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# State of Minnesota
# In Supreme Court

Elaine M. Wesely,

*Appellant,*

v.

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

*Respondents,*

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Appellant Elaine M. Wesely's
Brief, Addendum, 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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## Statement of the Legal Issue

**I. Does Minn. Stat. § 145.682, subd. 6(c) allow a plaintiff in a medical malpractice action to serve a substitute affidavit of expert identification within the forty-five day "safe harbor period" when the original affidavit was deficient because of the expert's lack of qualification?**

The trial court held that while Minn. Stat. § 145.682 allows a plaintiff forty-five days to correct deficiencies in her expert identification, the statute does not contemplate "a new affidavit by a new expert" as an acceptable method of doing so. Add. 23. The trial court found that the initial affidavit was deficient, that Appellant "did not attempt to amend the clear deficiencies" in that affidavit, and that Appellant had therefore failed to meet her obligation under Minn. Stat. § 145.682. *Id.* The trial court dismissed the case with prejudice on January 21, 2010. Add. 17. The Court of Appeals affirmed on December 14, 2010. Add. 3-14.

This issue was brought before the trial court in Respondents' Motion to Dismiss Under Section 145.682. A. 15. It was addressed in the parties' briefing and in the argument before the trial court. A. 21-23, 33-34. It was preserved for appeal in the trial court's Judgment and Order. Add. 17-23, 26. It was directly addressed by the Court of Appeals, and was the sole issue raised in Appellant's Petition for Review to this Court. Add. 3-14; A. 2-7.

**Apposite Authorities:**

Minn. Stat. § 145.682
*Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721 (Minn. 2005)
*Teffeteller v. University of Minnesota*, 645 N.W.2d 420 (Minn. 2002)

## Statement of the Case

This is a dental malpractice lawsuit that was commenced in February 2009 by Appellant Elaine Wesely. A. 39-49. On January 21, 2010, the Honorable Steven R. Schwab of the Freeborn County District Court dismissed Ms. Wesely's case for failure to comply with Minn. Stat. § 145.682. Add. 17. Specifically, Judge Schwab ruled that Ms. Wesely had failed to properly correct deficiencies in her expert identification, and that such failure was not the result of excusable neglect. Add. 18-26. Appellant filed a Notice of Appeal with the Clerk of Appellate Courts on March 11, 2010. A. 8. The Court of Appeals upheld Judge Schwab's ruling on December 14, 2010. Add. 3-14. On February 15, 2011, this Court granted review on the singular issue of whether Minn. Stat. § 145.682 allows a plaintiff in a medical malpractice case to serve a substitute affidavit of expert identification within the forty-five day safe harbor when the original affidavit was deficient because of the expert's lack of qualification. A. 1-3.

## Statement of Facts

On February 23, 2005, Appellant Elaine Wesely went to see Respondent A. David Flor, D.D.S. for a dental visit. A. 43. During that visit Dr. Flor displaced her jaw and temporal mandibular joint. *Id.* As a result, Ms. Wesely suffered significant jaw and facial deformity. *Id.* Ms. Wesely commenced a malpractice case against Dr. Flor. A. 39-50.

Minn. Stat. § 145.682, subd. 4 requires that an affidavit or answer to interrogatory identifying plaintiff's expert be served within 180 days

of commencement of suit. Add. 1. At the time this lawsuit was commenced Ms. Wesely was represented by counsel. A. 48-50. Her attorney withdrew from the case eighty-three days before the 180-day expert identification deadline expired. Add. 4. In order to comply with that deadline Ms. Wesely, acting *pro se*, served her affidavit on defense counsel identifying Dr. Arvin Vocal, an internist, as her expert. Add. 27-32. Ms. Wesely's affidavit disclosed Dr. Vocal's opinion that Dr. Flor breached the standard of care, and that that breach caused Ms. Wesely's injuries. *Id.* Ms. Wesely's affidavit was served eleven days prior to the expiration of the 180-day deadline. *Id.* Dr. Vocal signed a notarized form verifying that the disclosures made in Ms. Wesely's affidavit accurately reflected his opinions. Add. 32.

