

A05-340

---

**State of Minnesota  
In Supreme Court**

---

Brown-Wilbert, Inc., a Minnesota corporation, and  
Christopher Chandler Brown, an individual,

Petitioners/Appellants,

v.

Copeland Buhl & Company, P.L.L.P., and  
Lee Harren, an individual,

Respondents.

---

**REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF  
PETITIONERS/APPELLANTS BROWN-WILBERT, INC.  
AND CHRISTOPHER CHANDLER BROWN**

---

Kay Nord Hunt, #138289  
LOMMEN, ABDO, COLE, KING &  
STAGEBERG, P.A.  
2000 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
(612) 339-8131

George E. Antrim, III, #120534  
GEORGE E. ANTRIM, III, PLLC  
201 Ridgewood Avenue  
Minneapolis, MN 55403  
(612) 872-1313

**Attorneys for Petitioners**

Thomas J. Shroyer, #100638  
Peter A. Koller, #150459  
Julia M. Dayton, #319181  
MOSS & BARNETT  
4800 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402  
(612) 347-0300

**Attorneys for Respondents**

**TABLE OF CONTENTS**

I. THE PROCEDURAL RECORD OF THIS CASE ..... 1

II. ACCOUNTANTS DID NOT MAKE A DEMAND FOR AN AFFIDAVIT OF EXPERT REVIEW ..... 3

II. PLAINTIFFS ARE STATUTORILY ENTITLED TO CURE ANY DEFICIENCIES IN THEIR ANSWERS TO EXPERT INTERROGATORIES AND, THEREFORE, DISMISSAL COULD NOT BE ORDERED UNDER MINN. STAT. § 544.42, SUBD. 6(c) ..... 6

    A. Accountants would have this Court ignore the cure provision ..... 6

    B. Accountants are asking this Court to rewrite the statute, which the Court cannot do ..... 8

    C. Plaintiffs presented well-qualified experts with impeccable credentials ..... 10

    D. Minn. Stat. § 544.42 and the Rules of Civil Procedure are not interchangeable ..... 12

CONCLUSION ..... 13

CERTIFICATION OF BRIEF LENGTH ..... 15

## TABLE OF AUTHORITIES

### Statutes:

Minn. Stat. § 145.682 .....	5, 7, 13
Minn. Stat. § 544.42 .....	1, 2, 4, 6-9, 12, 13
Minn. Stat. § 544.42, subd. 2(1) .....	3
Minn. Stat. § 544.42, subd. 2(2) .....	10
Minn. Stat. § 544.42, subd. 3 .....	5
Minn. Stat. § 544.42, subd. 3(a)(1) .....	1, 4, 5
Minn. Stat. § 544.42, subd. 4 .....	6, 8, 11
Minn. Stat. § 544.42, subd. 4(b) .....	11
Minn. Stat. § 544.42, subd. 6(c) .....	6-8

### Rules:

Fed. R. Civ. P. 12(b)(6) .....	2
Minn. R. Civ. P. 12.02 .....	2
Minn. R. Civ. P. 26.02(d) .....	4
Minn. R. Civ. P. 37 .....	4
Minn. R. Civ. P. 56 .....	2, 13

### Cases:

County of Fresno v. Superior Court, 154 Cal. Rptr. 660 (Cal. App. 1979), reh'g denied .....	4
Ellingson v. Walgreen Co., 78 F.Supp.2d 965 (D. Minn. 1999) .....	5
Gil Enterprises, Inc. v. Delvy, 79 F.3d 241 (2d Cir. 1996) .....	3
Lindberg v. Health Partners, Inc., 599 N.W.2d 572 (Minn. 1999) .....	7
McNeice v. City of Minneapolis, 250 Minn. 142, 84 N.W.2d 232 (1957) .....	8
National Life & Accident Ins. Co. v. Dove, 174 S.W.2d 245 (Tex. 1943), reh'g denied .....	4

