

NO. 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.

RESPONDENTS' BRIEF AND APPENDIX

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF LEGAL ISSUE.....	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
ARGUMENT	5
I. Standard of Review	5
II. The failure to disclose a qualified expert within 180 days of suit forecloses application of the safe-harbor provision.	6
III. The safe-harbor’s limit on the method of cure to “amended affidavit[s] or answers to interrogatories” forecloses a plaintiff’s use of a substitute affidavit.....	11
IV. The plain-language interpretation of subdivision 6(a) is consistent with Section 145.682’s goals and this court’s longstanding jurisprudence.	20
CONCLUSION	22

TABLE OF AUTHORITIES

Cases

<i>American Family Ins. Grp. v. Schroedl</i> , 616 N.W.2d 273 (Minn. 2000)	13
<i>American Tower, L.P. v. City of Grant</i> , 636 N.W.2d 309 (Minn. 2001)	13, 18
<i>Anderson v. Florence</i> , 288 Minn. 351, 181 N.W.2d 873 (1970).....	20
<i>Anderson v. Rengachary</i> , 608 N.W.2d 843 (Minn. 2000)	8, 11, 12
<i>Brecht v. Schramm</i> , 266 N.W.2d 514 (Minn. 1978)	6
<i>Broehm v. Mayo Clinic Rochester</i> , 690 N.W.2d 721 (Minn. 2005)	1, 5, 6, 7, 10
<i>Brookfield Trade Ctr., Inc. v. County of Ramsey</i> , 584 N.W.2d 390 (Minn. 1998).....	6
<i>Brown-Wilbert v. Copeland Buhl & Co., P.L.L.P.</i> , 732 N.W.2d 209 (Minn. 2007)	1, 7, 8, 9, 10, 11, 12, 17, 20
<i>Chiodo v. Board of Ed. of Special School Dist. No. 1</i> , 298 Minn. 380, 215 N.W.2d 806 (1974)	18
<i>Complaint Concerning Winton</i> , 350 N.W.2d 337 (Minn. 1984)	15
<i>Cornfeldt v. Tongen</i> , 262 N.W.2d 684 (Minn. 1977).....	19
<i>Gebhard v. Neidzwiecki</i> , 265 Minn. 471, 122 N.W.2d 110 (1963).....	15
<i>Goodman v. Best Buy, Inc.</i> , 777 N.W.2d 755 (Minn. 2010).....	19
<i>Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assoc.</i> , 418 N.W.2d 173 (Minn. 1988)	21
<i>In re Raynolds' Estate</i> , 219 Minn. 449, 18 N.W.2d 238 (1945).....	19
<i>Johnson v. United States</i> , 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010).....	17
<i>Lindberg v. Health Partners, Inc.</i> , 599 N.W.2d 572 (Minn. 1999)	7, 17, 22
<i>Mycka v. 2003 GMC Envoy</i> , 783 N.W.2d 234 (Minn. App. 2010).....	17
<i>Norton v. Hauge</i> , 47 Minn. 405, 50 N.W. 368 (1891)	14
<i>Phoebe Putney Mem. Hosp. v. Skipper</i> , 510 S.E.2d 101 (Ga. App. 1998)	11

<i>Sorenson v. St. Paul Ramsey Med. Ctr.</i> , 457 N.W.2d 188 (Minn. 1990)	1, 7, 10
<i>State v. Day</i> , 108 Minn. 121, 121 N.W. 611 (1909)	14
<i>Stroud v. Hennepin County Med. Ctr.</i> , 556 N.W.2d 552 (Minn. 1996).....	6
<i>Teffeteller v. Univ. of Minn.</i> , 645 N.W.2d 420 (Minn. 2002)	1, 8, 10, 19
<i>Tousignant v. St. Louis Cty.</i> , 615 N.W.2d 53 (Minn. 2000)	16
<i>Vlahos v. R & I Constr. of Bloomington, Inc.</i> , 676 N.W.2d 672 (Minn. 2004).....	13
<i>Wallace v. Comm’r of Taxation</i> , 289 Minn. 220, 184 N.W.2d 588 (1971).....	14
<i>Walton v. Jones</i> , 286 N.W.2d 710 (Minn. 1979)	10

Statutes

Minn. R. Civ. P. 33.01(d).....	14
Minn. R. Civ. P. 33.01, <i>Advisory Committee Note – 1968</i>	15
Minn. Stat. § 145.682 (2009)	1, 5, 6, 8, 9, 11, 12, 22
Minn. Stat. § 145.682, subd. 2(1) (2009)	3
Minn. Stat. § 145.682, subd. 2(2) (2009)	2, 4
Minn. Stat. § 145.682, subd. 3(a)	6
Minn. Stat. § 145.682, subd. 4	7, 8, 10
Minn. Stat. § 145.682, subd. 4(a).....	14, 16, 18
Minn. Stat. § 145.682, subd. 4(b) (2009)	11, 12, 18
Minn. Stat. § 145.682, subd. 4(c)	19
Minn. Stat. § 145.682, subd. 5	7
Minn. Stat. § 145.682, subd. 6(c)	2, 4, 5, 8, 12, 13, 18
Minn. Stat. § 541.076.....	20
Minn. Stat. § 544.42	8
Minn. Stat. § 544.42, subd. 6	10

