The expert affidavit statute, unsheathed.

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The Minnesota Supreme Court has described Minn. Stat. § 145.682, (2000) as a statute that "cuts with a sharp but clean edge." *Lindberg v. Health Partners, Inc.*[1]. However, the *Lindberg* court didn't identify whether it meant a scalpel to carefully remove frivolous lawsuits or a sword to cut down meritorious claims based on a procedural technicality. Assuming the court's objective is to determine legislative intent, the more important question is, which instrument did the 1986 legislature intend when it enacted § 145.682? Was the intent to provide a precise method for dismissing frivolous lawsuits as is suggested in *Parker v. O'Phelan,*[2] or did the legislature intend to back away from the well-established principle of a just determination of every cause based upon a trial on the merits? Does Minn. Stat. § 145.682 give trial courts license to severely restrict who may be called as an expert witness by narrowly scrutinizing the qualifications of proffered expert, contrary to the principle set forth in *Cornfeldt v. Tongen*?[3] These questions have been central to a dialog that has occurred over recent years between the Minnesota Court of Appeals and the Minnesota Supreme Court, as well as within the supreme court itself (as witnessed by a number of vigorous dissents).

The recent decision in *Teffeteller v. University of Minnesota*, 645 N.W.2d 420 (Minn. 2002), suggests that a thin majority of the court (in a 3-2 decision) sees the statute as a sword that can be wielded by defendants to determine the outcome of lawsuits based upon the affidavits alone. In *Teffeteller*, the court reversed the court of appeals and held that the expert affidavit submitted by the plaintiff failed because the plaintiff's expert, an undisputed expert of pediatric critical care, was not competent to testify on the effects of morphine toxicity in a 14-year old bone marrow transplant patient. The supreme court concluded that the district court "[D]id not abuse its discretion in concluding that a doctor who is not specialized in the field of pediatric oncology, or experienced with the highly sophisticated procedure of bone marrow transplants, is not competent to testify as to this claim of medical malpractice." *Id.* at 427. In dissent, Justice Gilbert pointed out that this determination by the district court constituted an abuse of discretion because the court would have had to make an ultimate fact determination that the standard of care regarding the treatment of morphine toxicity in bone marrow transplant patients was different than in other pediatric patients, or that if there was a different standard, that such a standard was unfamiliar or unknown to the plaintiff's expert, and no such evidence was presented by either party. *Id.* at 432.

The supreme court has decided five cases since 1990 involving the expert affidavit statute, with each decision affirming the trial court's dismissal of the plaintiff's action for failure to meet the requirements of § 145.682. The result in *Teffeteller* was foreshadowed by *Sorenson v. St. Paul Ramsey Med. Ctr.,* 457 N.W.2d 188 (Minn. 1990), in which the court

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[1] 599 N.W.2d 572 at 578 (Minn. 2000).
[2] 414 N.W.2d 534 (Min. Ct. App. 1987).
[3] 262 N.W.2d 684, 698 (Minn. 1977).

gave warning that in the future, they intended to enforce new, more stringent requirements for expert affidavits. Whether these new, stringent requirements were indeed the legislative intent has been a hotly contested issue, accounting for numerous reversals of the court of appeals by the supreme court, as well as the strong supreme court dissents previously noted. The following analysis of these cases will show that a majority of the supreme court appears to have exceeded the expectation of the 1986 legislature.

Early Interpretations of Minn. Stat. § 145.682.

In the first few years following enactment of § 145.682, the appellate courts were very "forgiving" of plaintiffs who failed to serve the subdivision 4 affidavit identifying the expert witness and providing the substance of the witness' opinions. The courts used "excusable neglect" standard for determining whether plaintiffs should have additional time to serve a conforming affidavit. The appellate court's application of the statute in the early years was guided by its conclusion that the legislature intended the statute solely for the purpose of eliminating frivolous or nuisance lawsuits. Central to the court's decisions was adherence to the principle of a just determination of every cause based upon a trial on the merits.

