

CASE NO. A05-0340

**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.

RESPONDENTS' BRIEF AND APPENDIX

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STATEMENT OF ISSUES

By Order dated February 14, 2006, this Court granted review with respect to the following issues (A.A. 15)¹:

1. What constitutes a “demand” for counsel’s affidavit of expert review that triggers the 60-day period under Minn. Stat. § 544.42, subd. 6?

Minn. Stat. § 544.42

2. What is the minimum standard for a so-called “affidavit of expert identification” sufficient to entitle the plaintiff to notice of deficiencies and an opportunity to cure under Minn. Stat. § 544.42, subd. 6?

Minn. Stat. § 544.42

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

¹ References to Appellants’ Appendix shall be in the form “A.A. ___.” References to Respondents’ Appendix shall be in the form “R.A. ___.”

STATEMENT OF THE CASE

Plaintiffs Brown-Wilbert, Inc. (“B-W”) and Christopher Brown (“Chris”) commenced this accounting malpractice action against B-W’s former accountants, Defendants Copeland Buhl & Company, PLLP (“Copeland Buhl”) and Lee Harren, without serving the affidavit of expert review required by Minn. Stat. § 544.42. Similarly, Plaintiffs failed to comply with the further requirement under Section 544.42 that, within 180 days of commencing suit, a party suing a professional identify each expert witness that the party will present at trial and describe the substance of the facts and opinions to which each expert is expected to testify.

Based upon Plaintiffs’ failure to provide the required affidavits, Defendants sought a mandatory dismissal, as authorized by Minn. Stat. § 544.42, subd. 6. In addition, Defendants sought a dismissal on the basis of certain releases that Plaintiffs executed in connection with the settlement of a previous lawsuit.

The district court issued a judgment of dismissal pursuant to Minn. Stat. § 544.42, subd. 6, but did not reach the alternative basis for dismissal proposed by Defendants. Following entry of judgment, Plaintiffs served a timely notice of appeal.

The court of appeals affirmed the dismissal of Plaintiffs’ accounting malpractice claim (relying entirely upon Plaintiffs’ failure to comply with the “expert review” requirements), but remanded for further analysis of Plaintiffs’ other claims and of Defendants’ alternative request for summary judgment based upon the releases that Plaintiffs executed.

This Court granted limited review, as set forth above in the Statement of Issues.

STATEMENT OF FACTS

This matter and the nearly identical action now before the Court of Appeals (App. Ct. File No. A05-1952) represent the latest chapters in the story of the meltdown of B-W, the family business that Chris and his father, Jerry Brown (“Jerry”), operated together for a number of years before Chris was ousted from management for using company funds to pay expenses that, in no way, could be attributed to the business of B-W.

Over the course of several years, Chris all but entirely neglected his duties as a director, officer and employee of B-W. (Shroyer Supp. Aff., Ex. B.)² At the same time, Chris used B-W as his personal bank account, expensing numerous items that, in no way, could be attributable to the business of B-W. (*Id.*, Exs. C and D.) This behavior, though disapproved of, was tolerated until the spring of 2002, when Chris was terminated from his position with B-W and his expense account privileges were cut off. (*Id.*, Exs. A-B.)

The decision to terminate Chris came after years of warnings about his behavior and years of concern about his lack of contribution to the success of B-W. (*Id.*, Ex. B.) It was most unfortunate that Jerry, as Chris’ father and greatest defender, was forced to make such a decision. (*Id.*) However, in the face of the extravagant abuse of his expense account privileges, Jerry had no choice. (*Id.*, Ex. C.)

On July 10, 2002, Chris commenced a shareholder’s rights lawsuit against his father (the “Shareholder Lawsuit”). (Shroyer Aff., Ex. E.) In that lawsuit, Chris sought

² References to “Shroyer Supp. Aff.” refer to the October 22, 2004 affidavit that is contained in the district court docket at entry 10. References to “Shroyer Aff.” refer to the September 21, 2004 affidavit that is contained in the district court docket at entry 7 and which can also be found (without exhibits) at A.A. 93-94.

reinstatement as an employee of B-W and sought to buy out his father in order to become the sole shareholder of the company. (*Id.*) That action produced many by-products: contempt, spite, familial division, and, most recently, the present lawsuit. In it, Chris claimed that Jerry and B-W attempted to squeeze him out of the family business. (*Id.*) Chris sued his father and B-W in order to gain control of the company and to force Jerry to reimburse the company for various expenses that Chris alleged Jerry had improperly charged to the corporation. (*Id.*)

In connection with the Shareholder Lawsuit, Lee Harren signed an affidavit that helped present Jerry's side of the story. (Shroyer Supp. Aff., Ex. C.) The affidavit substantiated that Chris had bilked B-W out of more than \$900,000 for personal expenses fraudulently portrayed as business expenses (including, *inter alia*, expenditures for personal vacations, for a nanny and for extensive home remodeling and landscaping), before going on to explain that nearly all of the expenses of Jerry that Chris had alleged were not business-related were actually in furtherance of B-W business. (*Id.*) In addition, the affidavit contained Lee Harren's computation under the valuation formula in the buy-sell agreement that Jerry and Chris had signed. (*Id.*) Meanwhile, in responding to requests for admission in the Shareholder Lawsuit, Chris virtually admitted that he raided B-W's coffers for his own personal benefit. (*Id.*, Ex. D.)