People v. Robinson,  
74 N.W.2d 41 (Mich. 1955) ..... 4

Sorenson v. St. Paul Ramsey Medical Center,  
457 N.W.2d 188 (Minn. 1990), reh’g denied ..... 5, 7, 10, 13

Underwood Grain Co. v. Harthun,  
563 N.W.2d 278 (Minn. 1997) ..... 8

County of Fresno v. Superior Court,  
154 Cal. Rptr. 660 (Cal. App. 1979), reh’g denied ..... 4

Ellingson v. Walgreen Co.,  
78 F.Supp.2d 965 (D. Minn. 1999) ..... 5

Gil Enterprises, Inc. v. Delvy,  
79 F.3d 241 (2d Cir. 1996) ..... 3

Lindberg v. Health Partners, Inc.,  
599 N.W.2d 572 (Minn. 1999) ..... 7

McNeice v. City of Minneapolis,  
250 Minn. 142, 84 N.W.2d 232 (1957) ..... 8

National Life & Accident Ins. Co. v. Dove,  
174 S.W.2d 245 (Tex. 1943), reh’g denied ..... 4

People v. Robinson,  
74 N.W.2d 41 (Mich. 1955) ..... 4

Sorenson v. St. Paul Ramsey Medical Center,  
457 N.W.2d 188 (Minn. 1990), reh’g denied ..... 5, 7, 10, 13

Underwood Grain Co. v. Harthun,  
563 N.W.2d 278 (Minn. 1997) ..... 8

## I. THE PROCEDURAL RECORD OF THIS CASE.

The procedural history of this case is brief and undisputed. This lawsuit was commenced on March 10, 2004. (A. 27.) Respondents/Defendants Copeland Buhl and Company, P.L.L.P. and Lee Harren (“Accountants”) answered and filed their Counterclaim on April 9, 2004. (A. 38.) Sometime thereafter, Accountants served a set of Interrogatories on Appellants/Plaintiffs Brown-Wilbert, Inc. and Christopher Chandler Brown (“Plaintiffs”).<sup>1</sup> (A. 46.) Those interrogatories do not reference Minn. Stat. § 544.42 or request that the information set out in Minn. Stat. § 544.42, subd. 3(a)(1) be presented in an affidavit by Plaintiffs’ counsel. (Id.)

On June 17, 2004, the trial court issued its Scheduling Order which sets the deadlines as follows:

- Joinder of additional parties – July 30, 2004;
- Discovery completion – February 28, 2005;
- Nondispositive motions – March 4, 2005; and
- Dispositive motions – April 4, 2005.

A pretrial conference was scheduled for September 27, 2004, with a trial date to be set at that time. (Supplemental Appendix [S.A.] 1.)

---

<sup>1</sup> In a footnote in their brief to this Court, Accountants take issue with the fact that the date when Accountants’ interrogatories were served on Plaintiffs is not of record. (Respondents’ Brief, p. 5.) Accountants now assert that “had Plaintiffs raised the issue [Accountants] would have submitted the affidavit of service to prove the service date.” (Id.) They then submit a document not of record which Plaintiffs request be stricken from their brief. What Accountants ignore is that their argument that the service of interrogatories somehow functions as a § 544.42 demand was first made in Defendants’ Reply Memorandum of Law in support of their motion to dismiss. (Defendants’ Reply Memorandum, p. 5, dated October 22, 2004.) Accountants have no one to blame but themselves for not making of record the date of the service of their interrogatories.

Plaintiffs answered Accountants' discovery on June 18, 2004 and identified two experts they planned to call at trial. (A. 46.) On September 21, 2004, Accountants sought dismissal for Plaintiffs' purported failure to comply with Minn. Stat. § 544.42.

