

NO. A10-478

State of Minnesota
In Supreme Court

Elaine M. Wesely,

Appellant,

v.

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

Appellant Elaine M. Wesely's
Reply Brief

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Respondents make two overarching arguments.

First, they assert that an alleged expert qualification deficiency cannot under any circumstances be corrected. Either the expert disclosed within the applicable 180-day period is determined to be qualified, or the case is dismissed. A plaintiff is given no opportunity to correct an erroneous belief about the qualification of an expert.

Second, Respondents assert that only minor technical errors in expert disclosures can be corrected during the safe-harbor period. Serious deficiencies cannot be corrected.

Neither of these positions is consistent with the statute or Minnesota case law.

I. Respondents' position that expert qualification is a deficiency that cannot be corrected runs contrary to the language of Minn. Stat. § 145.682.

Respondents' first argument is that expert qualification is a deficiency that cannot under any circumstances be corrected. Respondents point to nothing in the language of the statute that supports this argument. Such language is nowhere to be found.

The statute's language is plain. A defendant can bring a motion to dismiss under § 145.682. The motion must identify "the claimed deficiencies" in the plaintiff's expert disclosure. The plaintiff has forty-five days to "correct the claimed deficiencies." The meaning of this is plain: if a defendant identifies a deficiency in his § 145.682 motion, the plaintiff has forty-five days to correct it.

Under this Court's ruling in *Teffeteller v. University of Minnesota*, 645 N.W.2d 420 (Minn. 2002), expert qualification is one of the of the deficiencies that can be claimed in a § 145.682 motion. Respondents do not dispute this. On the contrary, Respondents readily admit that their § 145.682 motion cited "several deficiencies in Dr. Vocal's affidavit, ***including the fact that he is not a qualified dental expert.***" Resp. Br. at 4 (emphasis added).

Respondents chose to bring a motion to dismiss under § 145.682. Respondents chose to identify Dr. Vocal's alleged lack of qualification as one of the deficiencies in Ms. Wesely's expert disclosure. Having chosen to take advantage of the benefits § 145.682 offers defendants, Respondents must also accept the protection it offers plaintiffs. Respondents' position is that a defendant can choose to bring a § 145.682 motion, choose to explicitly identify certain deficiencies, and then deny plaintiff the opportunity to correct one of them. This position is directly contrary to the plain language of the statute.

II. Respondents' reliance on *Brown-Wilbert* for the notion that Appellant did not provide a meaningful disclosure within 180 days is misplaced.

Respondents do not point to anything in the statute that says expert qualification is an incurable deficiency, and do not even attempt to address the fact that they chose to claim Dr. Vocal's supposed lack of qualification as a § 145.682 deficiency. Instead, they claim that *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209 (Minn. 2007) controls the issue, and use it to argue that Ms. Wesely failed to satisfy

the requirements of § 145.682 because Dr. Vocal's disclosure did not provide "meaningful information" on the issues for which expert testimony will be required at trial. Resp. Br. at 10. This argument is incorrect both as a matter of law and as a matter of fact.

A. Respondents have previously argued that analysis of the statute at issue in *Brown-Wilbert* does not transfer to this case.

Respondents draw much of their argument from *Brown-Wilbert*, a case that arose under Minn. Stat. § 544.42. This Court stressed there the "differences between sections 544.42 and 145.682 that limit the usefulness" of analogies between the two. *Id.*, 732 N.W.2d at 217. Nevertheless, Respondents have argued that *Brown-Wilbert* "provides the most apposite authority on the requirements for a plaintiff to trigger the safe-harbor provision." Resp. Br. at 8.

It is somewhat surprising that Respondents would now look to an interpretation of Minn. Stat. § 544.42 as controlling, because they argued exactly the opposite at the Court of Appeals. Respondents devoted an entire subsection of their Court of Appeals brief to the argument that "[t]he safe-harbor provision in Minn. Stat. § 544.42, Subd. 6 – containing different language than the safe-harbor provision in Section 145.682, Subd. 6 – does not control the result in this case." Resp. Court of Appeals Br. at 20. Respondents went on to argue that, while there are similarities between the two, "the statutes are not identical." *Id.* Respondents also pointed out that "the safe-harbor provisions in the two subdivision 6's contain altogether different language," and clarified

that “the plain language of the two safe-harbor provisions are entirely different.” *Id.* at 20-21. Most strikingly, Respondents argued that “analysis of Section 544.42, Subd. 6(c) cannot transfer to interpret Section 145.682, Subd. 6(c) *because the plain language of the two safe-harbor provisions are entirely different.*” *Id.* at 22-23 (emphasis added).