Despite the extensive evidence that he had looted B-W for years, Chris persisted in his theory that he was entitled to a buyout of Jerry's interest in the company. After an acrimonious legal battle, Jerry finally granted Chris' wish for a buyout of B-W and the parties to the Shareholder Lawsuit executed a settlement of that suit as part of Chris'

purchase of the company. (Shroyer Aff., Ex. F.) The settlement included a series of releases whereby Chris and B-W completely released Jerry. (*Id.*) While those releases purport to preserve any claims that Chris and B-W might have against the accountants that worked with the company prior to the buyout (*i.e.*, Defendants Copeland Buhl and Lee Harren), they are very explicit about requiring Chris and B-W to indemnify Jerry and hold him harmless from any such claims. (*Id.*)

After settling the Shareholder Lawsuit, Chris and B-W filed the present lawsuit against Defendants Copeland Buhl and Lee Harren, alleging various acts or omissions in the rendering of professional services and seeking relief under the legal theories of breach of contract, breach of fiduciary duty, accounting malpractice and restitution. (A.A. 21-37.) When they commenced the lawsuit, however, Plaintiffs failed to file an affidavit of expert review, certifying that the case had been reviewed by an expert who had concluded that Defendants deviated from the applicable standard of care and that this deviation caused Plaintiffs' injury, as is required by Minn. Stat. § 544.42. (A.A. 94.)

Defendants served their joint answer on April 9, 2004 (*Id.*, Ex. C; A.A. 38-45.), and served interrogatories on May 18, 2004. (A.A. 46-52.)³ In those interrogatories,

³ In their brief to this Court, Plaintiffs twice suggest that Defendants' interrogatories may not have actually been served on May 18, 2004. This is a classic "red herring." Aside from the fact that the approximate service date of the interrogatories can be accurately estimated from the date of the responses (June 18, 2004), Plaintiffs did not question the service date of the interrogatories in the district court. Had Plaintiffs raised the issue, Defendants would have submitted the affidavit of service to prove the service date. (R.A. 1.) *See In re Objections and Defenses to Real Property Taxes for the 1980 Assessment*, 335 N.W.2d 717, 718 n. 3 (Minn. 1983) (noting that appellate court may consider affidavit that is not part of the record, when affidavit supports the result below, is "conclusive," and "essentially uncontradicted").

Defendants requested that Plaintiffs identify any experts they expect to call at trial and, with respect to those experts:

- (a) State the expert's name, professional or business address and the employer's name;
- (b) State the expert's area of expertise and the basis for that expertise;
- (c) Provide a list of the expert's publications, papers, and treatises, speeches, lectures, and seminars;
- (d) State the subject matter upon which the expert is expected to testify;
- (e) State the substance of the facts and opinions to which the expert is expected to testify;
- (f) Give a summary of the individual grounds for each opinion; and
- (g) Set forth the author, publisher, title and date of publication of each learned treatise upon which the expert will rely in testimony.

(A.A. 47-48.) In addition, as Plaintiffs point out in their brief to this Court, Defendants requested in the interrogatories that Plaintiffs identify any individuals that might have "any knowledge of the facts surrounding this matter" and state the substance of each individual's knowledge. (A.A. 48.)

On June 18, 2004, Plaintiffs submitted their answers to the interrogatories. (*Id.*) In those answers, Plaintiffs identified two experts by name, Rob Tautges and William Legier, gave their whereabouts and expertise, but failed to provide any meaningful response to the rest of the questions posed in the interrogatories. (*Id.*) Plaintiffs stated that "[b]oth experts have been recently retained" and disclosed that Mr. Tautges' firm

serves as the accountants for Plaintiffs. (*Id.*) Plaintiffs' answers further noted that the experts "are expected to testify as to the conclusions set forth in the Complaint, based upon the facts alleged in the Complaint." (*Id.*)⁴

In addition to failing to file the required affidavit of expert review and failing to provide meaningful information in response to Defendants' expert witness interrogatories, Plaintiffs subsequently failed to comply with the second affidavit requirement under Minn. Stat. § 544.42. (A.A. 94.) That requirement directs that, within 180 days of commencing suit, a party suing a professional provide an affidavit identifying each expert who the party will present at trial and setting forth the facts and opinions to which each expert is expected to testify.

After receiving no affidavits and no meaningful information in response to their interrogatories, Defendants filed a motion to dismiss or, in the alternative, for summary judgment. The motion presented two separate grounds for relief: (1) dismissal under Section 544.42, subd. 6, due to Plaintiffs' failure to serve either of the required expert witness affidavits; and (2) summary judgment under Rule 56 because the releases Plaintiffs executed in settling the Shareholder Lawsuit effectively release Defendants from any liability for the claims being asserted by Plaintiffs in the present action.

Plaintiffs responded to Defendants' motion with a series of inconsistent arguments. Initially, Plaintiffs submitted the affidavit of Mr. Antrim (the "Antrim

⁴ At the motion hearing before the district court, Plaintiffs' counsel (Mr. Antrim) explained that Mr. Legier was retained because Mr. Tautges is not comfortable serving as an expert witness in this matter. (T. 18.) Thus, Mr. Antrim described Mr. Legier as the "primary expert." (T. 19.)

