

A10-478

**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.

**BRIEF OF AMICUS CURIAE
MINNESOTA ASSOCIATION FOR JUSTICE**

Terry L. Wade (I.D. No. 113426)
Brandon Thompson (I.D. No. 349173)
ROBINS, KAPLAN, MILLER
& CIRESI, L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
(612) 349-8500

Michael A. Zimmer (I.D. No. 141811)
M.A. ZIMMER LAW
88 South Tenth Street, Suite 300
Minneapolis, MN 55403
(612) 746-5546

*Attorneys for Appellant
Elaine M. Wesely*

Robert J. King, Jr. (I.D. No. 55906)
Kay Nord Hunt (I.D. No. 138289)
LOMMEN, ABDO, COLE,
KING & STAGEBERG, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

*Attorneys for Amicus Curiae
Minnesota Association for Justice*

[Additional counsel listed on reverse]

Barbara A. Zurek (I.D. No. 213974)
Melissa Dosick Riethof (I.D. No. 282716)
MEAGHER & GEER, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
(612) 338-0661

Attorneys for Respondents
A. David Flor, DDS, et al.

Charles E. Lundberg
BASSFORD REMELE, P.A.
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402-3707

Attorneys for Amicus Curiae
Minnesota Hospital Association and
MMIC Group/MMIC Insurance, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUE 1

INTEREST OF *AMICUS CURIAE* 2

ARGUMENT 3

THE HOLDINGS OF THE LOWER COURTS SHOULD BE REJECTED
BECAUSE THEY ARE INCONSISTENT WITH THE PLAIN MEANING
OF MINN. STAT. § 145.682 AND THE LEGISLATURE’S INTENT IN
ENACTING THE STATUTE 3

A. An Amended Affidavit Includes a Substituted Affidavit When
Applying the Common Understanding of the Word Amended 3

B. That an Amended Affidavit Includes a Substituted Affidavit Is
Supported by the Statute as a Whole 6

C. Even If Ambiguity Is Found in § 145.682, the Legislative History of
the Statute Indicates That “Amend” Includes Substitution, and Such
a Result Is in Accord With Public Policy 7

CONCLUSION 12

CERTIFICATION OF BRIEF LENGTH 13

TABLE OF AUTHORITIES

Statutes:

Ga. Code Ann. § 9-11-15	6
Ga. Code Ann. § 9-11-9.1	6
Minn. Stat. § 145.682	2, 3, 6-8, 10, 11
Minn. Stat. § 145.682, subd. 4	1
Minn. Stat. § 145.682, subd. 4(b)	7
Minn. Stat. § 145.682, subd. 6(c)	1, 3, 6, 8-11
Minn. Stat. § 145.682, subd. 6(c)(3)	7
Minn. Stat. § 645.08(1)	4
Minn. Stat. § 645.16 (1996)	4
Minn. Stat. § 645.16 (2008)	8

Rules:

Minn. R. Civ. App. Prac. 129.03	1
Minn. R. Civ. P. 9.08	5

Cases:

<i>Am. Family Ins. Group v. Schroedl</i> , 616 N.W.2d 273 (Minn. 2000)	4
<i>Am. Tower, L.P. v. City of Grant</i> , 636 N.W.2d 309 (Minn. 2001)	4
<i>Amaral v. Saint Cloud Hosp.</i> , 598 N.W.2d 379 (Minn. 1999)	4
<i>Anderson v. Comm’r of Taxation</i> , 253 Minn. 528, 93 N.W.2d 523 (1958)	6
<i>Anderson v. Rengachary</i> , 608 N.W.2d 843 (Minn. 2000)	10
<i>Baker v. Ploetz</i> , 616 N.W.2d 263 (Minn. 2000)	4
<i>Block Coal & Coke Corp. v. Case</i> , 246 S.W.2d 52 (Tenn. 1952)	4