In seeking dismissal, Accountants asserted that their Minn. Stat. § 544.42 dismissal was under "Minnesota Rule 12(b)(6)." (T. 3.)<sup>2</sup> Accountants also asserted that Plaintiffs had executed a release that released Accountants from liability and sought a Minn. R. Civ. P. 56 dismissal on that ground. (Defendants' Memorandum of Law, pp. 1-2.) Under either motion, Plaintiffs were entitled to have the underlying facts viewed in a light most favorable to them. Therefore, this Court must disregard Accountants' self-serving recitation of the facts on pages 3-5 of their Respondents' brief which is contrary to the standard of review.

Accountants are not entitled on appeal to contest the fact that they unashamedly sided with a minority shareholder to the severe damage to Brown-Wilbert, Inc., their employer, and Christopher Chandler Brown, the majority shareholder. The Court must take as true the allegations of Plaintiffs' Complaint that the Accountants, among other things, breached their duty to be neutral in their dealings with shareholders, accepted personal payoffs from a minority shareholder, assumed an advocacy role for a minority equity shareholder, favored that same minority shareholder by allowing him to give himself substantial officer salary increases in violation of the company's bylaws, testified

---

<sup>2</sup> Accountants were obviously referring to Minnesota Rule of Civil Procedure 12.02, which is the equivalent of Federal Rule of Civil Procedure 12(b)(6).

in court in favor of this same minority shareholder to the detriment of the majority shareholder and the corporation, attempted to squeeze out the majority shareholder by locking him out of the business, provided inaccurate financial and other information to the majority shareholder to assist the minority shareholder's buyout scheme at a very low price, and failed to extend proper due diligence in reviewing signed audit report letters that contained forged signatures of the president of Brown-Wilbert, Inc., all to the detriment of Brown-Wilbert, Inc. (A. 21-34.)

## **II. ACCOUNTANTS DID NOT MAKE A DEMAND FOR AN AFFIDAVIT OF EXPERT REVIEW.**

The important fact in this case is whether Accountants made a demand for the Minn. Stat. § 544.42, subd. 2 clause (1) affidavit, thereby triggering Plaintiffs' obligation to so provide within 60 days. There was no such demand.

As other courts have recognized, the gravamen of a demand is its notice providing function. Gil Enterprises, Inc. v. Delvy, 79 F.3d 241, 246 (2d Cir. 1996). “[A] demand requires an imperative solicitation for that which is legally owed.” Id. By its nature a demand is intended to trigger certain rights and obligations. The demand must contain imperative language putting the targeted party on notice of the “drastic legal repercussions that could result from noncompliance.” Id.

Accountants' arguments run counter to the very purpose of a demand requirement. A demand's purpose is to provide the targeted party with notice that failing to heed the demand will result in substantial legal consequences. It is necessary that the party upon

whom the demand is being made be put on notice that legal obligations have been triggered. Without such notice, a demand is not a demand and serves no purpose because it would fail to provide the party with an opportunity to cure any shortfalls. See also National Life & Accident Ins. Co. v. Dove, 174 S.W.2d 245, 246 (Tex. 1943), reh'g denied (“Bouvier defines the word ‘demand’ thus: A requisition or request to do a particular thing specified under a claim of right on the part of the persons requesting. . . . The substance of it is that there is an assertion of a right and a demand for the recognition and performance of the obligation upon which such right exists.”); County of Fresno v. Superior Court, 154 Cal. Rptr. 660, 663 (Cal. App. 1979), reh'g denied (“demand means ‘to ask peremptorily; to ask for . . . with legal right . . .; to claim as something one is legally or rightfully entitled to . . .’”); People v. Robinson, 74 N.W.2d 41, 45 (Mich. 1955) (Smith, J. dissenting) (“the word ‘demand,’ a blunt, arrogant word, full of pride, smelling of the Bill of Rights and eschewing the delicacy of request or advice”).