Affidavit”), which purported to satisfy both requirements of Minn. Stat. § 544.42 (albeit in an untimely manner) by stating that Mr. Antrim had reviewed the case with experts prior to filing and that the expert he intends to call at trial “will” review the relevant information prior to trial and “will” testify that Defendants breached professional and ethical standards. (A.A. 110-14.) Through his repeated use of the future tense, however, Mr. Antrim admitted that Plaintiffs’ chosen expert had not yet “been provided financial schedules and other documents,” had not yet “read various pleadings provided by [Defendants],” had not yet “researched professional ethical, accounting and auditing standards,” had yet to “consider” certain “issues,” and had yet to actually “opine” about anything. (A.A. 112-14.) (stating that experts “*will have* been provided financials, schedules and other documents . . .,” “*will have* read various pleadings . . .,” “*will have* researched professional ethical, accounting, and auditing standards . . .,” and “*will* consider” certain “issues”) (emphasis added).

At the motion hearing, Plaintiffs shifted their focus and emphasized their answers to interrogatories, rather than the Antrim Affidavit. Specifically, Plaintiffs claimed that those answers to interrogatories should be deemed to satisfy the so-called “affidavit of identification” requirement (T. 16.), even though:

- Those answers state that experts were only “recently retained” (plainly indicating that expert review had not yet occurred, months after the complaint was served);
- Those answers fail to provide any of the detailed information requested;

- Mr. Antrim subsequently asserted that he was unaware of Section 544.42 prior to Defendants' motion to dismiss (T. 14); and
- Mr. Antrim admitted in his affidavit (A.A. 112) and at the hearing (T. 19-20) that Plaintiffs' experts had not yet received the materials that would form the basis for their opinions.

In addition to those defects and inconsistencies, Plaintiffs also failed to explain the inconsistency between the lack of detailed information in their answers to interrogatories and Mr. Antrim's statements that he began consulting with at least one of the identified experts in March of 2003 (T. 18) and that he possessed the required expert information for "a long time" (T. 20).⁵

The district court granted Defendants' motion to dismiss pursuant to Section 544.42, subd. 6, and dismissed each of Plaintiffs' claims. (A.A. 5-14.) The district court did not reach the issue of the releases that Plaintiffs previously signed. (*Id.*)

The court of appeals affirmed the dismissal as to Plaintiffs' accounting malpractice claim (relying entirely upon Plaintiffs' failure to comply with the "expert review" requirements), but remanded for further analysis of whether Plaintiffs' other

⁵ In their petition to this Court, Plaintiffs improperly tried for the first time to create a controversy using a rhetorical comment that Defendants' counsel made at the motion hearing. (T. 26-27.) Plaintiffs' erstwhile contention completely ignored the implication of Defendants' counsel's comment – *i.e.*, that, *if* Plaintiffs' counsel's statements at the motion hearing about pre-litigation consultation with experts are true, *then* Plaintiffs' interrogatory answers are false and represent a deliberate refusal to provide duly requested (and discoverable) expert witness information. In short, this is not a case where a party made a good faith attempt to comply with the disclosure requirements of either Section 544.42 or the Rules of Civil Procedure, and any suggestion that Plaintiffs should have been given an opportunity to "cure" should be rejected.

claims should have been dismissed and whether the releases that Plaintiffs executed provide an alternative basis for dismissing the case. (A.A. 1-4.)

INTRODUCTION TO ARGUMENT

A. Standard of Review

The appellate courts of Minnesota apply an abuse of discretion standard when reviewing the dismissal of an action for failure to comply with an expert review statute. *See Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 725 (Minn. 2005) (“We will reverse a district court’s dismissal of a malpractice claim for noncompliance with expert disclosure only if the district court abused its discretion”) (citing *Teffeteller v. Univ. of Minnesota*, 645 N.W.2d 420, 426 (Minn. 2002)). Any issue as to statutory construction, however, is an issue of law and is subject to *de novo* review. *Teffeteller*, 645 N.W.2d at 427.

B. Minn. Stat. § 544.42

The Minnesota Legislature enacted Section 544.42 in an attempt to eliminate frivolous lawsuits against professionals. *Meyer v. Dygert*, 156 F. Supp. 2d 1081, 1090 (D. Minn. 2001). The statute requires a plaintiff in a malpractice actions against a non-medical professional to serve two separate affidavits.

First, to show that he has engaged in a minimal amount of investigation of the merits of his claim before commencing suit, the malpractice plaintiff is required to serve “with the pleadings” an affidavit, drafted by his attorney, certifying that the facts have been reviewed in consultation with an expert whose opinions would be admissible at trial and that “in the opinion of the expert, the defendant deviated from the applicable standard

of care and by that action caused injury to the plaintiff.” Minn. Stat. § 544.42, subd. 3(a)(1) (emphasis added). Second, within 180 days of filing suit, the malpractice plaintiff must serve an affidavit, signed by his attorney, that identifies any experts the attorney expects to call at trial and provides the substance and basis of the experts’ opinions. Minn. Stat. § 544.42, subd.4.