Minn. Stat. § 645.16 (2009) 12

Rules

Minn. R. Civ. P. 15 17

Minn. R. Civ. P. 56.05..... 4

Minn. R. Civ. P. 7.01 17

Other Authorities

American Heritage Desk Dictionary at 27 (4th ed. 2003)..... 13

Black’s Law Dictionary 1191 (8th ed. 2009) 17

Black’s Law Dictionary 1470 (8th ed. 2004) 13

Black’s Law Dictionary 619 (8th ed. 2004) 19

Black’s Law Dictionary 89 (8th ed. 2004)..... 13

Sen. Debate on S.F. 0936, 82nd Minn. Leg., May 16, 2001..... 9

STATEMENT OF LEGAL ISSUE

1. To avoid mandatory dismissal under Minn. Stat. § 145.682:
 - (a) Must a medical-malpractice plaintiff provide an affidavit from a *qualified* expert within 180 days of commencing suit?
 - (b) If not, may a medical-malpractice plaintiff invoke the 45-day statutory safe-harbor provision by substituting the affidavit of a qualified expert for the previously provided affidavit of an unqualified witness?

The district court dismissed plaintiff's dental-malpractice action with prejudice because she failed to disclose a qualified dental expert within the 180-day deadline. (Add.17). The Minnesota Court of Appeals affirmed. (Add.3).

Apposite Authority:

Minn. Stat. § 145.682 (2009)

Brown-Wilbert v. Copeland Buhl & Co., P.L.L.P., 732 N.W.2d 209 (Minn. 2007)

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

Teffeteller v. Univ. of Minn., 645 N.W.2d 420 (Minn. 2002)

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

STATEMENT OF THE CASE

In February 2009, Plaintiff/Appellant Elaine M. Wesely commenced this dental-malpractice action against Defendants/Respondents Dr. A. David Flor, D.D.S. and Uptown Dental. About four months later, Wesely's counsel withdrew. Wesely then acted *pro se* until she retained new counsel in September 2009. During this time, Wesely knew that Minn. Stat. § 145.682, subd. 2(2) (2009) required her to disclose a dental expert — and the substance of facts and opinions, together with the summary of the grounds for each opinion, that the expert would testify to at trial — within 180-days of commencing suit. Within the 180-day period, Wesely disclosed the proposed testimony of Dr. Arvin M. Vocal, an internal-medicine physician. When she met with prospective replacement counsel after the 180-day deadline had passed, he advised Wesely that this disclosure was inadequate because Dr. Vocal is not qualified to be an expert witness in this case. Dr. Vocal's lack of qualifications remains undisputed.

Defendants moved to dismiss under Minn. Stat. § 145.682, subd. 6(c) (2009). Wesely responded by serving a new disclosure, this one by a dentist. She also moved the district court to extend the 180-day deadline based on a claim of excusable neglect. The Freeborn County District Court, Hon. Steven R. Schwab presiding, dismissed the action with prejudice because: (1) the statute's plain language permits a plaintiff to *amend* a deficient affidavit within the 45-day safe-harbor period, not to *substitute* a qualified expert for a previously disclosed unqualified witness; and (2) Wesely had failed to demonstrate excusable neglect. The Minnesota Court of Appeals affirmed, and this court accepted review. Wesely's claim of excusable neglect is not before the court for review.

STATEMENT OF THE FACTS

Plaintiff/Appellant Elaine M. Wesely's allegations against Defendants/Respondents A. David Flor, D.D.S. and Uptown Dental stem from a February 23, 2005 dental treatment. (A.43). Wesely alleges that the dental office experienced either a power failure or power surge, or that it suffered a dental-equipment malfunction due to lack of maintenance or other negligence. (*Id.*). She further alleges that this malfunction of unknown origin occurred during her dental treatment and caused Dr. Flor to do permanent damage to her teeth and to a bridge in her mouth. (A.44). Wesely alleges that when Dr. Flor attempted to fix the damage, he caused additional damage to her teeth and jaw. (*Id.*).

Four years after this alleged occurrence, Wesely commenced suit. (A.39). Attorney Richard Dahl represented her at that time and attached an affidavit of expert review to the summons and complaint as required under Minn. Stat. § 145.682, subd. 2(1). (A.50). This affidavit stated that Dahl had consulted with an expert whom he reasonably expected would be qualified to testify at trial, and who opined that defendants had deviated from the standard of care and thereby caused damage. (*Id.*).

In the months that followed, defendants initiated discovery, but plaintiff failed to respond. (R.15).¹ Plaintiff's counsel agreed to provide discovery responses only after defendants' counsel contacted him and requested it. (R.16). Dahl then withdrew from representation on June 1, 2009. (R.17). He did not explain his actions. (*Id.*). Wesely has provided no clear explanation for why she delayed her search for substitute counsel

¹ "R" refers to Respondents' Appendix.

until late August 2009.² Wesely attributed the delay to her former attorney sending her file to an attorney in Michigan for review, but it is unclear why Wesely would not have retained the original copy of her file or medical records in order to consult with Minnesota attorneys or dental experts. (R.9).

