

NO. A10-478

State of Minnesota
In Supreme Court

Elaine M. Wesely,

Appellant,

vs.

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

Respondents.

**BRIEF OF AMICI CURIAE MINNESOTA HOSPITAL
ASSOCIATION AND MMIC GROUP / MMIC INSURANCE, INC.**

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INTERESTS OF AMICI MHA AND MMIC

The Minnesota Hospital Association (MHA) represents the interests of hospitals in the State of Minnesota, including 146 community-based hospitals and 16 health systems.¹ MHA assists Minnesota hospitals in carrying out their responsibilities to provide quality health care services to their communities; promote universal health care coverage, access, and value; and coordinate development of innovative health care delivery systems. MHA serves its members and the State of Minnesota as a trusted leader in health care policy and as a valued source for health care information and knowledge.

MMIC Group (MMIC) provides medical liability insurance and a range of information technology products and services to independent physicians, clinics, and health systems in the Upper Midwest. MMIC began in 1980 when Minnesota physicians concerned about rising premiums and the shrinking availability of medical professional liability insurance joined with American Health Systems of California to create an insurer that later became MMIC. Today, MMIC provides medical malpractice insurance, risk management, and claim service to more than 12,000 physicians, clinics, and health systems in the Upper Midwest. MMIC partners with physicians to achieve its mission of protecting and promoting good medicine by operating with the highest ethical standards, delivering exceptional customer service, and providing a supportive, trusting environment that enables employees to excel.

¹ No part of this brief was authored by counsel for a party. No person or entity, other than MHA and MMIC and their counsel, made any monetary contribution to the preparation or submission of this brief.

ARGUMENT

Amici curiae MHA and MMIC have no interest whatsoever in the specific dispute between the parties before this Court. Rather, their interests are in the broader issues of law and policy that this Court must decide to govern future cases. Accordingly, in this Brief, MHA and MMIC endeavor to represent and communicate the Minnesota health-care community's broad-based concerns surrounding the important considerations raised by this case.

This appeal requires the Court to again balance the health-care malpractice plaintiff's burden of establishing a prima facie case against health-care providers' interests in having litigation involved expeditiously. Inherent in the balancing of interests is the legislature's intent that meritorious cases go forward while cases lacking merit do not, thereby ensuring litigation, health-insurance, and health-care costs are controlled. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 725 (Minn. 2005).

The legislature demonstrated this intent by requiring plaintiffs to serve an expert-disclosure affidavit from a qualified expert within 180 days of commencing the lawsuit while effectively providing another 45 days for plaintiffs to cure deficiencies. By asserting a plaintiff can cure "deficiencies" in an expert's qualifications by serving an "amended" affidavit from a *new expert* within the 45-day period, Appellant and amicus curiae Minnesota Association for Justice ("MAJ") are asking the Court to write language into the statute. This would permit if not encourage plaintiffs to bring non-meritorious cases by relieving them of their burden to make sure in the half-year after suit is commenced their expert is qualified. Should the Court adopt Appellant and MAJ's broad

reading of the word “amended,” the holding would conflict with authority stating that an affidavit is amended only by substituting words, not affiants. Finally, if the Court finds it necessary to confront Appellant’s suggestion that expert-disclosure affidavits are averments not of experts but rather lawyers or *pro se* plaintiffs, MHA and MMIC suggest the Court reaffirm precedent to the contrary.

I. APPELLANT AND MAJ’S PROFFERED INTERPRETATION WOULD DRIVE UP LITIGATION, INSURANCE, AND HEALTH CARE COSTS

All agree Minn. Stat. § 145.682 aims to forestall “frivolous” medical-malpractice suits, in part by requiring plaintiffs to provide an expert-disclosure affidavit from a qualified expert within 180 days. From MHA and MMIC’s perspective, any holding that a plaintiff may “amend” this affidavit by substituting a new affidavit from a new expert after the 180-day period would encourage frivolous litigation. Plaintiffs likely would file borderline cases while adopting the “placeholder” strategy Respondent foreshadows. (Resp. Br. at 12.) This would effectively relieve plaintiffs of any meaningful incentive to make sure their experts are qualified and their claims properly screened before serving the complaint. Such a result would result in more frivolous litigation.

Importantly, however, the public policy behind section 145.682 is not limited to preventing frivolous litigation. As this Court observed in 1990, Minn. Stat. § 145.682 “was passed in 1986 as part of an overall attempt at tort reform in Minnesota.” *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 190 (Minn. 1990). And in this Court’s most-recent examination of the statute, the Court explained how section 145.682 fits within nationwide efforts “to reduce the costs associated with malpractice litigation as a

means to increase the availability of reasonably priced medical insurance.” *Broehm*, 690 N.W.2d at 725.