<i>Brown-Wilbert, Inc. v. Copeland Buhl & Co., PLLP</i> , 732 N.W.2d 209 (Minn. 2007)	10
<i>Christensen v. Hennepin Transp. Co.</i> , 215 Minn. 394, 10 N.W.2d 406 (1943)	6
<i>City of Morris v. Sax Invs., Inc.</i> , 749 N.W.2d 1 (Minn. 2008)	4
<i>Erdman v. Life Time Fitness, Inc.</i> , 788 N.W.2d 50 (Minn. 2010)	6
<i>Hans Hagen Homes, Inc. v. City of Minneapolis</i> , 728 N.W.2d 536 (Minn. 2007)	4
<i>Lindberg v. Health Partners, Inc.</i> , 599 N.W.2d 572 (Minn. 1999)	8, 10
<i>Phoebe Putney Mem. Hosp. v. Skipper</i> , 510 S.E.2d 101 (Ga. App. 1998), cert. denied	5, 6
<i>Schlottz v. Hyundai Motor Company</i> , 557 N.W.2d 613 (Minn. Ct. App. 1997)	4
<i>Smola v. City of St. Paul</i> , 234 Minn. 157, 47 N.W.2d 789 (1951)	10
<i>Sorenson v. St. Paul Ramsey Med. Ctr.</i> , 457 N.W.2d 188 (Minn. 1990)	8, 11
<i>State v. Brown</i> , 792 N.W.2d 815 (Minn. 2011)	4
<i>State v. Gaiovnik</i> , ___ N.W.2d ___, 2011 WL 798705 (Minn. 2011)	6
<i>Winkoop v. Carpenter</i> , 574 N.W.2d 422 (Minn. 1998)	7

Other Authorities:

2002 Minn. Sess. Law Serv. Ch 403 (H.F. 2780) (West) 8

2A C.J.S. *Affidavits* § 52 (West 2011) 5

3 Am. Jur. 2d *Affidavits* § 17 (West 2010) 5

Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* 2d § 1474
(3d ed.) (West 2010) 5

Black’s Law Dictionary (8th ed. 2009) 4

SF 0936, Senate Judiciary Committee, March 21, 2001 9

STATEMENT OF THE ISSUE¹

WHEN THE EXPERT IDENTIFIED IN AN AFFIDAVIT OF EXPERT DISCLOSURE UNDER MINN. STAT. § 145.682, SUBD. 4, IS CHALLENGED BY A DEFENDANT AS UNQUALIFIED IN A MOTION TO DISMISS PURSUANT TO MINN. STAT. § 145.682, SUBD. 6(C), MAY THE PLAINTIFF AVOID DISMISSAL BY SERVING AN AFFIDAVIT OF A NEW EXPERT WITNESS IF SHE DOES SO WITHIN THE SAFE-HARBOR PERIOD OF MINN. STAT. § 145.682, SUBD. 6(C)?

The lower courts held that an affidavit that identified and was signed by a different expert than the first affidavit was not an “amended” affidavit as required by § 145.682, subd. 6(c).

¹ Pursuant to Minn. R. Civ. App. Prac. 129.03, neither MAJ nor the writer of this brief has received or been promised any monetary or other compensation in regard to this case. Neither MAJ nor the writer of this brief have any financial stake in the outcome of this case. No one affiliated with a party has participated in writing any part of this brief.

INTEREST OF *AMICUS CURIAE*

The Minnesota Association for Justice (MAJ) is a non-profit Minnesota corporation whose members are trial lawyers in private practice devoting a substantial portion of their efforts to the representation of people who are injured in the State of Minnesota.

Among the goals of the MAJ is the protection of the rights of litigants in civil actions, the promotion of high standards of professional ethics and competence, and the improvement of the many areas of law in which its respective members regularly practice. The MAJ believes that the role of an amicus is to inform the Court of the impact of a particular case on the civil justice system.