Serving a routine set of interrogatories is not a demand for an affidavit of expert review. To adopt Accountants’ argument would not only introduce confusion in the law but runs counter to Minn. Stat. § 544.42 as written. The expert consulted to fulfill § 544.42, subd. 3(a)(1)’s requirement need not be someone who will actually be called to testify at trial. The expert consulted need not even be retained. The interrogatories and their answers by Plaintiffs have nothing to do with Minn. Stat. § 544.42, subd. 3(a)(1). Section 544.42’s affidavit of expert review requirement is not a Rule of Civil Procedure discovery request and Accountants’ references to Minn. R. Civ. P. 26.02(d) and 37 are

misplaced. Subdivision 3 simply demands proof of that which a lawyer should always do before initiating a malpractice suit – consult with an expert to confirm that such a suit has merit.

The affidavit of expert review requirement essentially holds an attorney to his or her honor. It is the attorney who is required to attest that he or she has reviewed the case with someone “whose qualifications provide a reasonable expectation that the expert’s opinions could be admissible at trial and that, in the opinion of this expert, the defendant deviated from the applicable standard of care and that by that action caused injury to the plaintiff.” Minn. Stat. § 544.42, subd. 3(a)(1). The affidavit of expert review is simply confirmation that the lawyer checked out his lawsuit with someone who could meet the foundational requirements of testifying as an expert in this case and confirms his suit has merit. See Sorenson v. St. Paul Ramsey Medical Center, 457 N.W.2d 188, 190 (Minn. 1990), reh’g denied (recognizing that the affidavit of expert review requirement under § 145.682 does not require the identity of the expert or need to provide the detail of the expert’s opinion); Ellingson v. Walgreen Co., 78 F.Supp.2d 965, 967 (D. Minn. 1999) (“the ‘expert review affidavit’ requires an expert’s review of the facts of the case with plaintiff’s attorney to verify the potential existence of a cause of action”). In contrast, the interrogatories which were served upon Plaintiffs asked the Plaintiffs to identify “each person whom you expect to call as an expert witness at trial.” (A. 46.) There simply is no correlation between the interrogatories and a demand for an affidavit of expert review.

If Accountants had made a demand for the affidavit of expert review, Plaintiffs' counsel would have provided the affidavit. Plaintiffs' counsel informed the trial court:

I certainly would have submitted an Affidavit that just said we got a good case against these guys and I consulted the accountants when I served the Complaint. I think the fact that I didn't do that underscores the fact that I just didn't know this statute was out there and that's my fault and I admit that to the Court and my clients. I have admitted it to them.

(T. 14-15.) To Plaintiffs' counsel's remarks, Accountants' counsel stated:

I – it is very clear now, taking counsel at his word as I do, that he has been consulting with an expert before the case started.

(T. 26-27.)

The lower court's dismissal for failure to provide an affidavit of expert review must be reversed.

**II. PLAINTIFFS ARE STATUTORILY ENTITLED TO CURE ANY DEFICIENCIES IN THEIR ANSWERS TO EXPERT INTERROGATORIES AND, THEREFORE, DISMISSAL COULD NOT BE ORDERED UNDER MINN. STAT. § 544.42, SUBD. 6(c).**

Accountants do not wish to have the Court apply Minn. Stat. § 544.42 as written. Not only did they not make a demand for an affidavit of expert review, they would have this Court ignore the language of Minn. Stat. § 544.42, subd. 4 and subd. 6(c).

**A. Accountants would have this Court ignore the cure provision.**

Plaintiffs responded to Accountants' expert witness interrogatory on June 18, 2004. Such response was provided well within 180 days after commencement of this lawsuit. At the time these answers were provided, the lawsuit was less than 100 days old

and the discovery cutoff deadline was eight months away – i.e., February 28, 2005. No depositions had even taken place. (T. 20.) Moreover, although Accountants had Plaintiffs' answers to interrogatories as of June 18, 2004, they never questioned their adequacy by a motion to compel. Rather, they waited until 180 days had passed from commencement of the action and then sought dismissal under Minn. Stat. § 544.42. In other words, Accountants were utilizing the strategy that had previously existed under Minn. Stat. § 145.682, until it was amended to include a cure provision. Minn. Stat. § 544.42 as enacted has always contained a cure provision. Minn. Stat. § 544.42, subd. 6(c). It is this cure provision which the trial court erroneously failed to employ.