Failure to file the required affidavits renders a plaintiff’s malpractice action “frivolous *per se*” and results in “mandatory dismissal of each cause of action with prejudice as to which expert testimony is necessary to establish a prima facie case.” *House v. Kelbel*, 105 F. Supp. 2d 1045, 1055 (D. Minn. 2000) (internal citation omitted); Minn. Stat. § 544.42, subd. 6(c). Minnesota courts have not hesitated to enforce that stern penalty against parties who fail to comply with the expert affidavit requirements of Section 544.42 and its sister statute pertaining to claims against medical professionals. *See, e.g., Middle River-Snake River Watershed District v. Dennis Drewes, Inc.*, 692 N.W.2d 87, 90-91 (Minn. Ct. App. 2005) (dismissal pursuant to § 544.42); *Meyer*, 156 F. Supp. 2d at 1090-91 (same); *House*, 105 F. Supp. 2d at 1054 (same); *see also Anderson v. Rengachary*, 608 N.W.2d 843, 847-48 (Minn. 2000) (dismissal pursuant to Minn. Stat. § 145.682).

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' LAWSUIT BECAUSE PLAINTIFFS FAILED TO TIMELY SERVE THE AFFIDAVIT OF EXPERT REVIEW REQUIRED BY MINN. STAT. § 544.42, SUBD. 3.

As noted above, Minn. Stat. § 544.42 requires a plaintiff alleging professional malpractice to file, contemporaneously with the complaint, an affidavit, drafted by the plaintiff's attorney, certifying that the facts have been reviewed in consultation with an expert whose opinions would be admissible at trial and that "in the opinion of the expert, the defendant deviated from the applicable standard of care and by that action caused injury to the plaintiff." Minn. Stat. § 544.42, subd. 3(a)(1). Failure to provide the defendant with such an affidavit of expert review within sixty days after a demand for the affidavit is made results in "mandatory dismissal of each cause of action with prejudice as to which expert testimony is necessary to establish a prima facie case." § 544.42, subd. (6)(a). The district court and the court of appeals properly applied these portions of Section 544.42 in dismissing the present lawsuit.

A. Treating Defendants' Interrogatories as a "Demand" for the Affidavit of Expert Review Was Not an Abuse of Discretion.

In granting review, one of the two issues on which this Court focused was the question of what constitutes a "demand" for the affidavit of expert review so as to trigger the 60-day compliance period under subdivision 6 of Section 544.42. Under the particular facts of this case, that issue can be reduced to the more fact specific question of whether interrogatories that seek information concerning the identity and factual knowledge of any expert witnesses and any other persons with knowledge of the facts can

constitute such a demand. The court of appeals expressly concluded that the district court did not commit an abuse of discretion when it treated Defendants' interrogatories as a demand for the affidavit of expert review. A.A. 3. For the reasons set forth below, this Court should affirm that conclusion.

Section 544.42 does not include a definition of what constitutes a "demand" for purposes of triggering the 60-day compliance period under subdivision 6. *See* Minn. Stat. § 544.42. In fact, that particular noun does not appear to be defined in any Minnesota statute or rule -- other than a handful of Public Utilities Commission rules that generally define the word to mean the quantity or volume of products or services for which there are willing and able buyers. *See* Minn. R. 7825.2400 (2005); Minn. R. 7620.0100 (2005); Minn. R. 7853.0010 (2005); *and* Minn. R. 7855.0010 (2005).

In their brief to this Court, Plaintiffs direct the Court to dictionary definitions of the word "demand" and, thereby, suggest that Defendants' interrogatories did not ask for the affidavit of review "boldly" enough to constitute a demand. However, Plaintiffs quote from dictionary definitions that define the word "demand" as a *verb*, not as a *noun*. Section 544.42 clearly uses the word as a *noun*. The dictionary definition of "demand" as a *noun* is "an act of demanding or asking." *Webster's Ninth New Collegiate Dictionary* (1990). The quoted definition of "demand" as a noun also contains a usage reference - "esp[ecially] with authority." *Id.*

Ultimately, the dictionary definition of the noun "demand" is not particularly helpful if the goal of the Court is to set some definite parameters as to what should constitute a "demand" under Section 544.42. That is, that definition is probably too vague

to provide a basis for establishing a firm rule. The defendant in a professional malpractice action plainly has statutory “authority” to “ask” for the affidavit of expert review, so anything that can be construed as a request for the affidavit of review should qualify as a “demand.”

Under the circumstances of the present case, including what appears to be a calculated withholding of information by Plaintiffs’ counsel (Mr. Antrim), the court of appeals properly concluded that the district court did not abuse its discretionary authority when it found that the expert witness interrogatories constituted a “demand” under the statute. Interrogatories represent a sufficiently authoritative request to constitute a demand, since the Rules of Civil Procedure expressly require the recipient to respond and authorize the imposition of sanctions if the recipient fails to provide adequate responses. Minn. R. Civ. P. 26.02(d) and 37.

Of course, in connection with the initial affidavit requirement, Plaintiffs seek to downplay the interrogatories and, in particular, the dubious answers to those interrogatories. Those answers include multiple assertions that the experts were “recently retained” (A.A. 47-48), notwithstanding Mr. Antrim’s subsequent statements to the district court that he began consulting with at least one of the identified experts in March of 2003 (T. 18) and that he possessed the required expert information for “a long time” (T. 20). Moreover, rather than setting forth any meaningful information concerning the facts known to the experts or the opinions provided by the experts, the answers to interrogatories merely include multiple assertions that the experts are “expected to testify

as to the conclusions set forth in the Complaint, based upon the facts alleged in the Complaint.” A.A. 47-48.