Respondents argued vehemently in the courts below against § 544.42’s applicability to this case, no doubt to avoid the Court of Appeals’ decision in *Noske v. Friedberg*, 713 N.W.2d 866 (Minn. Ct. App. 2006). In *Noske*, the Court of Appeals allowed a plaintiff in a legal malpractice case to substitute a qualified expert for an unqualified one in order to cure a deficiency. *Id.* at 872. The defendant there made the exact argument being advanced by Respondents here: that “the safe-harbor provision is intended to apply to inadvertent drafting errors, not to a party’s failure to submit an opinion by a qualified expert.” *Id.* The Court of Appeals rejected that argument, concluding that the statute “does not explicitly prohibit a party from substituting one expert with another as long as the other provisions of the statute are satisfied.” *Id.* The plaintiff had complied with the other requirements, so substituting a qualified expert for an unqualified one was allowed. *Id.*

Though there are differences between the safe-harbor provisions involved in § 544.42 and § 145.682, the general principle involved in *Noske* is directly applicable to this case: if a plaintiff provides an expert affidavit that meets the statutory requirements, but the affidavit is deficient because the expert is unqualified, the safe-harbor provision allows the plaintiff to correct that deficiency by substituting a qualified expert. Respondents unquestionably recognized this, which is why they

argued below that the safe-harbor provision in § 544.42 is inapplicable to this case. They now argue precisely the opposite.

B. Ms. Wesely complied with this Court’s mandate that a plaintiff provide a “meaningful disclosure” within 180 days of filing suit.

If this Court concludes that there are enough similarities between the two statutes to make *Brown-Wilbert* applicable in a general sense, it is important that its holding be properly characterized. *Brown-Wilbert* stands for the proposition that a § 544.42 affidavit does not satisfy the 180-day requirement if it has deficiencies which “are so great that it provides no significant information.” *Id.* at 217-18.¹ More specifically, an affidavit of expert disclosure must:

provide *some meaningful information*, beyond conclusory statements, that (1) identifies each person the attorney expects to call as an expert; (2) describes the expert's opinion on the applicable standard of care, as recognized by the professional community; (3) explains the expert's opinion that the defendant departed from that standard; and (4) summarizes the expert's opinion that the defendant's departure was a direct cause of the plaintiff's injuries.

732 N.W.2d at 219 (emphasis added).

¹ The “no meaningful information” standard for dismissal has been articulated by this Court before in § 145.682 cases. *See, e.g., Teffeteller*, 645 N.W.2d at 430; *Anderson v. Rengachary*, 608 N.W.2d 843 (Minn. 2000). Both cases arose prior to the addition of the safe-harbor provision.

Respondents argue at length that the opinions of Dr. Arvin Vocal, admittedly disclosed within 180 days of commencement of suit, do not provide “. . . meaningful information on each of the issues for which expert testimony will be required at trial.” Resp. Br. at 9-11. In the first place, this issue is not before the Court. No lower court has addressed the issue of whether Dr. Vocal provided meaningful information on each of the issues for which expert testimony will be required at trial. The lower courts simply held that if an expert’s qualification to testify is determined or conceded to be deficient, that deficiency is terminal and cannot be corrected.

While never examined below, Dr. Vocal’s disclosure did provide substantial meaningful information about how Dr. Flor departed from accepted standards of medical practice that would be applicable to any healthcare provider – be he physician or dentist. Ms. Wesely’s expert disclosure affidavit explained in some detail how a healthcare provider (in this case a dentist) must obtain an adequate clinical examination, appropriate x-rays, and perform appropriate diagnostic tests. Add. 27-29. The affidavit explained that this includes a complete medical history, and stressed that all patients are entitled to informed consent for “. . . any care and/or treatment provided.” Add. 27. The affidavit detailed the fact that Dr. Flor scheduled Ms. Wesely’s appointment at a time when he knew or should have known there would be potential electrical disruption. Add. 28. It detailed that, when the power surge occurred, Dr. Flor failed to maintain control of the dental equipment and