What Accountants would have this Court do is return to the days before the expert review statutes contained a cure provision. With the safe harbor provisions now contained both in Minn. Stat. § 145.682 and Minn. Stat. § 544.42, the trial court is required to give Plaintiffs notice of the claimed deficiencies to their expert identification interrogatory or affidavit and an opportunity to cure. No longer do the courts make the harsh decisions evident in Lindberg v. Health Partners, Inc., 599 N.W.2d 572, 577 (Minn. 1999), and its progeny when the Legislature had given the courts no choice but to dismiss for expert identification inadequacies. When Lindberg, Sorenson, etc. were decided, the Legislature had mandated dismissal if there were expert disclosure deficiencies. Now the Legislature mandates that if expert disclosure deficiencies are claimed and so found by the trial court, the plaintiff must be given a 60-day period to cure. Plaintiffs were unfairly deprived of this statutory right.

**B. Accountants are asking this Court to rewrite the statute, which the Court cannot do.**

Accountants, in essence, ask this Court to add requirements to Minn. Stat. § 544.42. Minn. Stat. § 544.42, subd. 6(c) does not distinguish between purported degrees of deficiency in an expert identification affidavit or answers to expert interrogatories. The Legislature did not state that the cure provision is only triggered when a plaintiff “has largely complied with the statutory requirements” as Accountants assert. Instead, the Legislature states that if there are “claimed deficiencies” in either the affidavit or answers to interrogatories, the nonmoving party is to be given 60 days to satisfy the disclosure requirements of Subdivision 4. Minn. Stat. § 544.42, subd. 6(c).

Ultimately the Court must take the statute as it finds it. As this Court has stated, “[i]t is not for the court to encroach upon the legislature field by an interpretation which would in effect rewrite a statute so as to accomplish a result which might be desirable . . . .” McNeice v. City of Minneapolis, 250 Minn. 142, 84 N.W.2d 232, 236-37 (1957). This Court is prohibited from adding words to a statute and cannot supply what the Legislature either purposefully omitted or inadvertently overlooked. Underwood Grain Co. v. Harthun, 563 N.W.2d 278, 281 (Minn. 1997). So even if this Court concludes that the answer to the expert interrogatory did not sufficiently outline the chain of causation and presents nothing but empty conclusions, as Accountants argued to the trial court, under Minn. Stat. § 544.42, subd. 6(c), Plaintiffs are entitled to an opportunity to cure any deficiencies.

Accountants assert that to allow Plaintiffs an opportunity to cure deficiencies makes a “mockery of the statutory requirements.” (Respondents’ Brief, p. 24.) Actually, to preclude Plaintiffs from such an opportunity makes a mockery of the statute’s requirements. Moreover, the Plaintiffs are only given 60 days to satisfy the disclosure requirements once the trial court has issued specific findings as to deficiencies. The Legislature has therefore assured litigants of this state that if a case has merit it will be heard. If Plaintiffs cannot cure, the case is subject to dismissal.

Under Accountants’ view of the statute, a court is also to inquire into a party’s intent when it answers expert interrogatories. Minn. Stat. § 544.42 contains no intent requirement and Accountants’ imputation of ill motives to Plaintiffs and their counsel is neither accurate nor relevant to this case. Under Minn. Stat. § 544.42, it does not matter whether a plaintiff was actually thinking about Minn. Stat. § 544.42 at the time it served its answers to expert interrogatories. As long as those answers were served within 180 days of the commencement of the action, Plaintiffs are entitled to assert, when presented with a motion to dismiss under Minn. Stat. § 544.42, that the answers to interrogatories meet the expert identification requirements.<sup>3</sup>

---

<sup>3</sup> Minn. Stat. § 544.42 appears to presume that if the expert affidavit is not provided with the complaint, the defendant will make a demand. The demand notifies the plaintiff’s counsel of the statute and the necessity for compliance. If Accountants had made a demand, Plaintiffs’ counsel would have been made aware of the requirements. Plaintiffs’ counsel has represented to the court he was not. That fact does not preclude Plaintiffs’ assertion that the expert identification requirement is satisfied by its answer to the expert interrogatory.