Wesely knew about the requirement in Minn. Stat. § 145.682, subd. 2(2) that she disclose a qualified expert opinion within 180 days of commencing suit. While acting *pro se*, Wesely consulted internist Dr. Arvin M. Vocal and disclosed his opinion before the statutory deadline. (Add.27). After the 180-day deadline had passed, Wesely first met with attorney Michael Zimmer. (R.4). Zimmer advised Wesely that Dr. Vocal's affidavit was insufficient because, as an internal-medicine doctor, he is not qualified to be an expert witness in this case. (*Id.*). This fact remains undisputed. Therefore, it is also undisputed that plaintiff did not disclose the opinions of a qualified expert within the 180-day deadline.

Within the next month, Zimmer engaged a dentist to review Wesely's dental records. (*Id.*). In the meantime, defendants served their motion papers for dismissal under Minn. Stat. § 145.682, subd. 6(c), citing several deficiencies in Dr. Vocal's affidavit, including the fact that he is not a qualified dental expert. (A.15). Wesely

² Wesely failed to provide proper record support for the events detailed in the fact section of her memorandum in response to defendants' motion to dismiss. Instead, her counsel submitted his and Wesely's affidavits simply stating that all facts listed in her responsive memorandum were true. (R.12,14). Although these affidavits were improper, defendants have had no choice but to cite to Wesely's district court memorandum as support for her version of these events. *See* Minn. R. Civ. P. 56.05 ("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.").

formally retained Zimmer in late September 2009. (R.4). She then submitted the affidavit of dentist Dr. Scott Lingle in response to — and before the hearing on — defendants’ motion to dismiss. (Add.33). Wesely contended that the new affidavit triggered the statute’s 45-day safe-harbor provision, thus remedying her failure to disclose a qualified expert within 180 days of suit. Wesely also requested that the district court extend the 180-day deadline based on excusable neglect. (R.7).

On January 21, 2010, the district court dismissed the action with prejudice under Minn. Stat. § 145.682, subd. 6(c). (Add.17). In doing so, the court concluded that: (1) the plain language of the 45-day safe-harbor provision allows a plaintiff to amend a deficient affidavit, but it does not allow a plaintiff to substitute a qualified medical expert for an unqualified witness; and (2) Wesely failed to demonstrate excusable neglect such that the court should extend the 180-day deadline. (*Id.*). Defendants made no argument at that time about the substantive sufficiency of Dr. Lingle’s affidavit. Rather, defendants argued — and the district court agreed — that the court could not consider this additional affidavit because doing so would violate the 180-day deadline. (Add.23). The Minnesota Court of Appeals affirmed. (Add.3).

ARGUMENT

I. Standard of Review

An appellate court will reverse the district court’s dismissal of a malpractice claim for non-compliance with Minn. Stat. § 145.682 only if the district court abused its discretion. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 727 (Minn. 2005). However, statutory construction is a question of law that the appellate courts review *de*

novo. Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W.2d 390, 393 (Minn. 1998). An appellate court will affirm the judgment of the district court if it can be sustained on any ground. *See Brecht v. Schramm*, 266 N.W.2d 514, 520 (Minn. 1978) (“If the trial court arrives at a correct decision, that decision should not be overturned regardless of the theory upon which it is based.”).

II. The failure to disclose a qualified expert within 180 days of suit forecloses application of the safe-harbor provision.

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). Therefore, the statute requires plaintiffs to verify early in the litigation that their medical-negligence claims are well-founded. *Stroud v. Hennepin County Med. Ctr.*, 556 N.W.2d 552, 555 (Minn. 1996). To do so, plaintiffs must make two disclosures: the first is an affidavit of expert review signed by plaintiff’s attorney and submitted along with the summons and complaint. This first affidavit must verify that the attorney has reviewed the case with an expert “whose qualifications provide a reasonable expectation that the expert’s opinion could be admissible at trial and that, in the opinion of this expert, one or more defendants deviated from the applicable standard of care and by that action caused injury to the plaintiff.” Minn. Stat. § 145.682, subd. 3(a).

The second is an affidavit of expert disclosure. Both the plaintiff’s attorney and each listed expert must sign this second affidavit. *Id.* at subd. 4(a). The affidavit must

identify each person whom the plaintiff expects to call as an expert witness at trial, the substance of facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. *Id.* The statute expressly provides that a *pro se* plaintiff must comply with the disclosure requirements “as if represented by an attorney.” Minn. Stat. § 145.682, subd. 5.