The interest of the MAJ in this matter is primarily one of public policy. The MAJ does not have any interest in the particular dispute between the litigants. The position of the MAJ on this case is most closely aligned with the Appellant. However, the primary concern that the organization has is with the orderly development of the law of the State of Minnesota. In this case, the primary concern of the organization is that the law in the State of Minnesota on the issue presented be clear, precise and consistent. It is the MAJ's position that the substitution of qualified experts during the statutory 45 day safe-harbor period does not offend the policy goal of eliminating frivolous claims and is in accord with the terms of Minn. Stat. § 145.682.

ARGUMENT

THE HOLDINGS OF THE LOWER COURTS SHOULD BE REJECTED BECAUSE THEY ARE INCONSISTENT WITH THE PLAIN MEANING OF MINN. STAT. § 145.682 AND THE LEGISLATURE’S INTENT IN ENACTING THE STATUTE.

Amicus urges this Court to apply the plain meaning of Minnesota’s expert review statute for medical negligence claims and reverse the lower courts’ decisions. The lower courts’ holdings should be rejected for two primary reasons. First, Minn. Stat. § 145.682 provides for amendment by substitution and the legislative history of the statute further bolsters that procedure. Second, construing the statute to allow for amendment by substitution is in accord with the policy underlying the statute. Notably, the application of the plain meaning of § 145.682 will facilitate the axiomatic principle that every matter should be settled by a just determination on the merits while at the same time protecting against frivolous medical negligence claims.

A. An Amended Affidavit Includes a Substituted Affidavit When Applying the Common Understanding of the Word Amended.

A plaintiff may respond to a motion to dismiss by serving the defendant with an “amended affidavit or answers to interrogatories that correct the claimed deficiencies.” Minn. Stat. § 145.682, subd. 6(c). While recognizing that subdivision 6(c) provides for a cure, the trial court erroneously concluded “the plain language . . . does not state that a new affidavit by a new expert is an acceptable method of curing the deficiencies.” (Appellant’s Addendum [Add.] 23). Contrary to the lower courts’ rulings, “amend” includes alteration by substitution.

In interpreting statutes, this Court “construe[s] words and phrases according to their plain and ordinary meaning.” *City of Morris v. Sax Invs., Inc.*, 749 N.W.2d 1, 9 (Minn. 2008) (citing *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000)). This Court’s primary duty in interpreting statutes is to ascertain and effectuate the intention of the legislature. *Schlotz v. Hyundai Motor Company*, 557 N.W.2d 613, 615 (Minn. Ct. App. 1997) (citing Minn. Stat. § 645.16 (1996)). If the “legislature’s intent is clearly discernable from the plain and unambiguous language” of the statute, this Court must “apply the statute’s plain meaning.” *Hans Hagen Homes, Inc. v. City of Minneapolis*, 728 N.W.2d 536, 539 (Minn. 2007) (citing *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001)). If the language of a statute is ambiguous, courts then turn to legislative history to determine how the language should be construed. *Baker v. Ploetz*, 616 N.W.2d 263, 269 (Minn. 2000) (citing *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 385-86 (Minn. 1999)).

In discerning the plain and ordinary meaning of a word or phrase such as “amend,” the Court considers the common meaning of the term. *See* Minn. Stat. § 645.08(1) (2008); *State v. Brown*, 792 N.W.2d 815, 822 (Minn. 2011). According to *Black’s Law Dictionary*, “amend” means “[t]o change the wording of; [specifically], to formally alter (a statute, constitution, motion, etc.) by striking out, inserting, or substituting words.” *Black’s Law Dictionary* (8th ed. 2009), p. 89 (emphasis added). Therefore, an “amended pleading” is “[a] pleading that replaces an earlier pleading and that contains matters omitted from or not known at the time of the earlier pleading.” *Id.* at 1191. *Block Coal &*

Coke Corp. v. Case, 246 S.W.2d 52, 53 (Tenn. 1952) (recognizing that the word amend was sufficiently broad to cover the legislative process of repeal and substitution).