Both the district court and the court of appeals were plainly troubled by the inconsistencies in the various assertions on behalf of Plaintiffs and by the apparent lack of any good faith intent on the part of Plaintiffs to produce required information. Regardless of whether Mr. Antrim and his clients were aware of the affidavit requirements set forth in Section 544.42, they were certainly aware of the interrogatories. Indeed, they responded to those interrogatories in a timely fashion, but did not disclose any information beyond the names and professional credentials of the “recently retained” experts. Based upon the interrogatories, which openly sought expert information, Plaintiffs and their attorney should have realized that they would need expert testimony to establish a professional malpractice claim against Defendants and should have quickly provided information to their experts in an effort to verify whether those experts would be able to provide the necessary testimony. Instead, on this record, it appears that Mr. Antrim may have been consciously trying to withhold information from Defendants for as long as possible. Under the circumstances, the district court did not abuse its discretion by dismissing the complaint under Section 544.42.

Contrary to Plaintiffs’ assertions, statements by the Minnesota Court of Appeals in *Paulos v. Johnson*, 502 N.W.2d 397 (Minn. Ct. App. 1993), do not require a different result. In fact, the portion of the *Paulos* opinion quoted by Plaintiffs has never been cited in any subsequent reported decision. Moreover, this Court is not bound the court of

appeals' interpretation of Minnesota law in any event. See *Anderson-Johanningmeier v. Mid-Minnesota Women's Ctr., Inc.*, 637 N.W.2d 270, 276 (Minn. 2002).

In addition, the language that Plaintiffs quote from *Paulos* is sheer speculation on the part of the court of appeals. The reason posited by the court of appeals in *Paulos* for the different deadlines in Section 544.42 is not the only possible explanation for those different deadlines. Indeed, it is just as likely that the different deadlines are the result of other considerations, such as a desire to encourage service in appropriate cases of the separate affidavit authorized by Minn. Stat. § 544.42, subd. 3(a)(2) to guarantee at least ninety days to submit the affidavit of expert review in such cases. Moreover, the language quoted by Plaintiffs is classic *dicta*, because *Paulos* did not actually involve a demand for the affidavit of expert review. 502 N.W.2d at 399. Rather, *Paulos* involved a dismissal pursuant to the separate 90-day deadline set forth in subdivision 3(b) of Section 544.42. *Id.*

In summary, the district court and the court of appeals both recognized that the interrogatories were a sufficient demand for the affidavit of expert review in the present case, since those interrogatories directed Plaintiffs to identify any expert witnesses and produce detailed information concerning the facts and opinions to which those experts would testify. To hold that that determination was an abuse of discretion would merely serve to condone Plaintiffs' apparent strategy of avoiding making the type of early expert disclosure that Section 544.42 requires. Under the circumstances, this Court should affirm the court of appeals' decision to uphold the judgment of dismissal.

B. The Court of Appeals Did Not Misunderstand the Affidavit of Expert Review Requirements.

Plaintiffs misconstrue the court of appeals' decision to be based upon a misunderstanding of Section 544.42. The court of appeals did not misunderstand Section 544.42. Rather, the court of appeals correctly recognized that the clear intent behind the affidavit of expert review requirement is to weed out frivolous lawsuits against professionals at the earliest possible stage by making potential malpractice claimants consult a qualified expert *before* bringing suit. (That is why the statute requires the affidavit of expert review to be filed "with the pleadings.") Furthermore, the court of appeals correctly recognized that, far from making any effort to comply with the statute, Plaintiffs merely stated in response to Defendants' interrogatories that they (Plaintiffs) had only "recently retained" experts and, months later, went so far as to acknowledge that they had still not provided relevant documents and information to their chosen expert.

In short, the court of appeals appropriately called attention to Plaintiffs' blatant disregard for the plain language of Section 544.42 – including the statement that the affidavit of expert review is to be served "with the pleadings." However, that does not mean that the court of appeals misunderstood the statute. On the contrary, after concluding that Defendants' interrogatories constituted a "demand" for the affidavit of expert review, the court of appeals correctly determined that Plaintiffs' answers to interrogatories failed to state that any expert review had been completed at that time. Thus, those answers to interrogatories could not possibly satisfy the affidavit of expert review requirement.

II. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' LAWSUIT BECAUSE PLAINTIFFS FAILED TO TIMELY SERVE THE SEPARATE AFFIDAVIT REQUIRED BY MINN. STAT. § 544.42, SUBD. 4.

In addition to requiring an affidavit of expert review, Section 544.42 also requires that the plaintiff in a professional malpractice action provide the defendant with a second affidavit. Minn. Stat. § 544.42, subs. 2(2) and 4. This second affidavit must be signed by the plaintiff's attorney and must disclose the following information: (1) the identity of any expert whom the attorney expects to call as a witness at trial, (2) the substance of the facts and opinions upon which the expert is expected to testify, and (3) a summary of the grounds for those opinions. *Id.* The affidavit must be served within 180 days of filing suit. Minn. Stat. § 544.42, subd. 2(2). Alternatively, interrogatory answers that contain the required information may be substituted for the required affidavit, provided the interrogatory answers are served within the 180-day period and are signed by the plaintiff's attorney. Minn. Stat. § 544.42, subd. 4.