This court has required strict compliance with these requirements, consistently ruling that failure to strictly comply results in mandatory dismissal. *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 577-78 (Minn. 1999). Strict compliance requires at least three things: (1) the disclosure of a *qualified* expert; *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 191 (Minn. 1990) (stating that “the most important disclosure of the affidavit required by Section 145.682, subdivision 4 (the second affidavit) is the *identity* of an expert who is willing to testify . . .”) (emphasis in original); *Broehm v Mayo Clinic Rochester*, 690 N.W.2d 721, 726 (Minn. 2005) (stating that “[t]he expert disclosure requirements cannot be met by a witness who is not qualified to give an expert opinion”); (2) the disclosure of “*specific details* concerning [plaintiff’s] 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” *Sorenson*, 457 N.W.2d at 193 (emphasis added); and (3) the specific details must consist of “meaningful information on each of the issues for which expert testimony will be required at trial. . . .” *Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*, 732 N.W.2d 209, 218

(Minn. 2007);³ *see also*, *Anderson v. Rengachary*, 608 N.W.2d 843, 849 (Minn. 2000) (stating affidavit had serious deficiencies because it “does not provide any meaningful disclosure”); *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 430 (Minn. 2002) (stating that “[a]t a minimum, a ‘meaningful disclosure’ is required”).

Wesely makes no argument that her disclosure of an internal-medicine witness and his opinions met the statute’s 180-day disclosure requirement. Instead, Wesely argues that the so-called safe-harbor provision in subdivision 6(c) gave her an additional 45 days to meet that requirement and that the law imposes “no limits” on the nature of deficiencies that can trigger the safe-harbor provision. (App. Br. at 7).⁴ But this court has already rejected that argument: “[T]he [safe-harbor] amendment to section

³ *Brown-Wilbert* involved construction of the parallel expert-disclosure statute applicable to actions against professionals like accountants and lawyers. *See* Minn. Stat. § 544.42. But the *Brown-Wilbert* decision included extensive discussion of, and comparison with, section 145.682, and it therefore provides the most apposite authority on the requirements for a plaintiff to trigger the safe-harbor provision.

⁴ Enacted in 2002, subdivision 6(c), the safe-harbor provision, provides as follows:

(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.

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.*” *Brown-Wilbert*, 732 N.W.2d at 217 (citing to Sen. Debate on S.F. 0936, 82nd Minn. Leg., May 16, 2001 (audiotape) statement of Sen. Neuville, author of the bill) (emphasis added). The court in *Brown-Wilbert* recognized that a no-limits construction would “render the 180-day limit meaningless.” *Id.* at 217-18. This is true because otherwise a plaintiff could provide an affidavit containing no significant information — or, absurdly, an affidavit containing no information at all — and thereby work a *de facto* change in the deadline from 180 days to 225 days in every case. *Id.* at 217. The court therefore rejected a limitless-cure construction and adopted one that reflected the cure provision’s legislative purpose — “to avoid the dismissal of meritorious claims over *minor technicalities.*” *Id.* (emphasis added). In short, to qualify for the safe-harbor provision, a plaintiff must provide a 180-day affidavit that, at worst, suffers from minor technical deficiencies. Because the plaintiff’s 180-day affidavit in *Brown-Wilbert* suffered from major deficiencies, this court concluded that the safe-harbor provision permitted no cure period, and it therefore affirmed a statutory dismissal. *Id.* at 219-20. The bedrock premise of plaintiff’s argument — that the safe-harbor provision applies without limitation on the type of deficiency at issue — contradicts this court’s caselaw.

The question before the court in *Brown-Wilbert* was “what the minimum standards are for an affidavit of expert disclosure to satisfy the 180-day requirement and entitle the

plaintiff to notice of any deficiencies and 60 days⁵ to satisfy the disclosure requirement.” *Brown-Wilbert*, 732 N.W.2d at 215-16. The court established such minimum standards as requiring “meaningful information on each of the issues for which expert testimony will be required at trial to avoid a directed verdict.” *Id.* at 218. A medical-negligence case unsupported by the testimony of a qualified expert cannot withstand a motion for directed verdict. *See, e.g., Walton v. Jones*, 286 N.W.2d 710, 715 (Minn. 1979) (affirming district court’s grant of directed verdict in medical-malpractice case where medical expert testimony was insufficient on element of causation).

Moreover, the proposed testimony disclosed in the affidavit of an unqualified witness not only is meaningless *per se* — because, by definition, such testimony cannot establish the existence of a well-founded claim — its insufficiency is the antithesis of a minor technicality. This is necessarily so because, again by definition, “[e]xpert testimony cannot be given by a witness who is not an expert — that is, someone who is not qualified or competent to give an expert opinion.” *Teffeteller*, 645 N.W.2d at 427. In fact, this court has expressly ruled that “[t]he expert disclosure requirements *cannot be met* by a witness who is not qualified to give an expert opinion,” *Broehm*, 690 N.W.2d at 726 (emphasis added). Moreover, the opposite of a minor technicality, the identity of a qualified expert is “the *most* important disclosure of the affidavit required by Section 145.682, subd. 4.” *Sorenson*, 457 N.W.2d at 158 (emphasis added). An affidavit disclosing the opinion of an unqualified witness fails the “minimum standards” test for

⁵ Section 544.42, subd. 6 — the parallel safe-harbor provision to the one at issue here — provides for a 60-day cure period.