Ms. Wesely subsequently contacted another attorney, Michael Zimmer. Add. 3. Mr. Zimmer informed her that Dr. Vocal would likely not be qualified to testify as an expert because he is not a dentist. *Id.* Respondents served a motion to dismiss two weeks later pursuant to Minn. Stat. § 145.682, subd. 6. *Id.* In that motion, Respondents alleged that Ms. Wesely's affidavit of expert identification was deficient because, among other things, Dr. Vocal was not qualified to testify. A. 15.

As allowed by Minn. Stat. § 145.682, subd. 6, Mr. Zimmer took steps to correct the claimed deficiencies. Ten days prior to the expiration of the "safe harbor" period provided by subdivision 6, Mr. Zimmer served his affidavit identifying Dr. Scott Lingle, a dentist, as an expert. Add. 33-38. Dr. Lingle's notarized signature followed Mr. Zimmer's affidavit and affirmed the following: "I have read this Affidavit and it correctly summarizes and outlines the testimony that I expect to give in this matter." Add. 38. Dr. Lingle is familiar with the standard of care that

applied to Dr. Flor. Add. 35. It is Dr. Lingle's opinion that Dr. Flor's treatment of Ms. Wesely did not meet the standard of care, and that his breach of the standard of care directly caused her permanent injuries. Add. 33-38.

Following service of Mr. Zimmer's affidavit, a hearing on Respondents' motion to dismiss was held. A. 18-38. The trial court determined that Appellant had failed to comply with Minn. Stat. § 145.682 because "a new affidavit by a new expert" is not "an acceptable method of curing the deficiencies." Add. 23. The court also rejected Appellant's argument that any failure to cure was the result of excusable neglect. Add. 24-26. The court dismissed Appellant's case with prejudice on January 21, 2010. Add. 17.

The Court of Appeals upheld that dismissal on December 14, 2010, finding no abuse of discretion in the trial court's refusal to find excusable neglect. Add. 13. The Court of Appeals also determined that "dismissal was mandatory if appellant did not serve an amended affidavit that corrected the claimed deficiencies," and agreed with the trial court that "one expert cannot amend the affidavit of another expert." Add. 8-9. Based on the conclusion that Appellant could not correct the deficiencies in her expert identification, the Court of Appeals affirmed. Add. 11-12.

Appellant petitioned this Court for review on the singular issue of whether Minn. Stat. § 145.682, subd. 6(c) allows a plaintiff in a medical malpractice case to serve a substitute affidavit of expert identification within the forty-five day safe harbor when the original affidavit is deficient because of the expert's lack of qualification. A. 2-3. This Court granted review on February 15, 2011. A. 1.

## Argument

### I. Standard of Review

Appellate courts review a trial court's decision to dismiss a claim for failure to identify an expert under an abuse of discretion standard. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 725-27 (Minn. 2005). As the Court of Appeals correctly recognized, however, "the applicability and construction of a statute are questions of law subject to de novo review." Add. 7; *see also Weston v. McWilliams & Associates, Inc.*, 716 N.W.2d 634, 638 (Minn. 2006). The trial court dismissed Appellant's claims based on its construction of Minn. Stat. § 145.682. The Court of Appeals correctly reviewed that dismissal de novo. This Court's review of the lower courts' interpretation of the statute is also de novo.

### II. The Plain Language Of Minn. Stat. § 145.682 Allows A Plaintiff To Correct A Deficient Expert Identification By Identifying A Different Expert.

If a statute is unambiguous, no interpretation is necessary and the plain language must be followed. *Burkstrand v. Burkstrand,* 632 N.W.2d 206, 210 (Minn. 2001). "Every law shall be construed, if possible, to give effect to all its provisions." Minn. Stat. § 645.16. Whenever possible, no word, phrase, or sentence should be deemed superfluous, void, or insignificant. *Amaral v. St. Cloud Hosp.,* 598 N.W.2d 379, 384 (Minn. 1999).

The plain language of Minn. Stat. § 145.682 allows a plaintiff to correct deficiencies in her expert identification by identifying a different expert. Because Appellant did precisely what the statute allowed her to do, the contrary decision below should be reversed.