caused damage to teeth which were not previously involved or in need of treatment. *Id.* The affidavit explained how in the process of attempting to repair this additional damage Dr. Flor had “. . . deformed plaintiff’s jaw so that she had permanent disfigurement and damage to her jaw, teeth and face.” *Id.* Indeed, the affidavit details precisely how this occurred, noting that while “. . . using the left side of plaintiff’s jaw for a resting place for his right fist that he was holding the drill in, and constantly applying pressure on plaintiff’s left side of her jaw, which causes [sic] great discomfort to her, the lower jaw suddenly moved way over to the far right and she was unable to move her jaw, including not being able to tap or slide.” Add. 29. The affidavit goes on to describe how Dr. Flor failed to diagnose the jaw problem, effectively abandoned Ms. Wesely, and engaged in activities preventing prompt and appropriate follow-up care for the condition Dr. Flor created; a condition which was beyond his ability to treat. Add. 28-30.

The detailed “meaningful information” contained in Ms. Wesely’s affidavit and verified by Dr. Vocal included concrete, specific, factual information describing what Dr. Flor did, what he should not have done, what he should have done, and how this caused damage to Ms. Wesely. While perhaps inartfully written, the disclosures in substance are meaningful, detailed, and entirely consistent with the subsequent opinions disclosed by Mr. Zimmer and verified by Dr. Scott D. Lingle, a dentist. While Dr. Lingle’s opinions are more clearly drafted and the

facts upon which he relies more specifically detailed, the substantive information is amazingly consistent between the two expert disclosures.²

To suggest that Dr. Vocal's disclosure provided no meaningful information is simply inaccurate. In contrast to the expert affidavit in *Brown-Wilbert*, Dr. Vocal's disclosure provided very detailed information regarding the appropriate standard of care, the way Dr. Flor breached that standard, and the way Dr. Flor's breach caused Ms. Wesely's injuries.³ Far from providing "no meaningful information," the initial affidavit in this case (1) identified each person Ms. Wesely expected to call as an expert; (2) described Dr. Vocal's opinion on the applicable standard of care; (3) explained Dr. Vocal's opinion that Dr. Flor departed from the standard of care; (4) summarized the chain of causation. This is exactly what *Brown-Wilbert* required. 732 N.W.2d at 219.

C. Respondents' reliance on the fact that Dr. Vocal is arguably unqualified is misplaced.

Respondents attempt to sidestep this by arguing that "[a]n affidavit disclosing the opinion of an unqualified witness fails the 'minimum standards' test for the statutory 180-day requirement, thereby foreclosing application of the safe-harbor provision." Resp. Br. at 10-11. It is telling that Respondents cite no authority for this

² This is particularly true given that Ms. Wesely was not represented by an attorney until after Dr. Vocal's disclosure had been completed.

³ Dr. Vocal's five pages of single-spaced detailed opinions stands in stark contrast to the three-sentence "disclosure" at issue in *Brown-Wilbert*.

argument, because this is not the law. Having an expert who *might* be unqualified provide detailed opinions about each element of a malpractice claim is not the same as serving an affidavit that provides no meaningful information whatsoever – and neither the trial court nor the Court of Appeals ever decided that Appellant’s first affidavit of expert identification provided “no meaningful information.”

Despite Ms. Wesely’s disclosure of detailed information, Respondents brought a § 145.682 motion to dismiss, claiming that the disclosure of Dr. Vocal was deficient because he was not qualified to testify, failed to adequately explain the standard of care, and failed to properly identify the chain of causation. A. 15-16. Given the breadth and detail of Dr. Vocal’s disclosure, and given the fact that his opinions were based on basic principles of health care, Ms. Wesely’s attorney could have easily taken the position that the first affidavit was sufficient. Obtaining informed consent, providing accurate records on request, and referring to a specialist if a problem is too complex are issues that arise in every health care setting. Most of the central allegations of negligence – such as continuing to press on a patient’s jaw when she is asking you to stop, continuing to apply pressure until the jaw is dislocated, failing to take a simple x-ray, or using a power drill in someone’s mouth when there is going to be a power disruption – are so basic that they fall under standards of practice applicable to all health care providers. Appellant certainly could have made a good faith argument that the disclosure of Dr. Vocal was not deficient.