As with the affidavit of expert review, failure to serve the second affidavit (or to provide answers to interrogatories that comply with the statute) "results, upon motion, in mandatory dismissal of each action with prejudice as to which expert testimony is necessary to establish a prima facie case." Minn. Stat. § 544.42, subd. 6(c). In contrast to the rules governing the service of the affidavit of expert review, however, the rules governing the second affidavit do not provide for a 60-day safe harbor. *House*, 105 F. Supp. 2d at 1051. Rather, a court is obligated to dismiss the action with prejudice when a malpractice plaintiff fails to file the second affidavit in a timely fashion. *Id.* at 1055 (applying Minn. Stat. § 544.42, subd. 6(c)).

In this matter, Plaintiffs did not even arguably attempt to serve the second affidavit required by Section 544.42 until Defendants had served their motion to dismiss more than 180 days after the commencement of the lawsuit. Indeed, Plaintiffs waited more than three weeks after Defendants' motion to dismiss was served before serving the Antrim Affidavit. In similar situations, courts have strictly enforced the 180-day deadline contained in Section 544.42. *See Middle River-Snake River*, 692 N.W.2d at 90-91 (affirming dismissal where affidavit was served three days late); *House*, 105 F. Supp. 2d at 1050-55 (dismissing suit where affidavit was served five weeks late). Accordingly, the district court did not abuse its discretion when dismissed Plaintiffs' complaint in this action on the basis of Plaintiffs' failure to timely comply with the second affidavit requirement set forth in Section 544.42.

A. The District Court Did Not Abuse Its Discretion By Concluding that Plaintiffs' Answers to Interrogatories Cannot Reasonably Be Viewed As An Attempt to Satisfy the Second Affidavit Requirement.

Plaintiffs no longer even try to claim that the Antrim Affidavit satisfies the requirements of 544.42, subd. 2(2) -- even though the affidavit expressly refers to that subdivision. This is probably a wise decision by Plaintiffs. The Antrim Affidavit is not only indisputably untimely; it also fails to articulate any specific professional standards that Plaintiffs are claiming Defendants breached and does not reflect any actual evaluation of materials by Plaintiffs' listed experts.

Rather than relying on the Antrim Affidavit, Plaintiffs now argue that their answers to interrogatories were intended to comply with the second affidavit requirement. Although answers to interrogatories may suffice to meet that requirement, the district

court specifically found that Plaintiffs' answers did not resemble an attempt to do so. A.A. 9. The district court correctly recognized that "Plaintiffs' Answers to Interrogatories completely fail to respond to requisite issues pursuant to the statutes" and could not be construed as an attempt to comply with the statute. A.A. 10. The district court's conclusions in this regard do not represent an abuse of discretion and should be affirmed.

The fact is, there is no basis for Plaintiffs' belated suggestion that they were attempting to comply with the second affidavit requirement when they served their largely non-responsive answers to Defendants' expert witness interrogatories. Indeed, during the motion hearing in the district court, Mr. Antrim expressly asserted that he "just plain didn't know about this statute until [Defendants' counsel] brought it to [his] attention." T. 14. If Mr. Antrim did not know about the statute at the time that he was preparing the answers to interrogatories, he could hardly have been trying to comply with the second affidavit requirement when he prepared those answers.

On the other hand, if Mr. Antrim did know about the statute and was actually trying to comply with the second affidavit requirement, one can only presume that he would have provided more information than is contained in the answers to interrogatories and, at a minimum, would have at least provided materials to the experts for them to review. However, the answers to interrogatories, along with the affidavit that Mr. Antrim later filed in opposition to the motion to dismiss, plainly indicate that the experts had not yet reviewed any materials other than the complaint and had not formed any opinions. A.A. 39-40 ("Both experts *are expected* to testify as to the conclusions set forth in the

Complaint, based upon the facts alleged in the Complaint”) and A.A. 102-105 (expert “*will have* been provided financials, schedules and other documents . . .,” “*will have* read various pleadings . . .,” “*will have* researched professional ethical, accounting, and auditing standards . . .,” and “*will consider*” certain “issues”) (emphasis added).

Based upon the foregoing facts, the district court did not abuse its discretion when it concluded that the answers to interrogatories could not be construed as an attempt to comply with the second affidavit requirement.

B. The District Court Did Not Abuse Its Discretion By Refusing to Give Plaintiffs An Opportunity to Cure the Obvious (and Intentional) Deficiencies of the Answers to Interrogatories.

1. Before an Opportunity to Cure is Warranted, a Malpractice Plaintiff Should be Required to Make a Good Faith Attempt to Comply with Each Aspect of the Second Affidavit Requirement.

In connection with the present appeal, the Court has asked the parties to address the appropriate standard for determining whether a plaintiff’s efforts to comply with the second affidavit requirement under Minn. Stat. § 544.42 are sufficient to entitle the plaintiff to notice of deficiencies and an opportunity to cure pursuant to subparagraph (c) of subdivision 6 of that statute. As set forth below, the Court should adopt a standard that requires a malpractice plaintiff to make a “meaningful” good faith attempt to address each of the separate elements of the second affidavit requirement – namely, (1) the identity of the expert(s), (2) an explanation of the applicable standard of care and the manner in which the defendant deviated from that standard, and (3) an outline of the claimed chain of causation.