In *Parker v. O'Phelan*, 414 N.W.2d 534 (Min. Ct. App. 1987), the court of appeals was called on to interpret the statute, which had been enacted by the legislature the previous term. In *Parker* the plaintiff sought representation by three different law firms in succession before finding one that agreed to represent him. In the course of seeking representation, the time limit for serving an affidavit of expert review as required by § 145.682 expired. The defendant moved to dismiss the lawsuit for failure to comply with the time limits. Prior to the hearing on the motion to dismiss, the plaintiff served the required affidavit. The plaintiff moved for an extension of time to serve the affidavit under Minn. R. Civ. P. 6.02. This rule permits a trial court to exercise discretion and grant an extension if the motion is made prior to the expiration of the time limits, or where the motion was made after the time limit expires, the court may extend the time if it finds "excusable neglect." Minn. R. Civ. P. 6.02. The *Parker* trial court ruled that although the plaintiff's affidavit was late, it did not prejudice the defendant, nor did it indicate negligence on the part of the plaintiff. The court of appeals affirmed the trial court's decision, holding that the purpose of § 145.682 was to eliminate nuisance medical negligence suits by establishing a process of expert review in order to verify the lawsuit's validity. *Id.* at 537. The court further held that the purpose of Minn. R. Civ. P. 6.02 was to ensure that cases were tried on their merits, and to seek a just determination of every action. The court ultimately read the rule and statute together, finding that the purpose of § 145.682 was not so frustrated by the application of Rule 6.02 that the two must be deemed inconsistent.

Similarly, in *Chizmadia v. Smiley's Point Clinic*, 428 N.W.2d 459, 460 (Minn. Ct. App. 1988), the court held that it was proper to grant numerous extensions of time to a plaintiff to comply with the expert affidavit requirement where there is a reasonable excuse for the delay. However, the court also noted that it would be an abuse of discretion to grant such extensions where it would result in prejudice to the defendant. *Id.* at 461.

In 1989 the supreme court expressed approval of the court of appeals' analysis in *Parker*. In *Stern v. Dill*, 442 N.W.2d 322 (Minn. 1989), the court agreed that Minn. Stat. § 145.682 must be read in conjunction with Rule 6.02 of the Minnesota Rules of Civil Procedure, and held that where statutes contain "procedural" requirements that are inconsistent or are in conflict with the rules, the procedural content of the statute is superseded. *Id.* at 324, *citing,* Minn. R. Civ. P. 81.01(c). The court concluded that the time limit imposed by § 145.682, subd. 2(2), and subd. 3 are procedural, because it imposes requirements on a plaintiff, but does not change a plaintiff's basic right to sue for negligence. *Id.* The court affirmed the court of appeals' decision that the time for serving expert affidavits as required by § 145.682 may be extended upon a showing of excusable neglect. *Id.* This decision represented the last time the court of appeals and the supreme court would agree on the interpretation of the expert affidavit statute.

In 1990, Justice Yetka, writing for the court in *Sorenson*, announced a dramatic change in the court's interpretation of the statute. *Sorenson v. St. Paul Ramsey Med. Ctr.,* 457 N.W.2d 188 (Minn. 1990). The court put plaintiffs on notice that in future cases it would impose stricter criteria on expert affidavits. *Id.* at 193. The court set forth new criteria that went beyond the requirements identified in the language of the statute,[4] stating that:

> 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 of omissions that plaintiffs allege violated the standard of care and an outline of the chain of causation that allegedly resulted in damage to them.

Id.

The court tempered this warning by stating that before granting a procedural dismissal, the trial court should carefully evaluate the degree of prejudice to the defendant, and, in borderline cases (e.g., where the plaintiff has identified the experts who will testify, and has given some meaningful disclosure regarding the expected testimony), less drastic alternatives to procedural dismissal might be used, such as ordering a deposition of the expert at the plaintiff's expense, or limiting the expert's testimony to the matters that were fully disclosed, in order to minimize or eliminate the potential prejudice to the defendant. *Id.* This caution seems to have gone largely ignored, while the warning, essentially dicta, has been repeatedly cited by the court as precedent.