Appellant chose not to fight that battle, however. Respondents had claimed Dr. Vocal's affidavit was "deficient" in part because of his lack of qualification. Counsel recognized that this issue could be resolved adversely to Ms. Wesely, and that the matter was easily corrected by having a dentist render virtually identical opinions to those of the internist – assuming the two reached similar conclusions. They did. Dr. Lingle reviewed the matter and agreed with Dr. Vocal's opinions almost verbatim. *See* Add. 35-37. The statute clearly allows deficiencies to be corrected, so Appellant chose to correct the alleged deficiency in her expert's qualification by identifying Dr. Lingle. The key issue decided by the trial court and the Court of Appeals, then, was whether Ms. Wesely could correct the claimed deficiencies in her expert disclosure by substituting a different expert.⁴ The question of whether an expert is qualified is a fact question for the trial court to decide, *Oulette v. Subak*, 391 N.W.2d 810, 816 (Minn. 1986), and the trial court never determined that Dr. Vocal was unqualified. Mr. Zimmer conceded the point for purposes of argument and simply chose not to contest the issue.

Based on this, Respondents argue that Dr. Lingle is "not an additional or substitute expert," but rather plaintiff's "first and only expert"; according to Respondents, it necessarily follows that the safe-harbor provision "has no application here." Resp. Br. at 19-20. This is inaccurate. As detailed above, Dr. Vocal was an expert who Ms. Wesely

⁴ Both courts also addressed the question of excusable neglect, an issue that is not before this Court.

expected to call, and he provided detailed, meaningful disclosures within 180 days. No court has concluded, and Appellant has certainly never conceded, that Dr. Vocal's disclosure had "major deficiencies," or provided "no meaningful information." None of those issues were decided in the courts below, and none of them are before this Court. The issue in this case is simple: when a defendant brings a § 145.682 motion and claims "qualification to testify" as a deficiency in the plaintiff's disclosure, the plain language of the statute gives the plaintiff forty-five days to correct that deficiency. Because the trial court and the Court of Appeals did not follow the statute's language, the decision below should be reversed.

III. Respondents' claim that the safe-harbor provision only applies to "minor" deficiencies is found nowhere in the statute.

The second arrow in Respondents' quiver is that the safe-harbor provision of § 145.682 only applies to "minor" deficiencies. Because an expert's lack of qualification is a "major" deficiency, it cannot be corrected. In fact, Respondents explicitly take the position that "to qualify for the safe-harbor provision, a plaintiff must provide a 180-day affidavit that, at worst, suffers from minor technical deficiencies." Resp. Br. at 9. This distinction between "minor" and "major" deficiencies is found nowhere in the statute.

Again, the statute is plain. A defendant can bring a motion to dismiss under § 145.682. The motion must identify "the claimed deficiencies" in the plaintiff's expert disclosure. The plaintiff has forty-five days to "correct the claimed deficiencies." The statute does not

create or even contemplate a hierarchy of deficiencies. The statute does not say that “minor” deficiencies can be corrected while “major” ones cannot. If a deficiency is identified – and Dr. Vocal’s qualification was unquestionably one of the deficiencies Respondents identified – it can be corrected. It matters not whether the deficiency is major or minor.⁵

IV. Respondents’ suggestion that the history of the safe-harbor amendment supports their interpretation is flawed.

Respondents suggest that the history of the safe-harbor amendment supports a conclusion that “major” deficiencies like expert qualification cannot be corrected. This argument is seriously flawed, and completely ignores the context in which the amendment was passed.

In 1990, more than a decade before the safe-harbor provision was passed, this Court cautioned that “[i]n borderline cases where counsel for a plaintiff identifies the experts who will testify and give [sic] some meaningful disclosure of what the testimony will be, there may be less drastic alternatives to a procedural dismissal.” *Sorenson v. St. Paul Ramsey Medical Center*, 457 N.W.2d 188, 193 (Minn. 1990).