### A. The plain language of the statute allowed Appellant to correct the claimed deficiencies in her expert's qualifications.

Minn. Stat. § 145.682, subd. 4, requires a plaintiff to identify an expert within 180 days of commencing suit and provide "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." *Broehm*, 690 N.W.2d at 726. Recognizing that strict enforcement of this substantial disclosure requirement could lead to the dismissal of meritorious claims, the legislature added a "safe harbor" provision to the statute in 2002. Minn. Stat. § 145.682, subd. 6(c) requires the defendant to specify the claimed deficiencies in the affidavit or answers to interrogatories, and provides plaintiffs forty-five days to "... serve upon the defendant an amended affidavit or answers to interrogatories that correct the claimed deficiencies." *Id.*

This Court has determined that one of the "deficiencies" contemplated by § 145.682 is the qualification of an expert. In *Teffeteller v. University of Minnesota*, 645 N.W.2d 420 (Minn. 2002), the defendants moved for dismissal under § 145.682 based, in part, on the contention that the plaintiff's expert "was not qualified to testify as an expert on the medical issue before the court." *Id.* at 426. The plaintiff argued that an expert's qualifications were not the proper subject of a motion to dismiss under Minn. Stat. § 145.682, subd. 4. This Court explicitly rejected that argument. *Id.* at 427. Under *Teffeteller*, one of the deficiencies a defendant can claim in a § 145.682 motion is that the plaintiff's expert is not qualified.

If expert qualification is one of the deficiencies a defendant can claim it must also be one of the deficiencies a plaintiff can correct. There are no limits in either the text of the statute or this Court's jurisprudence on the type of deficiencies that can be corrected. The statute simply provides that if the defendant specifies any deficiencies, the plaintiff is given forty-five days to correct them.

### B. As allowed by the statute, Appellant corrected the claimed deficiencies in her expert identification.

In this case, Respondents claimed there were three separate deficiencies in Appellant's expert identification: (1) Dr. Vocal was "not qualified to testify against Dr. Flor"; (2) Dr. Vocal failed "to properly identify the standard of care required of defendants under the circumstances"; (3) Dr. Vocal failed "to properly identify the chain of causation between defendants' alleged breaches of the standard of care and plaintiff's alleged injuries." A. 15-16. Appellant corrected all three of these deficiencies within forty-five days by serving an affidavit identifying Dr. Scott Lingle. Add. 33-38.

The statute puts no limitations on the type of deficiency that can be corrected and also provides that "[n]othing 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 (emphasis added). One of the three deficiencies Respondents identified was that Dr. Vocal was "not qualified to testify against defendants." The only way to correct such a deficiency was to substitute a qualified expert. This is precisely what Appellant did.

The statutory scheme clearly and directly allows a plaintiff in a medical negligence case to cure claimed deficiencies in expert disclosures and to freely substitute expert witnesses for those disclosed at an earlier time. Appellant did both.

Respondents' position is that if the "deficiency" is that an expert is unqualified, the plaintiff cannot correct that deficiency. The courts below agreed. No decision of this Court has ever so held, and such a position violates the clear language of the statute. The statute does not say that some deficiencies can be corrected and others cannot. If a defendant makes a motion to dismiss and identifies a deficiency, the plain language of the statute gives the plaintiff forty-five days to correct that claimed deficiency.

If the legislature had intended to prohibit a plaintiff from substituting experts, the statute would say so. It says exactly the opposite. If the legislature had intended to allow a plaintiff to correct certain deficiencies (such as a failure to describe the standard of care, omissions in the chain of causation, or errors in factual foundation), but not deficiencies related to the expert's qualification to testify, the statute would say so. It does not.

Instead, the statute says that plaintiffs can correct deficiencies and substitute experts. Because the plain language of the statute gave Appellant the right to correct the claimed deficiencies in her expert identification, and the only way to correct one of them was to substitute a different expert, the contrary decision below must be reversed.