Plaintiffs, when presented with Accountants' motion, unequivocally asserted to the trial court that they satisfied Minn. Stat. § 544.42, subd. 2(2) by their answers to expert witness interrogatories. They further asserted if the trial court found they were deficient, the court was required through specific finding to alert Plaintiffs to the deficiencies and allow for an opportunity to cure. (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, pp. 16-17, dated October 15, 2004.) There was no belated suggestion by Plaintiffs that they had complied with the expert identification affidavit. This was Plaintiffs' position from the day it was presented with Accountants' motion to dismiss.

**C. Plaintiffs presented well-qualified experts with impeccable credentials.**

There is no question that two very well-qualified experts in the field of accounting had been retained by the Plaintiffs within the first 100 days of this lawsuit. They stood ready to testify that Accountants breached the standard of care and by their breach had caused Plaintiffs' damage. (A. 35, 47-48.) However, in ordering dismissal, the trial court incorrectly states that Plaintiffs' Answers to Interrogatories "fail to identify the experts." (A. 13.) Accountants simply ignore the trial court's error. (See Respondent's Brief, p. 20.)

Accountants take issue with this Court's statement in Sorenson v. St. Paul Ramsey Medical Center, 457 N.W.2d at 190, that "the most important disclosure of . . . (the second affidavit) is the *identity* of an expert who is willing to testify as to the alleged negligence," and refer to this Court's statement as a "dubious statement." (Respondents'

Brief, p. 22.) This Court's statement is certainly not dubious and the Court was rather emphatic, having emphasized the word "identity," and specifically stating that the disclosure of the expert is the key requirement of Subdivision 4.

Accountants are correct that the identity of an expert can be changed under Minn. Stat. § 544.42, subd. 4(b), and it is true that the mere posing of a name who does not facially possess the requisite credentials may be meaningless. Offering, for example, an architect whose expertise is in building bridges as an expert witness in an accounting malpractice action could well be argued to be meaningless and a defendant could credibly argue that the hiring of such an expert fulfills no requisite of the expert identification requirement. But where, as here, the Plaintiffs have retained well-qualified, highly credentialed individuals in the field at issue who opine that the defendants were professionally negligent, the most important disclosure requirement of the expert identification affidavit has been fulfilled.

Accountants have not and cannot quarrel with the Plaintiffs' experts' qualifications and their competency to testify. In June 2004, the two experts identified by Plaintiffs were Robert Tautges and William Legier. (A. 47-48.) Mr. Tautges is presently serving as the CPA for Brown-Wilbert, Inc. Because of Mr. Tautges' present role, Plaintiffs' counsel explained at the motion to dismiss hearing that Mr. Tautges may well be called as a fact witness but not as Plaintiffs' primary expert. (T. 18-19.) The reluctance to call Mr. Tautges as Plaintiffs' primary expert witness has nothing to do with his opinions or expertise but with the fact that he is presently Brown-Wilbert, Inc.'s accountant. (T. 18.)

That acknowledgment does not preclude Plaintiffs, if they so desire, from calling Mr. Tautges as an expert at trial. After all, the trial had not yet been scheduled and given the trial court's scheduling order, the trial was at least six months away. (S.A. 1.) The fact that Brown-Wilbert's present accountant has concluded that the former accountants committed accounting malpractice is certainly not meaningless.