Eleven years passed, and it became clear that § 145.682 was cutting “with a sharp but clean edge.” *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 578 (Minn. 1999). Cases such as *Teffeteller*, where a malpractice case involving the death of a young boy was dismissed despite a detailed disclosure from a pediatric expert, were well-known

⁵ As discussed in section VI.C., *infra*, a finding that the statute only contemplates correction of “minor” deficiencies leaves unanswered the very significant question of exactly what a “minor” deficiency is.

and hotly debated in the legal community. The safe-harbor amendment was intended to soften the sharpness of § 145.682 that existed when cases like *Sorenson* and *Teffeteller* were decided. Respondents ask this Court to be even harsher than *Sorenson*, and give the safe-harbor no meaning or effect in a case where an expert's qualifications are challenged. This makes no sense, and inappropriately limits the legislature's revision of § 145.682.

As discussed in Appellant's opening brief, the initial attempts to add a safe-harbor provision to § 145.682 occurred during the 2001 legislative session. *See* App. Br. at 17. There is no question that the amendment was motivated by a perception that meritorious claims were being dismissed with prejudice, and that plaintiffs should have an opportunity to avoid the "sharp edge" of § 145.682 if a claim was in danger of being dismissed because of a deficiency in the expert disclosure that could have been corrected. Respondents argue that the dulling of that sharp edge only applies to "minor technical deficiencies," but the history of the amendment belies that argument.

Between the *Sorenson* decision in 1990 and the time the safe-harbor amendment was enacted in 2002, this Court countenanced dismissal under § 145.682 five times. In every one of those cases, the claim was dismissed because of one or more of the following deficiencies: inadequate description of the standard of care, incomplete description of a breach, failure to fully describe the chain of causation, or lack of a qualified expert. *See Teffeteller*, 645 N.W.2d at 427-29 (reinstating trial court's dismissal on grounds that expert was unqualified and disclosure failed to adequately describe the chain of causation); *Anderson*, 608

N.W.2d at 848-49 (reinstating trial court's dismissal on grounds that expert disclosure failed to "clearly set forth the standard of care, the defendant's acts or omissions that allegedly violated that standard, and the chain of causation between these violations and the plaintiff's injury"); *Lindberg*, 599 N.W.2d at 577-78 (affirming district court dismissal on grounds that expert disclosure failed to state how the standard of care was breached or outline an appropriate chain of causation); *Wall v. Fairview Hosp.*, 584 N.W.2d 395, 405 (Minn. 1998) (affirming dismissal of malpractice claims on grounds that expert was unqualified and in any event did not adequately describe the standard of care); *Stroud v. Hennepin County Med. Ctr.*, 556 N.W.2d 552, 556-57 (Minn. 1996) (reinstating trial court's dismissal because expert disclosure failed to make more than "broad, conclusory statements about causation").

Certainly Respondents would not suggest that any of these cases involved "minor technical deficiencies," but there can be no question that the safe-harbor amendment was passed in response to the results in these cases. *Anderson*, for example, was decided less than a year before the amendment was introduced in the legislature.⁶ The district court's

⁶ This Court denied rehearing in *Anderson* on May 3, 2000. On February 22, 2001, the safe-harbor amendment to § 145.682 was first introduced on the floor of the House. *Journal of the House*, 2001, p. 369.

dismissal of Jean Teffeteller's claims took place on September 28, 2000, less than five months before the amendment was introduced.⁷

When the bill was introduced, its sponsor Senator (now Judge) Neuville described the following "problem" that had been described to him and needed to be addressed:

Occasionally some mistakes are made in the affidavit and motions to dismiss with prejudice are made after the 180 days where - in circumstances where the affidavit could have been corrected; it was a meritorious case but the affidavit is not deficient [this was likely a misstatement, intended to be "sufficient"] and there no chance to fix it.

What this bill does is provide 45 days - no matter when the motion to dismiss is brought, you get 45 days - they have to identify the deficiency in the affidavit or the answers to interrogatories and a curing or supplemental expert affidavit could be filed before the hearing.

The purpose of this is to hopefully prevent meritorious cases from being dismissed for technical mistakes in the expert affidavit.

Sen. Jud. Comm. Debate on SF 0936, 82nd Minn. Leg., March 21, 2001 (audiotape).⁸

⁷ The Court of Appeals overturned the district court on May 15, 2001. This Court, in a 3-2 plurality decision, reinstated the trial court's decision on June 13, 2002. Though the safe-harbor amendment was signed into law on May 22, 2002, this Court recognized that the provision was inapplicable "because the amendment is only effective for causes of action commenced on or after May 23, 2002." *Id.* at 422, n. 1.