## III. Respondents' Interpretation Of "Amended Affidavit" Leads To Absurd Results.

The plain language of the statute allowed Appellant to correct the deficiencies in her expert identification by substituting Dr. Lingle. The contrary result reached by the courts below creates a result that contradicts that plain language. If the language of the statute is at all ambiguous, however, this Court must determine what the legislature intended. Minn. Stat. § 645.16. In doing so this Court examines, among other things, the necessity of the law, the circumstances under which it was enacted, and the object to be attained by it. *Id.* This Court presumes that the legislature intends the entire statute to be both effective and certain. Minn. Stat. § 645.17. It also presumes that the legislature did not intend a result that is absurd or unreasonable. *Id.*; *see also Cummings v. Koehnen*, 568 N.W.2d 418, 423 (Minn. 1997).

The Court of Appeals accepted Respondents' argument that "dismissal was mandatory if appellant did not serve an amended affidavit that corrected the claimed deficiencies." Add. 8.[1] The Court of Appeals also accepted Respondents' argument that Appellant could not amend her initial affidavit by providing a second affidavit identifying a different expert, and that she was therefore unable to meet the statute's requirement that she correct the deficiencies in her expert identification. This argument, successfully advocated below, is faulty for three reasons:

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[1] This is also the position Respondents took before the district court, arguing that "[u]nder subsection 6(c), after a defendant has made a motion to dismiss for insufficiencies in an existing expert affidavit, the only possibility at this point is to amend the deficient affidavit." A. 23, lines 15-19.

first, because as discussed above it reaches a conclusion directly contrary to the plain language of the statute, which allows deficiencies to be corrected and experts to be substituted; second, because it incorrectly assumes that the affidavits of expert identification were "Dr. Vocal's affidavit" and "Dr. Lingle's affidavit"; third, because it incorrectly assumes that Appellant's only option for correcting deficiencies was to amend the affidavit. These faulty assumptions led the courts below to decisions that create absurd results contrary to the legislature's intent.

### A. Appellant's affidavits of expert identification were not "Dr. Vocal's affidavit" or "Dr. Lingle's affidavit."

The decisions below were based on the assumption that Appellant's first affidavit of expert identification was "Dr. Vocal's affidavit" and that the second affidavit was "Dr. Lingle's affidavit." Both courts concluded that the second affidavit could not be an "amended affidavit," because one person cannot amend the affidavit of another. Add. 9, 23.

One problem with this conclusion is that its underlying premise is simply incorrect. Appellant's first affidavit of expert identification was not "Dr. Vocal's affidavit." That affidavit, a copy of which was provided to the trial court and included in the appendix on appeal, is unquestionably the affidavit of Elaine Wesely, acting *pro se*. Add. 27-32. After clearly introducing Ms. Wesely as the affiant, the affidavit's first paragraph reads: "I am acting as Pro Se in the above-named matter, and I make this Affidavit of Expert Review in compliance with Minnesota Statutes 145.682." Add. 27. The affidavit is signed by Ms. Wesely, representing herself. Add. 31. Dr. Vocal verifies that he has read the

affidavit, concurs with the statements contained therein, and signs it as required by the statute, but he never suggests that the affidavit itself is his. Add. 32. On the contrary, the affiant is plainly Ms. Wesely.

Similarly, the second affidavit is not "Dr. Lingle's affidavit" as the decisions below assumed. The second affidavit, which was also provided to the courts below, is clearly the affidavit of Ms. Wesely's attorney. Add. 33-38. The first paragraph reads "I represent Plaintiff Elaine Wesely in this litigation." Add. 33. The second paragraph reads "I expect to call Scott D. Lingle, D.D.S., as an expert witness at trial." *Id.* The affidavit is signed by Ms. Wesely's attorney. Add. 38. Though Dr. Lingle verifies that the affidavit correctly summarizes and outlines his expected testimony, and signs it as required by the statute, the document is plainly the affidavit of Ms. Wesely's attorney.[2] Add. 38. One of the fundamental premises of Respondents' argument below is therefore simply incorrect.

### B. Concluding that Appellant's second affidavit of expert identification was not an "amended affidavit" creates an absurd result.