the statutory 180-day requirement, thereby foreclosing application of the safe-harbor provision.⁶

A plaintiff foreclosed from the safe-harbor provision is not, however, without recourse. Section 145.682, subd. 4(b) allows a plaintiff to request an extension of the 180-day deadline from opposing counsel or from the court for good cause shown. Minn. Stat. § 145.682, subd. 4(b) (2009).⁷ Wesely made such a motion in this case, but the district court rejected her argument, noting that Section 145.682 holds *pro se* plaintiffs to the same statutory requirements as counsel, and finding that her own delays contributed to the missed deadline. (Add.25-26). The court of appeals affirmed. (Add.12-13). Those rulings, however, are not before the court for review. As to the issue accepted for review, plaintiff's disclosure of an unqualified witness fails the minimum-standards test and forecloses application of the safe-harbor provision, thus requiring affirmance.

III. The safe-harbor's limit on the method of cure to "amended affidavit[s] or answers to interrogatories" forecloses a plaintiff's use of a substitute affidavit.

Brown-Wilbert confirmed that the legislature intended to allow a plaintiff to invoke the safe-harbor provision only to correct minor technical deficiencies in a 180-day

⁶ Amicus MAJ's reliance on a seemingly contrary ruling from the Georgia Court of Appeals involving that state's expert-affidavit statute has no value here because it contradicts this court's holdings and the statute itself. *See Phoebe Putney Mem. Hosp. v. Skipper*, 510 S.E.2d 101 (Ga. App. 1998) (holding that amendment is always allowed unless plaintiff completely fails to file affidavit).

⁷ Excusable neglect may exist where plaintiff meets the following four elements: (1) she has a reasonable case on the merits; (2) she has a reasonable excuse for failure to comply with the 180-day deadline; (3) she acted with due diligence; and (4) the defendant would suffer no substantial prejudice. *Anderson*, 608 N.W.2d at 850.

disclosure. The legislature’s choice to limit the method of cure to “an *amended* affidavit or answers to interrogatories” further supports that intent. Minn. Stat. § 145.682, subd. 6(c) (emphasis added). Were a wholesale *substitution* permissible at the 180-day stage, a plaintiff could employ a “placeholder” strategy — i.e., disclose the opinion of a layperson, of plaintiff’s counsel, whomever — and thereby trigger a self-granted 45-day extension in every case.⁸ Such a construction would *de facto* change the 180-day deadline to a 225-day deadline, thereby not only eviscerating the 180-day provision, but end-running as well the good-cause provision for extending that deadline. *Id.* at subd. 4(b) (providing for extension of the 180-day limit by agreement or by order of the court for good cause shown). *Brown-Wilbert* rejects such an outcome specifically, just as the court has rejected generally any construction of section 145.682 that “would justify an extension of the time limit in any number of cases where the plaintiff serves an insufficient affidavit.” *Anderson*, 608 N.W.2d at 849 (rejecting argument that plaintiff is entitled to notice of insufficiency of affidavit).

The statute’s plain language bears out the impermissibility of invoking the safe-harbor provision by substituting the affidavit of a qualified expert for that of an unqualified witness. The object of all statutory construction is to ascertain and effectuate the legislature’s intent. Minn. Stat. § 645.16 (2009). Construction starts with the plain meaning of words in the statute. *Id.*; *American Family Ins. Grp. v.*

⁸ In fact, because only service of the defendant’s motion to dismiss triggers the 45-day cure deadline, a plaintiff’s placeholder strategy would almost certainly produce a self-granted extension longer than 45 days. Minn. Stat. § 145.682, subd. 6(c).

Schroedl, 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).

In ordinary usage, to “amend” means: “1. To improve. 2. To remove the errors in; correct. 3. To alter . . . by adding, deleting, or rephrasing.” *American Heritage Desk Dictionary* 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). “Amend” also means: “To change the wording of . . . by striking out, inserting, or substituting words.” *Black’s Law Dictionary* 89 (8th ed. 2004). Thus, an amendment consists of adding, deleting, or substituting words in or from an existing document. In this case, plaintiff did not add to, delete from, or rephrase Dr. Vocal’s affidavit. She substituted Dr. Lingle’s affidavit in its entirety. Plaintiff’s late-filed Lingle affidavit is not an “amended affidavit” within the safe-harbor provision’s plain meaning.

Both Wesely and Amicus Minnesota Association for Justice (MAJ) argue, however, that the safe-harbor provision’s plain language allows such a substitution of affidavits — i.e., the affidavit of a qualified expert for that of an unqualified witness. (App. Br. at 5; MAJ Br. at 3). But neither Wesely nor MAJ point to any supporting language within the safe-harbor provision — subdivision 6(c) — because none appears there. Amendment and substitution simply are not synonyms. Instead, a substitute is: “[o]ne who stands in another’s place.” *Black’s Law Dictionary* 1470 (8th ed. 2004). In construing a statute,

courts cannot supply that which the legislature purposely omits or inadvertently overlooks. *Wallace v. Comm'r of Taxation*, 289 Minn. 220, 229, 184 N.W.2d 588, 592 (1971). The legislature chose the word “amend” instead of the word “substitute,” and the two are not interchangeable. The legislature limited the method of cure to amendments. Plaintiff’s substitution was an invalid cure, and the lower courts were correct in so ruling.