The court of appeals, in a number of decisions following *Sorenson*, evidenced their reluctance to affirm procedural dismissals in borderline cases where there were remedies available with a less drastic result and where there was no prejudice to the defendant. The supreme court's approach, however, was to strictly enforce the criteria that they announced

[4] Minn. Stat. § 145.682 subd. 4 requires that the second expert affidavit contain: "the identity of each person whom plaintiff expects to call as an expert witness at trial to testify with respect to the issues of malpractice or causation, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion."

in *Sorenson*, reversing the court of appeals and affirming procedural dismissals with little discussion of less drastic remedies.

The case of *Stroud v. Hennepin Cty. Med. Ctr.*, 556 N.W.2d 552 (Minn. 1996), marked the beginning of an ongoing judicial dialogue between the court of appeals and the supreme court regarding the expert affidavit requirements of § 145.682.

In *Stroud*, the supreme court reversed the court of appeals, holding that the plaintiff failed to satisfy the *Sorenson* standard for expert opinion disclosures. *Id.* After issuing their holding on the dispositive issue, the court issued a terse commentary on an estoppel issue that was addressed in the court of appeals' opinion:

> [W]e feel compelled to address the court of appeals' treatment of the estoppel issue.. . . nothing in our prior cases, Minn. Stat. § 145.682, or the facts of this case suggests the result reached by the court of appeals. In fact, such a conclusion is clearly contrary to the plain language of Minn. Stat. § 145.682, subd. 6, which mandates dismissal, upon motion, after expiration of the 180-day period for plaintiff's failure to comply with Minn. Stat. § 145.682, subd. 4. 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.

Id. at 557.

The supreme court's disagreement with the court of appeals was also expressed in *Lindberg v. Health Partners*, where Justice Stringer, writing for the majority, stated that, "The court of appeals ruling is strikingly at odds with the clear legislative purpose expressed in Minn. Stat. § 145.682 and this court's opinions in both *Sorenson* and *Stroud*." *Lindberg v. Health Partners*, 599 N.W.2d 572, 576 (Minn. 1999). In *Lindberg* the plaintiff served an expert affidavit which identified the name and qualifications of the expert who was scheduled to testify at trial; stated that the expert was familiar with the accepted standard of care for doctors, midwives, nurses and other healthcare professionals in the local area; and stated that his opinion was based on his experience, a review of plaintiff's medical records, and on his familiarity with medical literature. The affidavit's only summary of negligence and causation was contained in the following statements:

> Based upon a reasonable degree of medical certainty, it is more probable than not, that if, among other things (plaintiff) had been instructed to seek medical treatment at the time of her phone call on the morning of (the incident) (plaintiff's baby) would not have died. Based upon a reasonable degree of medical certainty, (plaintiff's baby) died as a result of the negligent and careless conduct of the Defendants and/or their agents and employees . . .

Id. at 575.

The court of appeals reversed the trial court's grant of summary judgment based on plaintiff's failure to meet the requirements of § 145.682, finding that the affidavit was sufficient to meet the most important requirements of the statute: identifying the expert to be used at trial; securing expert review in order to avoid frivolous lawsuits; and furthering the judicial goal of resolving cases on their merits. *Id.* at 576. The supreme court reversed, holding that strict compliance with the disclosure requirements set forth in *Sorenson* was required in order to avoid mandatory dismissal. The court held: "Dismissal is mandated under Minn. Stat. § 145.682, subd. 6 when the disclosure requirements are not met and while we certainly recognize that the statute may have harsh results in some cases, it cuts with a *sharp but clean edge." Id.* at 578 (emphasis added). This sentiment was not echoed by all members of the court. Justice Anderson concurred with the decision, but expressed concern with the majority's unforgiving application of the *Sorenson* criteria, without giving consideration to the caution that also appeared in *Sorenson*, namely that in borderline cases where there has been meaningful disclosure by the plaintiff and no prejudice to the defendant, an alternative to procedural dismissal should be applied. *Id.* at 579. Justice Gilbert concurred in part and dissented in part, arguing that there were less drastic remedies available in this case than procedural dismissal, writing: "In the majority's zeal to establish this new "sharp but clean edge" standard, it ignored (without overruling) our reasoned discussion in *Sorenson* and the wisdom of using less drastic measures where there is an absence of prejudice." *Id.*