The word "amended" does not mean that deficiencies in an affidavit of the representative of the party cannot be corrected in a later affidavit by substitute counsel. Mr. Zimmer's affidavit improved,

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[2] The statute does not require that an affidavit of expert identification be the affidavit "of" the expert being identified. The plain language of the statute requires only that the affidavit identify the expert and be signed by the plaintiff's attorney and the expert. Minn. Stat. § 145.682, subd. 4(a). Appellants' affidavits of expert identification unquestionably complied with these requirements.

removed the faults or errors of, corrected, and altered by adding, deleting, and rephrasing the affidavit of Elaine Wesely. This is the very definition of "amended."[3]

Respondents will no doubt argue, as they did below, that Appellant's attorney could not amend Ms. Wesely's affidavit, and therefore his affidavit was not an "amended affidavit." Such a hypertechnical definition of "amended affidavit" ignores the reality of the attorney-client relationship.

When a party hires an attorney to represent her in a lawsuit, she empowers him to act on her behalf with respect to that lawsuit. The party no longer has to sign pleadings, briefs, or discovery documents. The attorney can accept service. The attorney appears in court on the party's behalf. When a party hires an attorney, she is effectively creating an extension of herself.[4]

When Appellant served her affidavit identifying Dr. Vocal, she was representing herself. Respondents filed a motion to dismiss, claiming that Appellant's affidavit was deficient in a number of respects. One of those claimed deficiencies was Dr. Vocal's qualification to testify. A. 15. By the plain terms of the statute, Appellant had forty-five days to correct that deficiency. She hired an attorney. Her attorney corrected the deficiency by serving an affidavit identifying Dr. Lingle.

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[3] Riverside Webster's II New College Dictionary, at page 36: "amend... 1. To improve. 2. To remove the faults or errors of: correct. 3. To alter...by formally adding, deleting, or rephrasing..."

[4] For example, the Rules of Professional Conduct allow the client to authorize her attorney to "take specific action on the client's behalf without further consultation." Minn. R. Prof. Cond. 1.2, cmt. 3.

When Ms. Wesely made the first affidavit, she was acting as her own representative. When Mr. Zimmer made the second affidavit, he was acting as Ms. Wesely's representative. Even under a restrictive definition, the second affidavit was an amendment of the first – both were the affidavit of Ms. Wesely's legal representative.

Any conclusion to the contrary leads to absurd results. For example, under the definition advanced by Respondents, Appellant could only have corrected the deficiencies by having Ms. Wesely herself provide the "amended affidavit" – despite the fact that she had retained an attorney to represent her. Ms. Wesely's affidavit identifying Dr. Lingle would then need to have been signed by her attorney (as the statute requires that the affidavit be signed by "the plaintiff's attorney") and by Dr. Lingle. Nothing in the statute contemplates that the "amended affidavit" would need to be signed by the client, the attorney, and the expert. But this is what would have been required under Respondents' definition.

Consider the following scenario: Plaintiff is represented by an attorney. That attorney provides an affidavit identifying a qualified expert, but failing to provide any specifics about the standard of care or the chain of causation. Defendant brings a motion to dismiss under § 145.682, pointing out the deficiencies in the attorney's affidavit. Plaintiff, angry that her attorney has not drafted an affidavit that complies with Minnesota law, fires him and hires a new attorney to respond to the motion to dismiss.

Under the definition of "amended affidavit" advanced by Respondents and accepted by the courts below, the only way for the new attorney to correct the deficiencies and avoid having the case dismissed

with prejudice is to convince the fired attorney to collaborate on a new affidavit, because only that original attorney can "amend" the affidavit that was initially served. This is not what the legislature intended nor what the statute requires.

### C. The legislature did not intend to treat plaintiffs differently depending on whether they proceed by affidavit or by answer to interrogatory.

Appellant was not required to correct the deficiencies in her expert identification by serving an amended affidavit. She could have provided "answers to interrogatories that correct[ed] the claimed deficiencies in the initial expert disclosures." Minn. Stat. § 145.682, subd. 6(c)(3). The options are interchangeable. This Court has concluded that "[i]nterrogatory answers may be used in lieu of affidavits so long as they are signed by the expert and plaintiff's attorney." *Broehm*, 690 N.W.2d at 725. The statute plainly allows a plaintiff to identify her expert by affidavit or interrogatory responses, and to correct deficiencies in the identification by affidavit or interrogatory responses. The argument advanced by Respondents, however, would result in plaintiffs being treated differently based on which option they choose.