As soon as a plaintiff commences a health-care malpractice action, providers and insurers must promptly retain defense experts at considerable expense to review the standard of care and causation issues in the case. Health-care malpractice litigation typically involves complex matters and standards of care outside jurors’ common knowledge, which is why this Court held that only in “exceptional cases” is expert testimony not necessary. *Sorenson*, 457 N.W.2d at 191.

Knowledge of the applicable standards of care falls outside the common knowledge not only of jurors, but also of district courts and, quite frankly, defense counsel. Likewise, a review of the critical causal relationship between the alleged malpractice and alleged harm is essential. Therefore, even though Minn. Stat. § 145.682 does not *require* defendants to serve rebuttal affidavits in support of a dismissal motion, defendants still must retain experts, not only for trial, but to inform and support the motion to dismiss. Health-care defendants simply cannot wait to prepare a defense while a plaintiff continues to search for entirely new experts outside the 180-day mandate.

So if the Court holds a medical malpractice plaintiff may “amend” an affidavit after the 180 days have run by starting all over again with an entirely new affidavit from an entirely new expert, defendants will have to retain entirely new experts themselves, thereby driving up “the costs associated with malpractice litigation.” *Broehm*, 690 N.W.2d at 725. Those costs, in turn, will be passed along to patients and insureds—in

direct contravention of the public policies underlying Minn. Stat. § 145.682 that this Court identified in *Broehm*.

The costs of litigating against brand-new affidavits from brand-new experts will be substantial. Once a plaintiff submits the new expert's affidavit, the health-care defendant will have to challenge the qualifications and substantive testimony of the second affiant. That, in turn, would result in a second notification of deficiencies, and a second notice of motion for another hearing, another 45 days out. Minn. Stat. § 145.682, subd. 6. As Respondent demonstrates (Resp. Br. 12), this would effectively extend the deadline for providing a qualified expert's affidavit testimony from the required 180 days to 225 days.

Most troublingly, that scenario could play out yet again, a third, fourth, or fiftieth time, in direct contravention of the legislature's intent that medical malpractice litigation be resolved expeditiously. In this appeal, the court of appeals identified this precise problem, observing that permitting Appellant to substitute experts via "amended" affidavit would allow the suit to continue "even though 180 days after beginning suit, appellant had not obtained a qualified expert's opinion that malpractice occurred." *Wesely v. Flor*, No. A10-478 (Minn. Ct. App. 2010), slip op. 7-8.

This would also contravene the interests of the health-care provider to have the malpractice allegations resolved expeditiously. Taken to an extreme, the process surrounding the plaintiff's disclosure, defendant's motion, and new affiant could go on interminably until the plaintiff finally gets it right—a far cry from the requirement that a

plaintiff review the case with a qualified expert on the standard of care and causation before commencing the action. *See* Minn. Stat. § 145.682, subd. 3.

But the very purpose of Minn. Stat. § 145.682 and its 180-day window is the legislature's recognition that health care providers need to focus on providing care, not on litigation. The court of appeals' application of section 145.682 is a prudent, cost-effective, and logical interpretation of a statute that leaves room for meritorious cases but also recognizes health care providers have duties not only to individual patients but to society as a whole.

II. AN AFFIDAVIT "AMENDMENT" IS NOT SYNONYMOUS WITH A "SUBSTITUTION"

At bottom, the issue in this appeal is what the legislature intended by authorizing health-care malpractice plaintiffs to "amend" deficient affidavits. As Respondent has explained, the Black's Law Dictionary definition of "amend," to which MAJ refers in its Brief, defines amendments as involving "striking out, inserting, or substituting *words*" and not affiants. (Resp. Br. 13.)

The definition references statutes as being amended. Along that line, in the statutory context this Court distinguishes between amendments and repealers in a way that furthers the conclusion that expert-disclosure affidavits are not amended by substitution of experts. *See, e.g., In re 2010 Gubernatorial Election*, 793 N.W.2d 256, 260 (Minn. 2010) (explaining election statutes "have been repealed *or* amended"); *In re Hubbard*, 778 N.W.2d 313, 323 (Minn. 2010) (explaining statute had been "repealed in part *and* amended [in] 2005"); *Stewart Title Guar. Co. v. Comm'r of Revenue*, 757

N.W.2d 874, 878 (Minn. 2008) (explaining statute “was repealed in 2000 . . . and reenacted in *amended* form”) (emphases added). Accordingly, MAJ’s citation to 1952 authority from Tennessee would appear to carry little weight. (See MAJ Br. at 4-5 (citing *Block Coal & Coke Corp. v. Case*, 246 S.W.2d 52, 53 (Tenn. 1952) (holding “amend” and “repeal and substitution” can be synonymous).)