The court of appeals correctly reasoned that the plain meaning of “affidavit” further supports the outcome here, because “a statement in a valid affidavit cannot be amended by the affidavit of another affiant; a second affiant cannot swear or affirm that the changes in an affidavit are the truthful testimony of the first affiant.” (Add.9); *see also State v. Day*, 108 Minn. 121, 124, 121 N.W. 611, 613 (1909) (confirming the importance of oath to affirm truth of the fact to which affiant gives testimony). Although the court spoke only of affidavits in this case — because this case only involves affidavits — the same reasoning applies to an amendment by answers to interrogatories, which are also required to be signed under oath. Minn. Stat. § 145.682, subd. 4(a) (requiring that both the affidavit and answers to interrogatories disclosing a medical expert’s opinion be “signed by the plaintiff’s attorney and by each expert listed in the answers to interrogatories”); *Norton v. Hauge*, 47 Minn. 405, 406, 50 N.W. 368, 368 (1891) (confirming that affidavit is a written statement sworn to or affirmed “before some officer who has authority to administer an oath or affirmation.”); Minn. R. Civ. P. 33.01(d) (“Answers to interrogatories shall be stated fully in writing and shall be signed

under oath by the party served or . . . by any officer or managing agent”); Minn. R. Civ. P. 33.01, *Advisory Committee Note* – 1968 (“All responses to interrogatories are to be signed under oath.”). A signature under oath in either format confirms the truthfulness of the document’s content. *See, e.g., Gebhard v. Neidzwiecki*, 265 Minn. 471, 478, 122 N.W.2d 110, 115 (1963) (confirming that defendant is bound to give truthful answers to interrogatories and is, therefore, subject to continuing disclosure requirement); *Complaint Concerning Winton*, 350 N.W.2d 337, 342 (Minn. 1984) (“If witnesses do not testify truthfully under oath, the justice system will be unable to function.”). In short, the substitution of a qualified expert’s certification for an unqualified witness’s certification is not an “amendment,” and that is true regardless of the chosen format (i.e., affidavit or answers to interrogatories).

Nevertheless, both Wesely and MAJ argue that litigants who use answers to interrogatories to remedy a deficient disclosure will be subject to conflicting outcomes. (App. Br. at 14; MAJ Br. at 7). But this argument merely begs the question because it assumes that by *labeling* the answers to interrogatories “amended,” they somehow become amended. But the required signature on both affidavits and answers to interrogatories certifies that the opinion stated therein is that of the signatory. An entirely new certification from a different signatory is not an “amendment” of the original, and labeling it as one does not make it so. The second signatory can no more certify the interrogatory changes on behalf of the first signatory than he or she could if the new document were an affidavit. The

result is the same regardless of the chosen format — a substitute disclosure is not an amendment within the meaning of the safe-harbor provision. By the plain meaning of the words in the statute, a qualified expert cannot “amend” the disclosure of a person who was never an expert to begin with.

Plaintiff sidetracks the analysis with the difficult-to-understand contention that the affidavits at issue were not really “Dr. Vocal’s affidavit” or “Dr. Lingle’s affidavit.” Instead, plaintiff argues, the only affidavits were those of counsel and of *pro se* plaintiff. (App. Br. at 10). This is so, argues plaintiff, because Dr. Vocal did not sign the actual affidavit; he separately signed under oath to his agreement with the facts stated therein. (Add.32). Only Wesely herself signed the affidavit. (Add.31). Therefore, plaintiff reasons, since affidavits can be amended by the original signatory, replacement counsel could have amended Wesely’s affidavit. (App. Br. at 11). If this argument were accepted, however, it also follows that Wesely’s initial disclosure would fail the minimum-standards test for additional reasons. First, repudiation of Dr. Vocal as a signatory to the original affidavit would directly violate subdivision 4(a), which requires all experts to sign the affidavit. Arguing that Dr. Vocal did not sign the affidavit is the same as arguing that the original disclosure subjected the suit to mandatory dismissal. *Tousignant v. St. Louis Cty.*, 615 N.W.2d 53, 60 (Minn. 2000) (failure of expert to sign affidavit would have subjected suit to mandatory dismissal). Second, arguing that Dr. Vocal did not sign the affidavit is the same as arguing that the information disclosed was non-affidavit material, also subjecting the suit to mandatory

dismissal. *Id.* (citing *Lindberg*, 599 N.W.2d at 578). Finally, arguing that Dr. Vocal did not sign the affidavit is the same as arguing that the information stated in the affidavit is the *pro se* party's conclusion about the alleged malpractice, yet again subjecting the suit to mandatory dismissal. *Brown-Wilbert*, 732 N.W.2d at 219 (stating that disclosures "that merely repeat or incorporate the attorney's conclusory allegations about [the malpractice] are not sufficient to meet the minimum standards for an affidavit of expert disclosure"). Denying the existence of Dr. Vocal's affidavit not only is an absurd exercise in semantics, it supports affirmance, not reversal.