Rather than serving Mr. Zimmer's affidavit identifying Dr. Lingle, Appellant could have corrected the claimed deficiencies in her expert identification by serving "answers to interrogatories that correct the claimed deficiencies."[5] She could have provided exactly the same

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[5] The fact that Appellant initially identified Dr. Vocal by affidavit does not obligate her to correct the claimed deficiencies by providing an amended affidavit. The statute plainly allows a plaintiff to correct claimed deficiencies either by amended affidavit or by answers to

information that was in Mr. Zimmer's affidavit, but in the form of an interrogatory response. As long as the answers to interrogatories were signed by Appellant's attorney and by Dr. Lingle, they would have unquestionably been an "answer to interrogatories" that corrected the claimed deficiencies – one of the two ways the statute allows a plaintiff to avoid dismissal. The conclusion, based on Respondents' argument below, that dismissal was "mandatory" if Appellant did not serve an amended affidavit was therefore erroneous.

This erroneous read of the statute leads to a result not contemplated by, and in fact contrary to, the statute's goal. The legislature did not intend to treat a plaintiff who identifies her expert by affidavit differently from a plaintiff who identifies her expert by answering interrogatories, but that is the result Respondents' interpretation creates. A plaintiff who elects to proceed by interrogatory answer lives to fight another day. A plaintiff who identifies the same expert with the same opinions relying on the same facts, but does so in affidavit form, has her case dismissed without an opportunity to correct the deficiency.

The statute gives two options for complying with the identification requirement and correcting deficiencies. It evidences no preference for one over the other. An interpretation that would lead to radically different outcomes based solely on the method chosen and punish a plaintiff for choosing one option over the other is contrary to the statutory scheme. Because the interpretation below inflicts precisely that type of punishment, it must be rejected.

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interrogatories. Nothing in the statute requires a plaintiff to correct deficiencies using the same format as the initial identification.

## IV. Allowing Appellant To Correct The Claimed Deficiencies In Her Expert Identification By Substituting Dr. Lingle Would Serve The Goals Of Minn. Stat. § 145.682.

The legislature did not intend to create a morass of tricky hurdles that would trip up plaintiffs and throw legitimate cases out of court. On the contrary, the statute is intended to end frivolous claims while at the same time ensuring that correctable deficiencies do not result in summary dismissal of meritorious claims. Because these dual goals are served by allowing Appellant to correct the deficiencies in her identification by substituting Dr. Lingle, the contrary decision below must be overturned.

When it was passed in 1986, the overarching purpose of Minn. Stat. § 145.682 was to eliminate frivolous medical malpractice lawsuits. *Sorenson v. St. Paul Ramsey Med. Ctr.,* 457 N.W.2d 188, 191 (Minn. 1990). Prior to 2002, the statute cut "with a sharp but clean edge." *Lindberg v. Health Partners, Inc.,* 599 N.W.2d 572, 578 (Minn. 1999). A plaintiff had 180 days to identify her expert, and to provide the substance of and grounds for that expert's opinions. Failure to provide any piece of the required information resulted, upon defendant's motion, in mandatory dismissal with prejudice of each cause of action for which expert testimony was required. There was no provision for correcting any deficiencies. Any error in disclosure was fatal to the action.

This Court found that such a result stood "in sharp contrast with the judiciary's traditional preference for the disposition of claims on their merits and a corresponding reluctance to require the parties to run a technical obstacle course," and admitted that the result would be "harsh in some cases." *Sorenson,* 457 N.W.2d at 193; *Lindberg,* 599

N.W.2d at 578. At least one member of this Court worried that § 145.682 would be transformed "from a shield against unwarranted medical malpractice litigation into a sword that will be used to prematurely cut off actions with a 'sharp but clean edge' before it can be properly determined whether they should be disposed of on the merits." *Anderson v. Rengachary*, 608 N.W.2d 843, 852 (Minn. 2000) (Paul H. Anderson, J., concurring in part and dissenting in part). Despite these concerns, this Court concluded that the plain language of the statute mandated the occasional harsh result. Harsh results ensued. *Teffeteller v. University of Minnesota*, 645 N.W.2d 420 (Minn. 2002).