Plaintiffs mistakenly rely upon a dubious statement from the *Sorenson* case for the proposition that the most significant information to be provided in the second affidavit is the *identity* of the claimants' testifying expert. *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 191 (Minn. 1990). For numerous reasons, this Court should reject Plaintiffs' invitation to rely upon their selective quotation from *Sorenson*.

First, the language from *Sorenson* on which Plaintiffs rely was not the basis for the decision in that case. On the contrary, the Court in *Sorenson* went on to expressly criticize the "empty conclusions" found in the affidavit in that case. *Id.* at 192-93. Only what the Court described as "the unique procedural circumstances of the case" – which gave rise to a finding of *estoppel* – caused the Court in *Sorenson* to refrain from reinstating the dismissal that the district court had granted. *Id.* at 193.⁶

Second, the specific statement from *Sorenson* on which Plaintiffs rely is based, at least in part, upon a mistaken assumption about the language of the statute at issue in that case (Minn. Stat. § 145.682). Specifically, the Court in *Sorenson* relies upon one of the "headings" found in the printed version of the statute. 457 N.W.2d at 191 n.4 ("This

⁶ There is no basis for an estoppel determination in the present case. Indeed, Plaintiffs have not attempted to argue that Defendants should be estopped from relying upon the 180-day deadline set forth in Minn. Stat. § 544.42 (although Plaintiffs call attention in their Statement of Facts to the absence of a motion to compel more detailed answers to interrogatories). Presumably, Plaintiffs recognize that this Court has refused to extend the estoppel-based conclusion in *Sorenson* to circumstances like the present case where a defendant takes no affirmative step on which the plaintiff might rely. See *Stroud v. Hennepin County Med. Ctr.*, 556 N.W.2d 552, 556-57 (Minn. 1996) ("The fact that a party may rely on the opposing party's withdrawal of a motion to compel answers to interrogatories as signifying '[the party's] acceptance of [the] answers in satisfaction of the requirements of section 145.682,' does not mean that a party can rely on the opposing party's failure to bring a motion to compel as signifying the same thing where there is no obligation on the opposing party to bring such a motion.").

conclusion is supported in part by the fact that subdivision 4 is entitled ‘Identification of Experts to be Called.’”). The problem is that such headings “are *not part of the statute* and thus *do not determine its scope or meaning.*” *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 303 n.23 (Minn. 2000) (emphasis added) (citing Minn. Stat. § 645.49, which provides that “[t]he headnotes printed in boldface type before sections and subdivisions in editions of Minnesota Statutes are mere catchwords to indicate the contents of the section or subdivision and are not part of the statute.”).⁷

Third, in quoting from an earlier part of *Sorenson*, Plaintiffs completely ignore the following express directive found at the end of that decision:

In future cases, plaintiffs will be expected to set forth by affidavit or answers to interrogatories, *specific details* concerning their experts’ expected testimony, *including the applicable standard of care, the acts or omissions that plaintiffs allege violated the standard of care and an outline of the chain of causation* that allegedly resulted in damage to them.

457 N.W.2d at 193 (emphasis added). The foregoing statement reveals that this Court never intended to suggest that merely identifying an expert by name could substantially fulfill the statutory expert disclosure obligation under the sister statute to Minn. Stat. § 544.42.

Fourth, and finally, the notion that disclosing the identity of the expert witness is more important than disclosing the substance of the expert testimony is actually

⁷ The same is true of the identically-worded heading that the Revisor of Statutes affixed to subdivision 4 of Section 544.42. It is not part of the statute and none of the actual parts of the statute use the word “identification” when referring to the affidavit required by that subdivision. For that reason, it is a bit of a misnomer to refer to that affidavit as the “affidavit of identification.”

contradicted by the language of the statute itself. Subparagraph b of subdivision 4 of the statute expressly authorizes “calling additional expert witnesses or substituting other expert witnesses.” Minn. Stat. § 544.42, subd. 4(b). Since the “identity” of the expert can be changed, it is anomalous to suggest that disclosure of the expert’s identity (as opposed to disclosure of the substance of the expert’s opinions) is the most important aspect of Section 544.42.

In summary, for each of the foregoing reasons, the *Sorenson* decision does not support Plaintiffs’ contention that a plaintiff in a malpractice action should be entitled to an opportunity to cure when he or she merely *identifies* an expert by name and background and provides none of the other required information. Furthermore, adopting a rule such as the one proposed by Plaintiffs would make a mockery of the statutory requirements and would render the intentionally short deadlines largely meaningless. Clever plaintiffs’ attorneys intent upon withholding information from defendants for as long as possible would quickly take advantage of such a rule. Those attorneys will merely name an expert and promise to obtain an opinion later. Indeed, it is human nature to put off deadlines for as long as possible, so it can be assumed that if all that a plaintiff’s attorney need provide to avoid dismissal is the name of the expert, that is all that the plaintiff’s attorney is likely to provide (even if he or she is not trying to obtain any tactical advantage through delay).