⁸ This passage has in the past been erroneously cited as a "floor debate," and incorrectly dated as May 16, 2001. Though SF 0936 was introduced on the Senate floor on May 16, 2001, the bill was not debated

Respondents suggest that Senator Neville’s statement means that only “minor technical deficiencies” can be corrected during the safe-harbor provision. This suggestion is totally without basis. Neither Senator Neville nor any other legislator used the term “minor.” The statute does not use the term “minor.” No reported Minnesota case has ever seen a medical malpractice case dismissed because of “minor deficiencies.” The amendment was plainly aimed at fixing what were perceived as problematic results in a number of recent cases: a plaintiff with a seemingly meritorious claim had her case dismissed with prejudice because she had made a mistake in her expert disclosure that could have been corrected – including, as in *Teffeteller*, a mistake about the qualification of an expert. Some plaintiff’s lawyers may have thought their cases were dismissed because of missing “technical information,” and some of those lawyers likely characterized the perceived deficiency to Senator Neville as such. It is clear, however, that the amendment was passed in response to cases like *Anderson*, *Teffeteller*, and *Lindberg*. The legislature’s goal was to allow plaintiffs to correct the type of deficiencies that led to those cases being dismissed.

Any other explanation ignores the history of the amendment and the language of the statute. Despite the floor discussion of “technical information,” and despite this Court’s reference in *Anderson* to “serious deficiencies,” (see Resp. Br. at 8), the legislature did not distinguish between “minor” deficiencies (that could be corrected) and “major” deficiencies (that could not be corrected). The statute’s history makes

on that date; Senator Neville’s discussion of the reason for the bill took place in the Judiciary Committee several weeks earlier.

clear the legislature's intent to prevent harsh results and allow a plaintiff to correct deficiencies in her disclosure if she can – even if they involve the qualification of her expert, and even if a court defines them as serious. Requiring the district court to determine whether the deficiency is big or small simply never entered into the equation, and it is not a part of the statute.

V. Respondents and MHA/MMIC fundamentally misconstrue Appellant's arguments with respect to the signatories of the affidavits.

Both Respondents and MHA/MMIC appear to argue that there is a problem with the fact that Dr. Vocal and Dr. Lingle signed verifications, rather than signing the actual affidavit. See Resp. Br. at 16-17; MHA/MMIC Br. at 9-10. The statute allows such a procedure – as long as the disclosing document is signed by both the party's representative and the expert, it complies with the statute. Minn. Stat. § 145.682, subd. 4(a).

Respondents and MHA/MMIC miss the point of Appellant's argument in this regard, claiming that Appellant's "repudiation" of Dr. Vocal's signature is tantamount to admitting that no expert signed the affidavit at all. Resp. Br. at 16-17. Appellant never argued that Dr. Vocal did not sign the document. Appellant pointed out that the original affidavit was signed by Ms. Wesely and verified by Dr. Vocal. Under the discussion of "amend" advanced by the trial court, Court of Appeals, and Respondents, Ms. Wesely could have amended that affidavit. It follows that her attorney, who is acting as her representative, can amend her

affidavit as well. When Dr. Lingle verified the affidavit the correction process was complete. As argued in Appellant's opening brief, a contrary result is absurd and would treat plaintiffs different depending on whether they disclose their experts by affidavit or answer to interrogatory. *See* App. Br. at 14-15.

VI. Allowing plaintiffs to correct deficiencies in an expert identification by substituting a different expert will not significantly impact medical malpractice litigation.

Amici MHA/MMIC, and to a lesser extent Respondents, paint a doomsday scenario where allowing a plaintiff to cure a deficient expert identification by substituting a different expert will lead to radical changes in medical malpractice litigation. These hypothetical changes include a lengthening of the timeline for malpractice cases, higher litigation costs, and an increase in frivolous filings. *See* Resp. Br. at 21-22; MHA/MMIC Br. at 2-6. These fears are simply unfounded.

A. Whether a plaintiff corrects deficiencies by substitution or not, frivolous claims will be eliminated on exactly the same timetable.