It has long been the practice and the rule to permit the amendment of pleadings where the amendment substitutes claims or defenses and even parties to the action. *See* Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* 2d § 1474 (3d ed.) (West 2010); Minn. R. Civ. P. 9.08 (recognizing that when a party is ignorant of the name of an opposing party and so alleges in the party's pleading, the pleadings and proceedings in the action "may be amended by substituting the true name"). The same is true for affidavits. "Affidavits are as amendable as other pleadings, and an amendment by substitution is as permissible as an amendment by striking from or adding to the contents of the paper which it is sought to amend." 3 Am. Jur. 2d *Affidavits* § 17 (West 2010); 2A C.J.S. *Affidavits* § 52 (West 2011) ("With respect to affidavits, amendment by substitution is as permissible as amendment by striking from or adding to the contents of the paper which it is sought to amend.").

The Georgia Court of Appeals, in *Phoebe Putney Mem. Hosp. v. Skipper*, 510 S.E.2d 101 (Ga. App. 1998), *cert. denied*, reached that conclusion in the context of a medical malpractice expert review statute. Under Georgia law, if a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed on or before the close of discovery, that the affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim. Ga. Code Ann. § 9-11-9.1 (2010). As under Minnesota's statute, pursuant to

Georgia Code § 9-11-15, the plaintiff may cure the alleged defect by amendment within 30 days of service of the motion alleging that the affidavit is defective. Ga. Code Ann. § 9-11-9.1; § 9-11-15; *see* Minn. Stat. § 145.682, subd. 6(c). In construing its statute, the Georgia Court of Appeals held that affidavit amendment includes affidavit substitution. *Phoebe Putney Mem. Hosp.*, 510 S.E.2d at 536. In so ruling, the Georgia Court of Appeals recognized that so allowing “serves the gatekeeper purpose of OCGA § 9-11-9.1,” which is “to reduce the number of frivolous malpractice suits being filed.” *Id.*

B. That an Amended Affidavit Includes a Substituted Affidavit Is Supported by the Statute as a Whole.

This Court construes a statute “‘as a whole’ and ‘[w]ords and sentences are understood . . . in light of their context.’” *State v. Gaiovnik*, ___ N.W.2d ___, 2011 WL 798705 at *3 (Minn. 2011) (quoting *Christensen v. Hennepin Transp. Co.*, 215 Minn. 394, 10 N.W.2d 406, 415 (1943)). This Court has stated it must read and construe a statute as a whole “to avoid absurd results and unjust consequences.” *Erdman v. Life Time Fitness, Inc.*, 788 N.W.2d 50, 56 (Minn. 2010) (citation omitted). As this Court has long recognized, a statute is to be construed “as a whole so as to harmonize and give effect to all of its parts.” *Anderson v. Comm’r of Taxation*, 253 Minn. 528, 93 N.W.2d 523, 533 (1958). Therefore, “various provisions of a statute relating to the same subject must be interpreted in light of each other.” *Id.* (citation omitted). Only by concluding “amend” includes substitution can the various provisions of § 145.682 be harmonized and absurd results avoided.

As Appellant points out in her brief to this Court, by statute she 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.” Minn. Stat. § 145.682, subd. 6(c)(3). The statute, as presently construed by the lower courts, now results in plaintiffs being treated differently based on which option they choose. Only if “amend” includes alteration by substitution are the statutory alternatives in harmony with each other.

To recognize “amend” includes expert substitution is also in accord with Minn. Stat. § 145.682, subd. 4(b), governing identification of experts, which specifically states that “[n]othing in this subdivision may be construed to prevent either party from calling additional expert witnesses or substituting other expert witnesses.” But the lower courts, by their construction of the statute, have done exactly that. Such a result is not in accord with the court’s obligation to harmonize a statute’s various provisions.