So what should the standard be? Ironically, one of the best suggestions can be found in a different portion of the *Sorenson* decision. At the end of that decision, this Court noted that there should be a result short of mandatory dismissal in “borderline

cases,” where the plaintiff has largely complied with the statutory requirements by “identify[ing] the experts who will testify and giv[ing] some meaningful disclosure of what the testimony will be.” 457 N.W.2d at 193. It is reasonable to conclude that that statement provides the basis for a reasonable standard for triggering the “cure” provisions that were later included in Minn. Stat. § 145.682 and Minn. Stat. § 544.42. Indeed, it is reasonable to conclude that this often-cited statement from *Sorenson* was the genesis for those “cure” provisions.

Looking at the issue another way, while it is obvious that the “cure” provision was intended to avoid mandatory dismissal in situations where a plaintiff tried to fully comply with the statute and, through inadvertence, simply fell short of full compliance; it is equally obvious that the “cure” provision was *not* intended to protect a plaintiff who failed to make any effort to comply with one or more of the statutory disclosure requirements. In the latter situation, the plaintiff would be fully aware of the deficiencies in the affidavit or interrogatory answers and would not need any “notice of deficiencies” from the court or the defendant. Since the plaintiff could have and should have eliminated such known and intentional deficiencies before serving the affidavit or interrogatory answers, the plaintiff cannot reasonably use the deficiencies as a basis for invoking the 60-day “cure” provision.

2. Plaintiffs Did Not Make a Good Faith Attempt to Comply with the Various Separate Parts of the Second Affidavit Requirement.

Regardless of what standard this Court may adopt for use in other cases, the Court should not treat Plaintiffs’ answers to interrogatories in this case as a sufficient attempt to

comply with the second affidavit requirement of Section 544.42 to warrant giving Plaintiffs an opportunity to cure. Plaintiffs did nothing more than provide the names of two individuals – one who is not even expected to testify as an expert and one who had not yet reviewed any of the information that would be essential to forming a meaningful expert opinion.

At the time that the answers to interrogatories were served – indeed, for several months thereafter – Plaintiffs’ testifying expert had not yet received information on which his opinion was to be based and, accordingly, had not yet formed a meaningful opinion. Mr. Antrim has acknowledged this fact in his affidavit and during the motion hearing. A.A. 112-14; T. 20. In addition, the answers to interrogatories themselves state that the experts were only recently retained (apparently referring to Mr. Legier, since Plaintiffs’ counsel claims that he has been consulting with Mr. Tautges since March of 2003).⁸ A.A. 47-48. These facts plainly reveal a lack of diligence on the part of Plaintiffs and their attorney and should not be treated as a basis for giving Plaintiffs an opportunity to cure.

In short, it is apparent that, when the answers to interrogatories were served, Plaintiffs’ counsel had had nothing more than preliminary discussions with Mr. Legier – the only one of the two experts named in the answers to interrogatories who is willing to

⁸ Mr. Antrim has also admitted that Mr. Tautges is not willing to testify as Plaintiffs’ expert and that that is what necessitated the hiring of Mr. Legier. T. 18-19. Thus, the identification of Mr. Tautges cannot possibly satisfy the second affidavit requirement of Section 544.42, since that requirement is expressly directed at identification of each of the experts who the plaintiff “expects to call as an expert witness at trial.” Minn. Stat. § 544.42, subd. 4(a).

serve as an expert witness at trial. The answers to interrogatories fail to include any “meaningful disclosure of what the [expert] testimony will be,” because Mr. Legier had not yet provided any opinions at the time that the answers to interrogatories were prepared. Indeed, he could not have provided any meaningful opinions at that time, since – as noted above – he had not yet reviewed the necessary background information and had not yet considered the potentially applicable professional standards. A.A. 112-14.

That a plaintiff has hired an expert means nothing. Anyone can hire an expert. Unless the hired expert is given the materials necessary to form an opinion prior to the service of the affidavit or the answers to interrogatories, the disclosures are not worth the paper on which they are printed and the statutory purpose of eliminating frivolous lawsuits against professionals at an early stage is frustrated. Here, at the time that the answers to interrogatories were served, Plaintiffs plainly knew that their answers to interrogatories did not include anything beyond the identity of the individual who they intended to use as an expert witness. The absence of any of the other statutorily-required information was open, obvious and intentional. Accordingly, there is no reason to give Plaintiffs an opportunity to “cure” under the facts of this case.

CONCLUSION

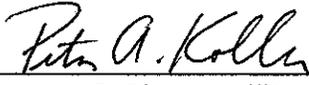
As set forth above, the district court did not abuse its discretion when it dismissed Plaintiffs’ complaint for failure to serve either of the affidavits required by Minn. Stat § 544.42. Accordingly, Defendants Copeland Buhl and Lee Harren respectfully request that this Court (a) affirm that part of the decision of the court of appeals that upheld the judgment of dismissal on the basis of Plaintiffs’ failure to comply with the first affidavit

requirement and (b) modify the decision of the court of appeals by separately upholding the judgment of dismissal on the basis of Plaintiffs' failure to comply with the second affidavit requirement.

Respectfully submitted,

MOSS & BARNETT
A Professional Association

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, in Times New Roman font, 13 point, and according to the word processing system's word count, is no more than 7517 words, exclusive of the cover page, table of contents, table of authorities, signature block and appendix, and complies with the typeface requirements of Minn. R. Civ. App. P. 132.01.

Dated: May 1, 2006.

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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) (with amendments effective July 1, 2007).