The legislature subsequently took steps to ameliorate this harshness. In a bill that enjoyed almost unanimous support in both houses, the legislature added a number of safeguards to Minn. Stat. § 145.682 in 2002.[6] Following the 2002 amendment, the statute includes a requirement that the defendant identify any claimed deficiencies, a forty-five day "safe harbor" period before the defendant's motion to dismiss can be heard, and an opportunity for the plaintiff to correct the claimed deficiencies in her expert identification. Minn. Stat. § 145.682, subd. 6(c).

The statute, as amended, now balances two competing interests: eliminating frivolous medical malpractice lawsuits at an early stage of

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[6] The safeguards were initially passed by both houses in 2001. The vote was 58-0 in the Senate and 118-15 in the House. *See* Journal of the House, 2001, p. 5252; Journal of the Senate, 2001, p. 3634. Governor Ventura vetoed the bill. The same safeguards were reintroduced in the 2002 session. The bill amending the statute, H.F. 2780, passed the House 121-10 and the Senate 56-0. Journal of the House, 2002, pp. 8949, 8952. Governor Ventura signed the bill into law on May 22, 2002.

the litigation, while at the same time ensuring that plaintiffs with legitimate claims are not thrown out of court.

The Court of Appeals' decision advances neither of these interests. Allowing Appellant to correct deficiencies in her expert identification by substituting Dr. Lingle will serve both.

Cases for which a plaintiff cannot produce qualified expert support are frivolous. *Sorenson*, 457 N.W.2d at 191. This is not one of those cases. Dr. Flor drilled into Ms. Wesely's teeth and lip during a routine dental visit, then severely displaced her jaw while trying to repair the damage. Add. 34. Appellant provided a very detailed disclosure from a qualified medical expert who has opined that a meritorious medical negligence claim exists. Add. 33-38. Respondents have not challenged Dr. Lingle's qualifications, and have not claimed that his opinions lack the specificity required by § 145.682. On the record before this Court, Appellant has a meritorious claim. Allowing Appellant to correct the deficiencies in her initial expert identification by identifying Dr. Lingle will protect a legitimate claim from being dismissed summarily. This was the purpose of the 2002 amendment.

Minn. Stat. § 145.682 is not intended to eliminate medical malpractice claims in general. The goal of the statute is to weed out ***frivolous*** malpractice cases. Allowing a plaintiff to correct deficiencies in an expert identification by substituting for an expert who may be unqualified will not impact this goal, because a frivolous medical malpractice case is one for which there is no expert support. If Dr. Lingle's opinions are sufficient to establish that the claim has merit, it is not frivolous. If the trial court had determined that Dr. Lingle's opinions

were still deficient, however, the case would have still been dismissed.[7] Whether substitution is allowed or not, frivolous cases will be cut off exactly as the statute intends.

Dismissing this case, however, results in dismissal of a meritorious case. Doing so is not the goal of the statutory scheme. Indeed, doing so is contrary to the statutory goal of allowing meritorious claims to proceed. The decision below must therefore be reversed.

## Conclusion

The statutory scheme set forth in Minn. Stat. § 145.682 requires identification of an expert and the expert's opinions within 180 days of commencement of suit. If the defense articulates deficiencies in the identification, the statute gives the plaintiff forty-five days to correct those deficiencies.

Deficiencies were identified and corrected in this case in a manner entirely consistent with the statute. Nothing in the statute says or even implies that an expert may not be substituted to correct a qualification deficiency of an earlier expert. Appellant respectfully asks this Court to reverse the decision below and remand the matter for trial.

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[7] The trial court admitted that Dr. Lingle's opinions "may be sufficient to establish a prima facie case of dental malpractice." Add. 22. There has been no finding that Dr. Lingle is unqualified, and no finding that his opinions are inadequate. The trial court simply refused to consider Dr. Lingle's opinions at all because he was not disclosed within 180 days – even though he was disclosed within the forty-five day safe harbor period.

Respectfully Submitted,

Dated this 17th day of March, 2011.

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