The plain language of § 145.682(6)(c), when read in context, affords plaintiffs the opportunity to correct deficiencies in an expert affidavit or answers to interrogatories by substituting a different expert witness. The lower courts’ rulings to the contrary should be reversed.

C. Even If Ambiguity Is Found in § 145.682, the Legislative History of the Statute Indicates That “Amend” Includes Substitution, and Such a Result Is in Accord With Public Policy.

This Court looks outside the statutory text to ascertain legislative intent if the statute’s language is deemed to be ambiguous. *Winkoop v. Carpenter*, 574 N.W.2d 422,

425 (Minn. 1998) (citation omitted); *see also* Minn. Stat. § 645.16 (2008). The legislative history supports amendment by substitution.

In 2002, the “safe harbor” provisions were added. *See* Minn. Stat. § 145.682, subd. 6(c); 2002 Minn. Sess. Law Serv. Ch 403 (H.F. 2780) (West). There is no question that prior to 2002, Minn. Stat. § 145.682’s provisions were harsh. In addressing medical malpractice cases brought before it under § 145.682 where the expert identification was found to be inadequate, this Court continually acknowledged the “harsh results,” but had concluded the statute “cuts with a sharp but clean edge” and that there was no opportunity to cure because it was the legislative choice to mandate dismissal. *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 578 (Minn. 1999). This Court also recognized that

[T]he sanction imposed by section 145.682 is the abrupt termination with prejudice of what may be a meritorious cause of action, a sanction 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.

Sorenson v. St. Paul Ramsey Med. Ctr., 457 N.W.2d 188, 192 (Minn. 1990). The Legislature, through its 2002 enactments, has mitigated that harshness.

There were initially two bills: the Senate version, SF 0936, and the House version, HF 1051. The bill originated in the Senate with Senator Thomas Neuville. The bills were merged on April 20, 2001. The merged bill passed the Senate unanimously and the House with overwhelming support in May 2001. Governor Ventura vetoed the bill. The changes to § 145.682 were introduced again the next year and enjoyed nearly unanimous support in both the House and Senate. This time Governor Ventura signed the bill.

The clear purpose of the amendments was to provide plaintiffs with an opportunity to cure and to eliminate the harshness of the statute as originally enacted.² Senator Neuville explained the purpose of the amendment that added the 45-day safe-harbor provision as follows:

Occasionally some mistakes are made in the affidavit and motions to dismiss with prejudice are made after the 180 days where — in circumstances where the affidavit could have been corrected; it was a meritorious case but the affidavit is not [sic] deficient and there is no chance to fix it. . . . What this bill does is provide 45 days — no matter when the motion to dismiss is brought, you get 45 days — they have to identify the deficiency in the affidavit or the answers to interrogatories, *and a curing or supplemental expert affidavit could be filed before the hearing.*

SF 0936, Senate Judiciary Committee, March 21, 2001 (emphasis added).

By its enactment, the Legislature made sure that a plaintiff with a meritorious claim would be able to avoid being tossed out of court because her expert affidavit did not arguably meet the statutory requirements the first time around by allowing plaintiff an opportunity to cure. Substituting experts within the cure provision time limit, demonstrating the case is meritorious, is a curing expert affidavit and is in accord with the statute and its very purpose, as the legislative history reflects.

Regardless of whether the new affidavit presented is of the same expert or of another expert, that affidavit is the one that is now to be scrutinized by the trial court. When a plaintiff presents the trial court with a new affidavit in response to defendant's

² It is due to this amendment that a defendant's motion for dismissal must now identify the claimed deficiencies and provide the plaintiff with at least forty-five days to correct the deficiencies. Minn. Stat. § 145.682, subd. 6(c).

motion to dismiss, the trial court is obligated to scrutinize that affidavit, as it would an amended pleading. *See Smola v. City of St. Paul*, 234 Minn. 157, 47 N.W.2d 789, 790 (1951) (“An amended complaint completely supersedes the original complaint and for the purpose of determining a cause of action is to be construed as the only one interposed in the case.”) For purposes of § 145.682 and its cure provision, it simply does not matter whether the affidavit is of the same or a different expert. And Minn. Stat. § 145.682(6)(c) places no limits on the deficiencies that can be remedied by service of “an amended affidavit or answers to interrogatories that correct the claimed deficiencies.” Here the trial court’s obligation was to scrutinize the affidavit that Appellant substituted to cure the alleged deficiencies, which the trial court failed to do.