MAJ suggests an annotation from the *American Jurisprudence* treatise might help the Court resolve the statutory interpretation issue here. (MAJ Br. at 5.) The annotation states: “Affidavits are as amendable as other pleadings, and an amendment by substitution is as permissible as an amendment by striking from or adding to the contents of the paper which it is sought to amend.” 3 Am.Jur.2d Affidavits § 17. But the treatise cites only Georgia law for support, *see id.* nn.1-4, including *Putney Memorial Hospital v. Skipper*, 510 S.E.2d 101 (Ga. Ct. App. 1998), which MAJ also cites. As Respondent explains, the case has no precedential value in Minnesota. (Resp. Br. at 11 n.6.)

Further, even if the Court were to consider *Skipper* for possible persuasive authority, it would find the case involved only *one expert* and is readily distinguishable on its facts.² The decision is distinguishable on the law as well. In Georgia, the rules of civil procedure state “[a]ll affidavits ... that are the foundation of legal proceedings ...

² As the dissent in *Skipper* explains, the dispute arose because the expert’s initial affidavit was “wholly invalid, because the notary was not present when [the expert] signed it.” *Id.* at 105 (Smith & Andrews, JJ., dissenting). A prior Georgia Court of Appeals decision in the case fleshes out the details of how there came to be two affidavits from the same expert. *See Phoebe Putney Memorial Hosp. v. Skipper*, 487 S.E.2d 1, 2 (Ga. Ct. App. 1997), *cert. granted* (Ga. Jan. 8, 1998) (remanding to court of appeals for reconsideration in light of recent authority).

shall be amendable to the same extent as ordinary pleadings and with only the restrictions, limitations, and consequences of ordinary pleadings.” *Skipper*, 510 S.E.2d at 103 (citing Ga. Code Ann. § 9-10-130). The Minnesota Rules of Civil Procedure do not define affidavits as amendable pleadings, or pleadings at all. Minn. R. Civ. P. 7.01.

Further, Georgia’s version of the expert-disclosure statute, Ga. Code Ann. § 9-11-9.1(e), states “the plaintiff may cure the alleged defect by amendment pursuant to Code Section 9-11-15[.]” And section 9-11-15, like Rule 15 of the Minnesota Rules of Civil Procedure, plainly differentiates between amendment and supplementation both in its title (“Amended *and* Supplemental Pleadings”) and body. *Compare* Ga. Code Ann. § 9-11-15(a) (describing amended pleadings) *with* Ga. Code Ann. § 9-11-15(d) (describing supplemental pleadings); *accord* Minn. R. Civ. P. 15.01 & 15.04. MHA and MMIC believe that if the Minnesota Legislature had intended for the “amended affidavit” language to be applied broadly in Minn. Stat. § 145.682, subd. 6, as it is in Georgia, the legislature would have said so, as the Georgia legislature did.

This Court’s goal when interpreting and applying Minn. Stat. § 145.682 is to not “undermine the legislative aim of expert review and disclosure.” *Broehm*, 690 N.W.2d at 726. “[I]t is not for the courts to read into a clear statutory scheme something that plainly is not there.” *Anderson v. Rengachary*, 608 N.W.2d 843, 848 (Minn. 2000). From MHA and MMIC’s perspective, by asking the Court to hold that a medical malpractice plaintiff may “amend” an affidavit by submitting a new one from a new expert, Appellant is asking the Court to read something into the section 145.682 statutory scheme that plainly

is not there. Any effective extension of the 180-day deadline is for the legislature, not the Court.

III. APPELLANT'S CONTENTION THAT THE EXPERT-DISCLOSURE AFFIDAVIT IS THAT OF THE ATTORNEYS OR PARTIES IS INCONSISTENT WITH MINNESOTA LAW

As Appellant astutely observes, Minn. Stat. § 145.682 does not specifically state that by signing an expert-disclosure affidavit or answers to interrogatories, it is the expert who has provided sworn testimony. MHA and MMIC agree the statute could be clearer in this respect. But amici take pause at Appellant's suggestion that Minn. Stat. § 145.682 should or could be read as characterizing the expert-disclosure affidavit not as an expert affidavits but rather as an *attorney's* affidavit—or, in this case, a *pro se plaintiff's* affidavit. (Appellant's Br. at 10-11.)