In the same year following the *Lindberg* decision, the court of appeals affirmed a trial court's dismissal of a medical negligence case based on an insufficient expert affidavit,[5] finding that (1) the affidavit failed to set forth the applicable standard of care or the way in which the defendant departed from the standard; and (2) the experts did not sign the affidavit. *Tousignant v. St. Louis County, Minnesota*, 602 N.W.2d 882 (Minn. Ct. App. 1999). The court reluctantly applied the strict criteria of *Sorenson, Stroud* and *Lindberg*, concluding:

> Dismissal of Tousignant's case is unquestionably harsh. The concurring opinion in *Lindberg* was concerned that "arguably, the future implications of the majority's language will be decisions much more harsh than the result that we reach in the case before us today." 599 N.W.2d at 579 (J. Paul H. Anderson, concurring specially). The deficiencies of Tousignant's affidavit have caused no identifiable prejudice to Jensen and St. Louis County. More troubling is the fact that Tousignant's claim is clearly not frivolous. Nevertheless, we are bound by *Lindberg* to reach this decision.

[5] In this case the plaintiff, Violet Tousignant, was admitted to Chris Jensen Nursing Home to recover from hip surgery. There was some confusion in the chart as to whether the plaintiff needed to be restrained, but while the staff was attempting to clarify this with the plaintiff's doctor over the course of several hours, the plaintiff was left unrestrained. She was found injured, lying on the floor. The Minnesota Department of Health conducted an investigation of the incident, and concluded that the staff failed to provide adequate care to the plaintiff. *Id.* at 884.

Id. at 887.

Interestingly, on appeal to the Minnesota Supreme Court, the case was reversed and remanded for a new trial after the court concluded that the standard of care applicable to the nursing home, the breach of that standard and the chain of causation were all within the general knowledge and experience of a layperson. *Tousignant v. St. Louis County, Minnesota*, 615 N.W.2d 53, 61 (Minn. 2000). Therefore, since expert testimony was not required, Minn. Stat. § 145.682 did not apply and dismissal was not warranted. *Id.*

The following year the supreme court once again considered the issue, reversing the court of appeals and affirming the district court's dismissal based on an insufficient expert affidavit. *Anderson v. Rengachary*, 608 N.W.2d 843 (Minn. 2000). In *Anderson* the plaintiff served an expert affidavit in which the expert stated that there was a deviation from the standard of care, but failed to specifically identify the standard of care required, how the defendant deviated from that standard, or to provide a causal connection. *Id.* at 845. Following the district court's dismissal, the plaintiff requested reconsideration or an extension to comply with the requirements of the statute. *Id.* at 844. The district court denied the plaintiff's request, and the court of appeals, in keeping with *Sorenson's* instruction that courts consider less drastic alternatives to dismissal, reversed and remanded, directing the district court to grant plaintiff an additional 30 days to comply with the statute. *Id.* The court of appeals reasoned that the plaintiff did not receive notice of the insufficiency of the affidavit prior to the 180-day deadline, and the plaintiff made a "good faith" effort to comply with the statute's requirements. *Id.* at 846. The supreme court disagreed with this result, characterizing as "*dicta*" the caution it gave in *Sorenson* to use less drastic alternatives to dismissal in borderline cases, and in any event, stated that this case was not a borderline case. *Id.* at 848. The majority held that the plaintiff did not comply with the requirements of the statute and that there was no requirement that plaintiffs be notified of the insufficiency of their affidavit prior to the expiration of the 180-day time limit. Justice Anderson, in dissent, restated his concern that the result reached by the majority, procedural dismissal, was inconsistent with the judiciary's preference to dispose of cases on their merits, and with the legislature's intent to limit frivolous lawsuits by enacting Minn. Stat. § 145.682. *Id.* at 851. Justice Gilbert, also in dissent, offered his opinion that the enforcement of such strict criteria in pleading essentially represented a return to "code pleading in medical malpractice cases . . ." *Id.* at 852. In addition, Justice Gilbert reasoned that allowing the legislature to control pretrial procedure through the requirements of § 145.682 was a violation of separation of powers, and the court's inherent and statutory power to control matters concerning judicial procedure. *Id.* at 852, *citing*, Minn. Stat. § 480.051.