MHA/MMIC takes the position that allowing substitution would give a plaintiff infinite time to correct a deficiency, because “[t]aken to the extreme, the process surrounding the plaintiff’s disclosure, defendant’s motion and new affiant could go on interminably until plaintiff gets it right.” MHA/MMIC Br. at 5. This argument makes the erroneous assumption that the process will “reset” each time a plaintiff corrects claimed deficiencies.

The statute provides plaintiffs 180 days to identify an expert and his opinions. If a defendant believes the identification is deficient, he can bring a motion to dismiss and specify those deficiencies. The hearing on that motion must be at least forty-five days after the motion to dismiss is filed. During that forty-five days, the plain language of the statute gives plaintiff the ability to correct the claimed deficiencies. At the end of that period of time, the hearing occurs. There is no “resetting” of the process, where the defendant files a new motion alleging new deficiencies in the corrected disclosure that the plaintiff must respond to anew. Nothing in the statute contemplates such a thing.⁹ The defendant alleges deficiencies, the plaintiff takes steps to correct the deficiencies, and the trial court decides whether the plaintiff has successfully corrected the deficiencies. The cycle does not repeat.

Furthermore, the timeline of the motion will be exactly the same whether a plaintiff can correct deficiencies by substitution or not. The defendant can bring a § 145.682 motion 180 days after suit is commenced. The hearing must be scheduled for at least forty-five days after the motion is served. During that forty-five day period, the plaintiff has an opportunity to correct deficiencies. At the end of the forty-five days, the court hears the motion and decides whether the

⁹ MHA/MMIC argues that this process could play out three, four, even fifty times, “in contravention of the legislature’s intent that medical malpractice litigation be resolved expeditiously.” MHA/MMIC Br. at 5. Aside from the fact that this is not the way the statutory system works, it is difficult to envision a scenario where a plaintiff’s attorney would ever go through the time and expense of having unqualified expert after unqualified expert review a matter and provide opinions. Repeatedly addressing motions based on the adequacy of an expert affidavit is simply not a good business model for plaintiffs’ lawyers.

plaintiff's corrected disclosure is sufficient. Whether experts are substituted or not, a § 145.682 motion that is brought promptly will be heard 225 days after the lawsuit is filed. Whether the plaintiff corrects the claimed deficiencies by substituting a new expert or not, the procedure and timeline for determining whether the claim is frivolous will be exactly the same. That being the case, the additional litigation costs MHA/MMIC discusses are a non-issue.

B. Allowing plaintiffs to correct deficiencies in their expert disclosure by substituting experts will not lead to an increase in frivolous filings.

MHA/MMIC also argues that allowing substitution will “encourage frivolous litigation” because plaintiffs will be effectively relieved “of any meaningful incentive to make sure their experts are qualified and their claims properly screened before serving the complaint.” MHA/MMIC Br. at 3. Respondents echo these concerns, worrying that plaintiffs will adopt a “placeholder strategy” involving meaningless affidavits of “a layperson, of plaintiff's counsel, whomever” to buy an additional forty-five days to disclose their “real” expert. Resp. Br. at 12. Why a plaintiff's lawyer would consider such a foolish strategy is never explained, and this argument defies logic.

In the first place, Minn. Stat. § 145.682, subd. 3 requires the plaintiff's attorney to sign an affidavit verifying that he has reviewed the matter with a qualified expert who believes that a cause of action exists. This is more than a “meaningful incentive” to make sure the claim is properly screened – it is a statutory mandate requiring the attorney to

verify, under penalty of perjury, that the claim has been properly screened.

With an expert review already completed, there is little incentive for a plaintiff or her attorney to engage in the “placeholder” strategy envisioned by Respondents and MHA/MMIC. Allowing substitution of experts will not make it any more likely that this inefficient “placeholder” strategy will be utilized, because the statute as written and as interpreted by this Court would already allow plaintiffs’ attorneys to use it. An attorney could intentionally have a qualified expert provide an opinion that is deficient, “forcing” the defendant to bring a motion to dismiss. The plaintiff then has the forty-five day cure period to provide her expert’s “real” opinions. The fact that malpractice litigation is not currently plagued by this practice is proof that the mandates of the Rules of Civil Procedure and the Rules of Professional Conduct work to prevent it.