Appellant's position appears in direct contravention of this Court's description of affidavits under Minn. Stat. § 145.682 as belonging to experts, not litigants or their counsel. *See, e.g., Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 430-31 (Minn. 2002) (referring to "Dr. Perloff's first affidavit" and "Dr. Perloff's second affidavit" while holding "both of Dr. Perloff's affidavits fail to provide any meaningful disclosure ..."). As Respondent also demonstrates, this description accurately shows that experts, not attorneys, provide testimony at trial.

The Minnesota Legislature reflected this reality in the health care malpractice context by specifically explaining why plaintiffs or their lawyers are required to sign affidavits and answers to interrogatories. As the legislature stated in Minn. Stat. § 145.682, subd. 7, the signatures do not denote testimony but rather constitute the

plaintiff's and/or the lawyer's certification that the expert's testimony is of sufficient veracity:

The signature of the plaintiff or the plaintiff's attorney constitutes a certification that the person has read the affidavit or answers to interrogatories, and that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry, it is true, accurate, and made in good faith. A certification made in violation of this subdivision subjects the attorney or plaintiff responsible for such conduct to reasonable attorney's fees, costs, and disbursements.

MHA and MMIC believe that if the legislature had intended to establish a *sui generis* rule for health care malpractice litigation, it would have explicitly done so. It did not, but rather it enacted subdivision 7, and "it is not for the courts to read into a clear statutory scheme something that plainly is not there." *Anderson*, 608 N.W.2d at 848.

If the Court were to disregard subdivision 7 as well as established precedent characterizing expert-disclosure affidavits as belonging to experts, it would change the complexion not only of health-care malpractice litigation but of litigation in general. Nothing would prevent litigants from supporting or opposing summary judgment by submitting an attorney's affidavit attesting to what a trial witness, expert or otherwise, would say. But the Rules of Civil Procedure generally require affidavit testimony from witnesses themselves. *See* Minn. R. Civ. P. 56.05 (requiring affidavits containing "facts as would be admissible in evidence").

Accordingly, if the Court finds need to confront Appellant's suggestion that Minn. Stat. § 145.682 expert-disclosure affidavits are actually affidavits from plaintiffs or their counsel, MHA and MMIC respectfully suggest the Court reaffirm that the affidavits belong to the experts.

CONCLUSION

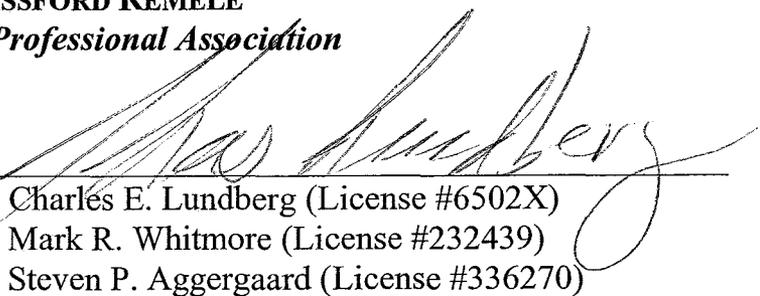
Implicit in Minn. Stat. § 145.682's enactment and amendments is the legislature's goal of ensuring meritorious cases are litigated while non-meritorious cases do not funnel resources from health-care providers or their insurers. This, in turn, helps keep the costs of health care and health-care insurance as low as possible. These overarching goals, rooted in both legislative intent and important public policies, support the conclusion that an expert-disclosure affidavit cannot be "amended" by substituting a new affidavit from a new expert within the Minn. Stat. § 145.682, subd. 6(c) 45-day period.

Respectfully submitted,

BASSFORD REMELE
A Professional Association

Dated: April 25, 2011

By

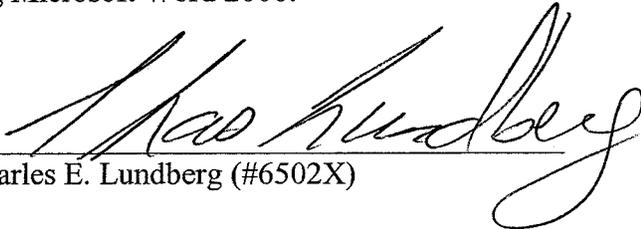


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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to Minn. R. Civ. App. P. 132.01, for a brief produced using the following font: Proportional serif font, 13 point or larger. The length of this brief is 2,760 words. This brief was prepared using Microsoft Word 2000.

By 
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