MAJ also argues that "amend" really means "substitute" because courts generally accept that an "amended pleading" replaces an earlier pleading when it contains matters omitted from or not known at the time of the earlier pleading. (MAJ Br. at 4) (citing *Black's Law Dictionary* 1191 (8th ed. 2009)). But the term "amended pleading" is a legal term of art in the context of the Minnesota Rules of Civil Procedure, defined within those rules and subject to their specific requirements. *See* Minn. R. Civ. P. 15 (setting forth rules concerning when and how litigants can amend pleadings). And affidavits (or answers to interrogatories) are not among "pleadings" as defined in the Minnesota Rules of Civil Procedure. *See* Minn. R. Civ. P. 7.01 (confining "pleadings" to complaint, answer, reply to counterclaim, and answer to cross-claim). In statutory interpretation, "term-of-art definitions should not be inserted 'into contexts where they plainly do not fit.'" *Mycka v. 2003 GMC Envoy*, 783 N.W.2d 234, 239 n. 1 (Minn. App. 2010) (quoting *Johnson v. United States*, 130 S.Ct. 1265, 1270, 176 L.Ed.2d 1 (2010)). Rather, a statute should be interpreted

according to its *plain* meaning — presupposing the ordinary usage of words. *American Tower, L.P.*, 636 N.W.2d at 312. Thus, the word “amend” must be interpreted according to its common meaning, not as a term of art when paired with the defined word “pleading.” The treatment of an “amended pleading” under the Minnesota Rules of Civil Procedure does not alter the plain meaning of the word “amended” as used in the safe-harbor provision.

Wesely also attempts to export the concept of expert substitution from where it appears in subdivision 4(b) into the safe-harbor provision in subdivision 6(c). Subdivision 4(a) sets forth the substantive requirements for a 180-day affidavit or answers to interrogatories, while subdivision 4(b) governs events that occur after expiration, like extensions of the 180-day period and the calling of other or additional expert witnesses at trial:

(b) 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 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). Wesely insists that the second sentence in subdivision 4(b) allows for unrestricted substitution of medical experts under the safe-harbor provision. (App. Br. p. 8). This is an impermissible construction for at least two reasons. First, exporting this provision to the safe-harbor clause would permit a badly out-of-context application of the language. See *Chiodo v. Board of Ed. of Special School Dist. No. 1*, 298 Minn. 380, 382, 215 N.W.2d 806, 808 (1974) (“[W]ords of a statute are to be viewed in their setting, not isolated from their context.”); *In re Reynolds’*

Estate, 219 Minn. 449, 444-45, 18 N.W.2d 238, 241 (1945) (warning courts to interpret statutory provisions within the context in which they appear). The subject of the clause at issue is the “calling” of additional or substitute expert witnesses. But the calling of witnesses occurs at trial.⁹ In the context of an attempt to replace the affidavit of an unqualified witness with that of a qualified expert, however, the term “calling” is nonsense. The plaintiff’s suggested construction is impermissible because the context of the clause makes clear that it does not apply to safe-harbor issues.

Second, the subject of the clause is the calling of additional “*expert witnesses*” or of substitute “*expert witnesses.*” An expert is “[a] person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder.” *Black’s Law Dictionary* 619 (8th ed. 2004).¹⁰ An expert must have both scientific knowledge and some practical experience with the subject matter of the offered testimony. *Cornfeldt v. Tongen*, 262 N.W.2d 684, 692 (Minn. 1977). “Expert testimony cannot be given by a witness who is not an expert — that is, someone who is not qualified or competent to give an expert opinion.” *Teffeteller*, 645 N.W.2d at 427. Dr. Vocal is not an expert. Therefore, Dr.

⁹ Such experts might include damages experts or additional medical experts to support plaintiff’s case. This clause would also apply if the plaintiff’s 180-day expert later became unavailable for trial. This clause must be read in conjunction with subdivision 4(c), which directs the district courts to issue scheduling orders setting deadlines for disclosing all experts a party intends to call as witnesses at trial.

¹⁰ This court has recently stated, “The United States Supreme Court has recognized the usefulness and appropriateness of consulting *Black’s Law Dictionary* when conducting a plain-language reading of a statute, as have we.” *Goodman v. Best Buy, Inc.*, 777 N.W.2d 755, 759 n. 2 (Minn. 2010).

Lingle is not an additional or substitute expert; he is plaintiff's *first and only* expert. On its face, therefore, the clause at issue has no application here.

In sum, the legislature's choice to limit the method of cure to "amended affidavit[s] or answers to interrogatories" is consistent with both the purpose of the safe-harbor provision — the correction of minor technical deficiencies in an otherwise timely and meaningful disclosure — and with this court's caselaw, especially *Brown-Wilbert*. Plaintiff's argument, by contrast, not only contradicts the established legislative purpose and attendant case law, it depends on a construction of words untethered from their context and violates the plain meaning of the words in the statute itself. For these reasons, this court should reject Wesely's interpretation and affirm the court of appeals' decision.