In *Demgen v. Fairview Hosp.*, the court of appeals reversed the trial court's dismissal, holding that the trial court erred in dismissing the plaintiff's medical negligence claim for failure to comply with the expert affidavit requirements of Minn. Stat. § 145.682. 621 N.W.2d 259 (Minn. App. 2001), *rev. denied*, April 17, 2001. The trial court found that the expert affidavit stated with sufficiency the applicable standard of care and the alleged deviation from that standard, however the court found that the affidavit was insufficient

with regard to causation. The court of appeals, however, considered the expert's lengthy and detailed affidavit as a whole, and stated "[I]f this affidavit, taken as a whole, does not meet the requirements of Minn. Stat. § 145.682, subd. 4(a), this court questions 'whether any expert affidavit ever will?'" *Id.* at 263. Judge Randall, in a strongly worded opinion, stated that the expert's "detailed and exhaustive affidavit easily puts the defendants on notice of his medical opinion covering the areas of negligence, causation, and the standard of care. Section 145.682 is a discovery tool, not a fetish. The affidavit is not a trial on the merits." *Id.* at 265. In addition, the court held that the district court erred in considering rebuttal evidence of defendants' expert when assessing the adequacy of plaintiff's affidavit. *Id.* at 266.

Teffeteller v. Univ. of Minn., 645 N.W.2d 420 (2002), the most recent case, decided by the supreme court, concerned a 14-year-old male bone-marrow recipient who died from respiratory depression following an allegedly negligent failure of his physicians and hospital staff to diagnose and treat morphine toxicity. The supreme court reversed the court of appeals, which had reversed the district court's dismissal of the plaintiff's medical negligence action. Central to the supreme court's decision was its holding that the district court did not abuse its discretion in finding that because plaintiff's expert was not specialized in the field of pediatric oncology or experienced with specialized procedures related to bone marrow recipients, he was not competent to testify as to the plaintiff's claim of medical negligence. *Id.* at 427. Plaintiff's affidavit named an expert who was board certified in pediatrics and pediatric critical care, and who held numerous teaching and committee positions related to pediatric care, and had served as the medical director of the pediatric intensive care unit at the University of Wisconsin Children's Hospital in Madison, Wisconsin from 1982 until at least the time of this lawsuit in 1998. In addition the expert had published articles and had spoken on various issues in pediatric care. *Id.* at 424. Additionally, the court affirmed the trial court's finding that the plaintiff's affidavit was insufficient as to the issue of causation. *Id.* at 429.[6]

In a vigorous dissent, Justice Gilbert, joined by Justice Paul Anderson, contended that the district court erred by applying the standards reserved for a summary judgment motion by considering evidence beyond the pleadings and the expert affidavit when it granted defendant's motion for dismissal. *Id.* at 432. More importantly, the dissent stressed that in the absence of any evidence to support such a decision, the trial court made a factual determination that the standard of care for treating respiratory depression due to morphine toxicity in a pediatric patient would differ if the patient were a bone marrow transplant recipient. *Id.* at 432. Further, in the absence of any evidence, the court determined that plaintiff's expert had no practical or clinical experience in dealing with bone marrow transplant recipients. *Id.* The dissent emphasized that the trial court's fact-finding and weighing of evidence for the purposes of determining whether dismissal was required for