As a practical matter, the sort of substitution that occurred in this case arises out of an abundance of caution. When defense counsel brings a motion claiming a deficiency, a wise plaintiffs’ attorney will “bulletproof” her initial disclosures with a supplement – even if she fully believes the initial disclosures are adequate. For example, if plaintiff’s expert in an anesthesia case is an anesthesiologist and the defendant is a nurse anesthetist, some defense counsel may bring a motion arguing that an anesthesiologist is not qualified to render a standard of care opinion against a nurse. Similar situations could arise with a neurologist testifying against a bedside nurse, or a bedside nurse against a hospitalist physician, or any other number of permutations. Most plaintiffs’ counsel would likely address a § 145.682 motion by

supplementing their initial disclosure with the opinions of a nurse anesthetist, or a bedside nurse, or a hospitalist physician – just to be safe.¹⁰ This is exactly what Ms. Wesely’s attorney did in this case.

C. The interpretation advanced by Respondents and MHA/MMIC will unnecessarily impede judicial efficiency and increase costs.

Respondents and MHA/MMIC pay lip service to the goals of efficiency and cost-savings, but this is illusory. The fact of the matter is, the statutory interpretation they advance will increase the workload of the trial courts and virtually guarantee that § 145.682 motions are brought in every medical malpractice case filed in this state.

The statute envisions a simple, efficient process for analyzing § 145.682 motions. The plaintiff serves a disclosure, the defendant identifies deficiencies, the plaintiff attempts to correct those deficiencies in a revised disclosure, and the trial court reviews the revised disclosure to determine whether it provides “specific details concerning [the] 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.” *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 726 (Minn. 2005). If it does, the motion is denied. If it does not, the case is dismissed with prejudice.

¹⁰ Minn. Stat. § 145.682, subd. 4(b), which provides that “nothing in this subdivision may be construed to prevent either party from calling additional expert witnesses,” unquestionably allows a plaintiff to add more experts up to the cut-off date set in the scheduling order.

Respondents' major deficiency/minor technicality distinction will create an entirely new layer of review. First, the trial court will need to review the original, uncorrected disclosure to determine the "seriousness" of the deficiency. If the trial court determines that the deficiencies are sufficiently "minor," it can move on to examine the corrected disclosure and determine whether it is sufficient.¹¹

Of course, the trial courts will also be placed in the impossible position of attempting to determine where on the "spectrum of seriousness" the alleged deficiencies fall. The trial judge will need to determine whether a deficiency is major, minor, or somewhere in between. Even more difficult will be the determination of where on this spectrum the "cut-off" is.

With so many unknowns, it is virtually certain that defendants will bring § 145.682 motions in nearly every case. Equally certain is the increase in appeals that will result, as the trial courts understandably try to wade through the morass created by trying to divide deficiencies into "major" ones and "minor" ones. Litigation costs will rise, and judicial efficiency will be hampered. The existing statutory scheme, with a simple process of identifying and correcting whatever deficiencies may exist, serves the goals of efficiency while at the same time ensuring that frivolous claims are weeded out and meritorious claims are protected. The only goal served by Respondents' and MHA/MMIC's interpretation is reducing medical malpractice claims in general.

¹¹ It will always fall to the trial court to determine whether a deficiency is minor, because no defendant will ever characterize it as such. Indeed, Respondents have never explained precisely what a minor, correctable deficiency would look like.

Conclusion

The legislature has determined that plaintiffs in medical malpractice cases should have the opportunity to correct deficiencies in their expert disclosure. Because Respondents identified Dr. Vocal's qualification as a deficiency, the statute plainly allowed Appellant to correct that deficiency – whether major or minor. Respondents argue, and the courts below essentially held, that an expert qualification deficiency cannot ever be corrected. Because this holding runs contrary to the plain language and history of the statute, the decisions below should be reversed.

Respectfully submitted,

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The undersigned certifies that this brief complies with the length limitations specified in Minn. R. Civ. App. P. 132.01. This brief was prepared using Microsoft Word 2003. The font is Century, a proportional font using serifs. The font size is thirteen-point. According to Microsoft Word's counting feature, this brief has 6,194 words.

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Brandon Thompson