MAJ recognizes the role that Minn. Stat. § 145.682 is to play in weeding out frivolous claims. Amendment by substitution preserves the gatekeeper function of § 145.682 and allows for meritorious claimants to have their day in court. Minn. Stat. § 145.682 was not enacted to eliminate meritorious lawsuits and the Legislature’s enactment of curative provisions following this Court’s decision in *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572 (Minn. 1999), and *Anderson v. Rengachary*, 608 N.W.2d 843 (Minn. 2000), is a “sure sign” that the purpose was “to effectuate the legislative intent and judicial policy to dispose of cases on their merits.” *Brown-Wilbert, Inc. v. Copeland Buhl & Co., PLLP*, 732 N.W.2d 209, 228 (Minn. 2007) (Anderson, Paul. J., concurring in part, dissenting in part).

The point Respondents have ignored in making their arguments to the lower courts is that Minn. Stat. § 145.682 is not a substitute for or interchangeable with the application of the Minnesota Rules of Civil Procedure. *Sorenson*, 457 N.W.2d at 193 (noting that compliance with Minn. Stat. § 145.682 does not rule out the possibility of a grant of summary judgment). Regardless of Minn. Stat. § 145.682, a party can always make a Rule 56 motion for summary judgment asserting that the plaintiff cannot meet the prima facie standard for professional negligence. Here, however, Respondents sought dismissal under Minn. Stat. § 145.682, subd. 6(c). (A. 15–16). Plaintiffs are entitled to cure any claimed deficiency because the Legislature says they can.

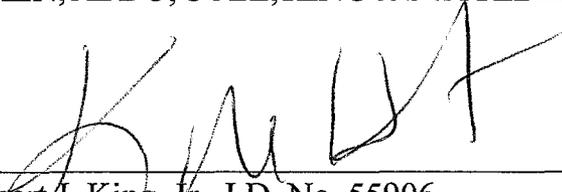
Respondents, having premised their motion to dismiss on Minn. Stat. § 145.682, must abide by the statute’s safe harbor provisions regardless of the fact that the affidavit of a new expert allows plaintiff’s suit to continue even though 180 days after beginning the suit plaintiff arguably had not obtained a qualified expert’s opinion that malpractice occurred. Once the defendant identifies the deficiencies and seeks by motion to dismiss the action, the plaintiff, before the hearing on that motion, is allowed to cure by serving “an amended affidavit or answers to interrogatories that correct the claimed deficiencies.” Minn. Stat. § 145.682, subd. 6(c). Appellant did just that. Her action should be reinstated.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully request that this Court reverse the District Court and the Court of Appeals and reinstate Appellant's lawsuit.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: March 23, 2011

BY 

Robert J. King, Jr., I.D. No. 55906
Kay Nord Hunt, I.D. No. 138289
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Attorneys for Amicus Curiae
Minnesota Association for Justice

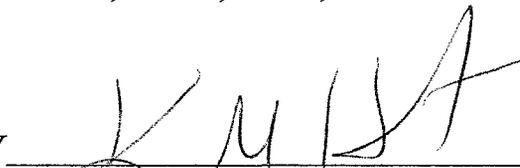
CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 2,859 words. This brief was prepared using Word Perfect 12.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: March 23, 2011

BY



Robert J. King, Jr., I.D. No. 55906
Kay Nord Hunt, I.D. No. 138289
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

*Attorneys for Amicus Curiae
Minnesota Association for Justice*