IV. The plain-language interpretation of subdivision 6(a) is consistent with Section 145.682's goals and this court's longstanding jurisprudence.

A plaintiff has ample opportunity under Minnesota law to build and demonstrate a well-founded medical-negligence claim. In this case, for example, the occurrence took place in February 2005. Plaintiff had four years from then to evaluate the propriety of suit and to commence one. See Minn. Stat. § 541.076 (establishing four-year statute of limitations in actions against health-care providers). Plaintiff availed herself of the entire four years. The law contemplates that a plaintiff will not commence such a suit without first procuring expert support. See, e.g., *Anderson v. Florence*, 288 Minn. 351, 364, 181 N.W.2d 873, 881 (1970) (stating that "[e]very experienced lawyer knows that it is completely unprofessional and unjust to institute a suit for medical malpractice without an

independent medical evaluation of the care and treatment rendered by the defendant doctor unless the result alone supports an inference of medical negligence”). Nevertheless, once suit was commenced, plaintiff had an additional six months to provide a meaningful disclosure from a qualified expert. Had she done so, plaintiff would have had an additional 45 days to cure any technical deficiencies. The legislature has balanced these ample time periods against the tremendous cost to the healthcare system of protracted litigation for which expert support is lacking. The legislature chose the 180-day deadline as a fair balance between the parties’ (and the public’s) competing interests.

This court has consistently upheld the legislative goals by requiring strict compliance with the 180-day deadline, thereby recognizing that excusing major deficiencies on a case-by-case basis would utterly defeat the statute’s main purpose. Wesely in essence argues that the 180-day deadline is of minor importance because the legislature did not intend the statute to “throw legitimate cases out of court.” (App. Br. at 16). Despite the fact that her original affidavit provided no meaningful disclosure, she argues that her case is not “frivolous” because she eventually identified an expert, albeit after the 180-day deadline. (App. Br. at 18).¹¹ This is the same as arguing that the proper inquiry is the substantive merit of plaintiff’s disclosure without regard to its timeliness. That was the system in place *before* the legislature adopted a statute with a deadline. This

¹¹ The district court never considered the substance of Dr. Lingle’s affidavit. (Add.23). Consistent with this court’s admonitions, therefore, in the event of a reversal, Respondents request a remand to the district court to determine the substantive adequacy of Dr. Lingle’s late-filed disclosure. *Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assoc.*, 418 N.W.2d 173, 175 (Minn. 1988) (stating that a respondent may protect itself from a wayward mandate by expressly seeking remand of issues undecided in the district court).

is undoubtedly why the court has ruled that the failure of a defendant to establish that plaintiff's claim is "frivolous" does not excuse or justify an untimely or deficient expert disclosure. *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 578 (Minn. 1999). If this court were to accept Wesely's claim that her case allegedly had "merit" because she provided a new purported expert affidavit beyond the 180-day deadline, it would upend the entire purpose of the statute, which is to require plaintiffs to demonstrate by the 180-day deadline that their claims are well-founded. Without the deadline, the statute would be ineffectual because it could not work to distinguish claims that are frivolous *per se* — e.g., unsupported by expert testimony within 180 days — from any other medical-malpractice claims. Both the court of appeals and the district court understood that they could not alter the meaning of subdivision 6 to create an exception for this particular plaintiff under these facts. These decisions are consistent with the policy goals of Section 145.682 (as well as its plain language and this court's case law construing it) and should be affirmed.

CONCLUSION

To trigger section 145.682's safe-harbor provision, a medical-malpractice plaintiff must, within 180 days of suit, provide meaningful information on each of the issues for which expert testimony will be required at trial to avoid a directed verdict. The affidavit of an unqualified witness, by definition, is meaningless *per se* because nothing therein can avoid a directed verdict on any relevant issue. Therefore, Plaintiff's undisputed failure to disclose a qualified expert within 180 days of suit foreclosed application of the statute's safe-harbor provision, requiring affirmance.

In addition, the safe-harbor's limit on the method of cure to *amended* affidavits or answer to interrogatories forecloses a plaintiff's *substitution* of an affidavit from a qualified expert for that of an unqualified witness. Moreover, because Dr. Vocal, by definition (and concession), is not an expert witness, the late-disclosed Dr. Lingle affidavit did not provide a substitute expert opinion in any event. He provided the *first and only* expert opinion. The lower courts were correct in ruling that the statute's safe-harbor provision is inapplicable in this case.

For all the reasons set forth herein, Respondents respectfully request that the judgment of the district court, and the decision of the court of appeals, be affirmed in all respects.

Respectfully submitted,

Dated: April 18, 2011

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FORM AND LENGTH CERTIFICATION

This brief was drafted using Word 2002. The font is Times New Roman, proportional 13-point font, which includes serifs. The word count of this brief is 6,217.

Dated: April 18, 2011

A handwritten signature in black ink, appearing to read "William M. Hart". The signature is written in a cursive style with a large initial "W".

William M. Hart