stat. § 645.16 (“The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.”). If this court were to allow plaintiff to claim “excusable neglect” to extend the Section 145.682 deadline based upon her legal inexperience, it would nullify Subdivision 5. See Minn. Stat. § 645.17 (2) (“the legislature intends the entire statute to be effective and certain.”); *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999) “[N]o word, phrase, or sentence should be deemed superfluous, void, or insignificant.”). The Minnesota Supreme Court has recognized that Section 145.682’s requirements are mandatory, “while we certainly recognize that the statute may have harsh results in some cases, it cuts with a sharp but clean edge.” *Lindberg*, 599 N.W.2d at 578. Here, the Minnesota legislature specifically spoke to this very situation and concluded that a plaintiff cannot use her pro se status as a means to avoid Section 145.682’s requirements. Thus, Wesely’s argument that “her conduct was not unreasonable” given the fact that she is not an attorney cannot be a basis for excusable neglect. (See App. Br. at 12).

Wesely alleges that the district court abused its discretion when concluding that she was at least partially to blame for the delay in finding a new attorney. (App. Br. at 11). She argues that it is difficult to find a lawyer to take a medical-malpractice case and to then find an expert to review the medical records. (*Id.*). Yet, once Wesely met with her current counsel on August 25, 2009, it took only approximately six weeks for her to

secure representation, have Dr. Lingle review her records, and have Dr. Lingle issue an opinion with respect to Dr. Flor's treatment. (A.43). Thus, Wesely demonstrates that had she done so earlier, she could have secured both her current counsel and Dr. Lingle's opinion during the 11-week timeframe between June 1 and August 23, 2009. And Wesely fails to explain why she did not attempt to find a new attorney until three months after Dahl withdrew as counsel on June 1. This delay does not support a due-diligence excuse.

Wesely proposes that she was somehow unable to contact a medical expert or other attorneys to request representation before August 2009 because Dahl had sent her medical records to a Michigan attorney.⁷ (App. Br. at 14). Wesely never explains if these were the only copies of her medical records. It is highly unlikely that Dahl would send the original — and only — copies of these medical records through the mail. And there must have been additional copies of her medical records, given that at the time she commenced suit, Dahl signed the affidavit of expert review stating that the medical records had already been reviewed by a medical expert who opined that the defendants had breached the standard of care. *See Broehm*, 690 N.W.2d at 727-28 (rejecting plaintiff's excusable-neglect claim where plaintiff had copies of medical records well in advance of commencing suit). Dahl's actions in sending Wesely's medical records to

⁷ Although the district court considered the facts as stated in Wesely's memorandum in opposition to defendants' motion, the information concerning Dahl's and Wesely's actions after June 1 were never properly admitted via affidavit. Zimmer and Wesely merely submitted affidavits stating that all facts in her district-court memorandum were true, as opposed to setting forth facts via affidavit that would be admissible in evidence pursuant to Minn. R. Civ. P. 56.05. Thus, this court can disregard these facts.

another attorney do not explain Wesely's own delayed actions over three months. Wesely did not meet with a new attorney until the end of August 2009. At that point, it only took six weeks for her to secure representation and find another expert. Thus, the district court recognized that: "Plaintiff is at least partially to blame for the delay." (Ad. 12). Wesely had more than enough time — had she acted — to secure another attorney and medical expert during the four-month time period that she was unrepresented by counsel.

Thus, the district court correctly exercised its discretion when it rejected Wesely's excusable-neglect argument, concluding that Wesely had failed to meet two of the four elements of the excusable-neglect test.⁸ (Ad. 11). Wesely also failed to show that she had a reasonable case on the merits, given that it is undisputed that Dr. Vocal's affidavit is insufficient. *See Mercer v. Anderson*, 715 N.W.2d 114, 123 (Minn. App. 2006) (holding that whether plaintiff had reasonable case on the merits is questionable without expert affidavit). Dr. Lingle's affidavit cannot be used to defend this case "on the merits" because the district court rejected it. Wesely then argues that this is not one of those cases that the legislature contemplated would be dismissed because it is not "frivolous." But the word "frivolous" as used in cases interpreting Section 145.682 is merely a term describing any medical-negligence case without valid expert support. *See Sorenson*, 457

⁸ Although this court can affirm the district court's order because Wesely failed to meet two of the four elements of the excusable-neglect test, defendants disagree with the district court that plaintiff has a reasonable suit on the merits and that defendants would not suffer prejudice as a result of an extension of the deadline. *See Myers through Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990) (confirming that court of appeals can affirm judgment on any grounds).

N.W.2d at 191 (holding that malpractice action without supporting expert testimony is frivolous per se). A layperson's definition of frivolous is entirely different. A defendant has never been required to prove that the medical-negligence claim is frivolous by lay standards for Section 145.682 to apply, mandating dismissal, “. . . failure of defendant to prove plaintiff's claim is frivolous . . . will not excuse or justify an affidavit of expert identification falling short of the substantive disclosure requirement.” *Lindberg*, 599 N.W.2d at 578. Thus, whether or not Wesely believes that her claims have merit is of no moment in this analysis.

Finally, defendants would have been prejudiced had the district court accepted Wesely's excusable-neglect argument and — contrary to the plain language of Section 145.682 — allowed Dr. Lingle's affidavit to substitute for Dr. Vocal's insufficient affidavit. Plaintiff waited until the last possible date — four years after the alleged injury — to commence suit. (A.22). During the time that Dahl represented Wesely, there were no responses to discovery requests. (A.75, 88). And this trend continued while Wesely acted pro se. (*Id.*). Thus, five years later, defendants still have not been able to procure any medical information about Wesely to prepare a defense. Thus, the delay in getting any information from Wesely has already been prejudicial to defendants — and will be more so should her claims be reinstated. *See, e.g., Maloney v. Fairview Community Hosp.*, 451 N.W.2d 237, 240 (Minn. App. 1990) (concluding that plaintiff had not exhibited excusable neglect, in part, because of five-year delay in receiving expert affidavit). This is one reason why Section 145.682 and the statute of limitations exist —

to force a plaintiff to move forward with litigation and to allow a defendant to prepare a defense.

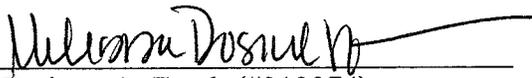
In sum, Wesely fails to meet any of the four elements of the excusable-neglect test. But more importantly, the district court did not abuse its discretion when it concluded that Wesely simply failed to act with due diligence and had no reasonable excuse for her failure to comply with the 180-day time limits when she waited until after the 180-days had expired to retain new legal counsel. According to Section 145.682, her efforts as a pro se plaintiff are no excuse for the failure to find a qualified expert to meet the 180-day deadline. Thus, this Court should affirm the district court's rejection of Wesely's excusable-neglect argument as well as the dismissal of Wesely's lawsuit with prejudice.

CONCLUSION

This Court should affirm the district court's order dismissing Wesely's medical-negligence lawsuit with prejudice based upon Minn. Stat. § 145.682, Subd. 6(c) because: (1) the plain language of Subdivision 6(c) does not allow substitution of experts during the 45-day safe-harbor period; and (2) the district court correctly exercised its discretion when it determined that Wesely's actions did not support extending the 180-day deadline based upon excusable neglect.

Respectfully submitted,

Dated: May 17, 2010

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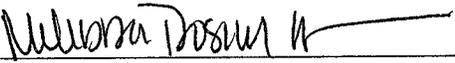
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FORM AND LENGTH CERTIFICATION

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