Plaintiffs' other expert – William Legier – in addition to being a CPA is also a certified fraud examiner. (A. 47, 64.) Mr. Legier has over 32 years of accounting experience. (Id.) As Plaintiffs' counsel has acknowledged, Mr. Legier had not yet received everything necessary to testify at trial, but that was because discovery had barely begun when the interrogatory was answered. Based on Mr. Legier's review of Plaintiffs' extremely detailed complaint, he is prepared to testify that the Accountants had breached their standard of care and caused Plaintiffs' damages. (A. 35, 47-48.)<sup>4</sup> This disclosure is certainly not meaningless and supports Plaintiffs' claim that their lawsuit has merit.

---

<sup>4</sup> Accountants vaguely state that the hired expert must be "given the materials necessary to form an opinion . . ." (Respondents' Brief, p. 27.) Plaintiffs do not know to what "materials" Accountants are referring. Plaintiffs' experts were given "materials." Mr. Tautges was Brown-Wilbert's accountant. The case had just begun. No one had been deposed and Accountants had not yet been served with discovery. Accountants lose sight of the fact that Plaintiffs' answers to expert interrogatories were given within the first 100 days of the lawsuit.

**D. Minn. Stat. § 544.42 and the Rules of Civil Procedure are not interchangeable.**

The point Accountants ignore is that Minn. Stat. § 544.42 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). Plaintiffs are entitled to use their answer to the expert interrogatory to fulfill Minn. Stat. § 544.42 requirements only because the Legislature says they can. Regardless of Minn. Stat. § 544.42, 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. So any purported tactical delay under Minn. Stat. § 544.42 does not exist in reality because a motion to dismiss for failure to present a prima facie case brought under Rule 56 does not provide a cure provision. Accountants, however, having premised their motion to dismiss on Minn. Stat. § 544.42, must abide by the statute's safe harbor provisions.<sup>5</sup>

**CONCLUSION**

Plaintiffs respectfully request that the trial court's dismissal of their claims be reversed. Since there was no demand for an affidavit, the trial court's ordered dismissal of all claims for failure to provide an affidavit of expert review must be reversed. As to the expert identification requirement, the experts were identified and the trial court's dismissal must also be ordered reversed. The case should be remanded to the trial court

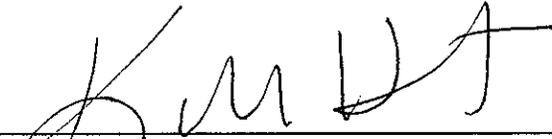
---

<sup>5</sup> The summary judgment motion was made only by Accountants on their assertion of a purported release, which issue is not before this Court.

to make specific findings as to the expert identification deficiencies, if any, and to grant Plaintiffs 60 days to cure.

Dated: May 11, 2006

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

BY 

Kay Nord Hunt, I.D. No. 138289  
2000 IDS Center  
80 South Eighth Street  
Minneapolis, Minnesota 55402  
(612) 339-8131

GEORGE E. ANTRIM, III, PLLC  
George E. Antrim, III, I.D. No. 120534  
201 Ridgewood Avenue  
Minneapolis, Minnesota 55403  
(612) 872-1313

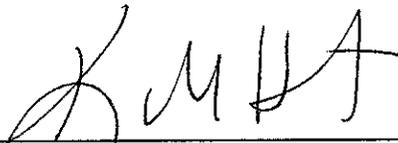
**Attorneys for Petitioners**

**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 3,549 words. This brief was prepared using Word Perfect 10.

Dated: May 11, 2006

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

BY   
\_\_\_\_\_  
Kay Nord Hunt, I.D. No. 138289  
2000 IDS Center  
80 South Eighth Street  
Minneapolis, Minnesota 55402  
(612) 339-8131

GEORGE E. ANTRIM, III, PLLC  
George E. Antrim, III, I.D. No. 120534  
201 Ridgewood Avenue  
Minneapolis, Minnesota 55403  
(612) 872-1313

**Attorneys for Petitioners**

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) (with amendments effective July 1, 2007).