[6] The majority contends that while plaintiff's affidavit outlines the standard of care and defendant's alleged deviation from the standard, it treats the cause of death summarily. *Id.* at 429. Justices Gilbert and Anderson disagreed, finding that plaintiff's expert affidavit stated that the defendants failed to diagnose morphine toxicity (standard of care), they failed to administer frequent boluses or a continuous infusion of naloxone in order to reverse the respiratory depression caused by the morphine (deviation from standard), and why their failure to take these steps ultimately resulted in the death of this fifteen-year-old boy (causation). *Id.* at 435.

failure to comply with the expert affidavit statute was inappropriate. *Id.* Justice Gilbert expressed concern with the district court's decision that plaintiff's expert was not qualified to testify as an expert, stating that, "If there was any question as to (plaintiff's expert's) qualifications at this stage in the case, that should go to the weight of his testimony rather than the admissibility. *Id.* at 433.

The most significant lessons to be learned from *Teffeteller* are that the supreme court (albeit by a thin majority) again supported an interpretation of Minn. Stat. § 145.682 that encourages, in essence, "trial by affidavit", and once again failed to support the consideration of any alternatives to procedural dismissal of cases that fail to comply with these expert affidavit requirements.

2002 Amendment - Safe Harbor provision

Fortunately, during the 2002 legislative session, Minn. Stat. § 145.682, subd. 6 was amended to include a "safe harbor" provision, effective for all actions commenced on or after May 23, 2002, which provides plaintiffs some protection against procedural dismissal based on a deficient expert affidavit. The defendant's motion for procedural dismissal will be required to identify the claimed deficiencies in the plaintiff's affidavit, and will provide the plaintiff with at least 45 days to correct the deficiencies. The amended language of Subd. 6 provides:

> (c) Failure to comply with subdivision 4 because of deficiencies in the affidavit or answers to interrogatories results, upon motion, in mandatory dismissal with prejudice of each action as to which expert testimony is necessary to establish a prima facie case, provided that:
> (1) the motion to dismiss the action identifies the claimed deficiencies in the affidavit or answers to interrogatories;
> (2) the time for hearing the motion is at least 45 days from the date of service of the motion; and
> (3) before the hearing on the motion, the plaintiff does not serve upon the defendant an amended affidavit or answers to interrogatories that correct the claimed deficiencies.

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Conclusions and Recommendations for Practice

While the supreme court majority in *Teffeteller* provided medical malpractice defendants with a potent weapon for slicing away potentially meritorious medical negligence actions, the 2002 Minnesota Legislature fortunately has "sheathed" that weapon as to all actions commenced on or after May 23, 2002. Plaintiffs will have an opportunity to remedy any alleged deficiencies in an expert affidavit, and cases (as they should be) will be decided on their merits.[7]

[7] It is noteworthy that the supreme court "majority" in *Teffeteller* was only a majority of 3 to 2 (both Justices Blatz and Page declined to participate in the decision) and two members of this majority, Justices Stringer

However, plaintiffs' counsel should not plan to rely upon the "safe harbor provision" of the 2002 amendment to save a deficient affidavit. Instead, plaintiffs' counsel should be diligent from the outset in submitting expert affidavits which comply with the *Sorenson* requirements as emphasized in *Teffeteller*. Specifically, the expert affidavit should identify the qualifications of the expert and state specifically both the scientific background and the practical experience that the expert has in the subject matter at issue. The affidavit must identify, separately, the requirements of accepted standards of medical practice under the circumstances and how the defendant or defendants departed from those accepted standards of medical practice. Finally, and perhaps most importantly, the affidavit must provide the causal connection between the substandard care and the bad outcome suffered by the patient. The causal connection must be stated to a reasonable degree of medical probability and must carefully lay out the physical, physiological, anatomical or other scientific basis for establishing that the patient's poor outcome was the result of the substandard medical treatment. Conclusory statements of causal connection will not be adequate.

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and Lancaster, are no longer on the supreme court. Whether this decision will stand the test of time remains to be seen.