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Torts: No Statutory Interpretation Required—Guzick v. Kimball

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**TORTS: NO STATUTORY INTERPRETATION
REQUIRED—*GUZICK V. KIMBALL***

Marcus Jardine[†]

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I. INTRODUCTION

Plaintiffs alleging legal malpractice in some states must file expert affidavits¹ supporting their claims before trial.² Requirements for these affidavits vary by state; in Minnesota, for example, they must contain specific details linking the defendant’s negligent conduct to the plaintiff’s damages.³ This imposes a high burden on plaintiffs and filters out frivolous lawsuits that will never obtain legitimate expert support.⁴ This burden, however, is a double-edged sword: it can also preclude meritorious claims that, for some reason, cannot timely secure adequate expert support.⁵

Minnesota Statutes section 544.42 requires plaintiffs to file two pretrial expert affidavits supporting legal and other non-medical malpractice claims.⁶ Section 544.42 also allows for additional time to remedy defects in the second, more detailed and burdensome of the two affidavit requirements,⁷ which helps prevent dismissals of meritorious claims. In *Guzick v. Kimball*, the Minnesota Supreme

1. Expert affidavits may sometimes be called “certificates of merit.” See *Certificate*, BLACK’S LAW DICTIONARY (10th ed. 2014).

2. See 4 RONALD E. MALLIN & ALLISON MARTIN RHODES, LEGAL MALPRACTICE § 37:62 (2016 ed.) (citing ARIZ. REV. STAT. ANN. § 12-2602 (West, Westlaw through 2016 2d Reg. Sess. of the 52d Leg.); COLO. REV. STAT. ANN. § 13-20-602 (West, Westlaw through 2016 2d Reg. Sess. of the 70th Gen. Assemb.); GA. CODE ANN. § 9-11-9.1 (West, Westlaw through 2016 Sess. of the Gen. Assemb.); IOWA CODE ANN. § 668.11 (West, Westlaw through 2016 Reg. Sess.); MINN. STAT. § 544.42 (2016); N.J. STAT. ANN. § 2A:53A-27 (West, Westlaw through 2016 Leg.); OKLA. STAT. ANN. tit. 12, § 19.1 (West, Westlaw through Sept. 1, 2016 2d Reg. Sess. of the 55th Leg.); PA.R.C.P. No. 1042.3 (West, Westlaw through Sept. 1, 2016)).

3. See, e.g., MINN. STAT. § 544.42, subdiv. 4(a) (requiring details on “issues of negligence, malpractice, or causation” and “a summary of the grounds for each opinion”).

4. See, e.g., *Parker v. O’Phelan*, 414 N.W.2d 534, 537 (Minn. Ct. App. 1987), *aff’d*, 428 N.W.2d 361 (Minn. 1988) (noting the purpose of a medical affidavit requirement is to eliminate “nuisance malpractice suits”).

5. See *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 193 (Minn. 1990) (noting that an abrupt dismissal for failure to file an affidavit could terminate a “meritorious cause of action”).

6. MINN. STAT. § 544.42.

7. *Id.* § 544.42, subdiv. 6(c).

Court established that a legal malpractice plaintiff can obtain additional time only if her affidavit passes a two-step process.⁸ First, provided a set of facts, courts determine on a case-by-case basis which elements of legal malpractice require expert support.⁹ If a lay juror would likely not understand how the facts of the case relate to an element of malpractice, expert support is required for that element.¹⁰ Second, courts evaluate the expert support for each required element, and if the support is deficient, the court may dismiss the case before trial without granting the plaintiff any time to remedy the deficiency.¹¹

Guzick was the supreme court's first legal malpractice case interpreting section 544.42. Arguably, its primary contribution to Minnesota jurisprudence was interpreting the first of the two steps: determining which elements of legal malpractice require expert support. *Guzick* upheld the second step—the court's ability to evaluate expert support—from the court's previous case on section 544.42.¹²

Guzick's two-step process is problematic because it opens the door to two ways plaintiffs can lose their cases. First, a plaintiff might fail to anticipate that the court may require expert support for an element of malpractice after applying its lay juror standard. This would make the affidavit insufficient. Second, even if the plaintiff correctly identifies all the elements that require expert support, she still may not solicit enough detail from the expert. Again, this would be insufficient. *Guzick*, therefore, sets two traps for plaintiffs to lose a case with prejudice on a procedural misstep. This threatens the law's "primary objective . . . to dispose of cases on the merits."¹³ This is what is at stake after *Guzick*.

8. See *Guzick v. Kimball*, 869 N.W.2d 42, 49 (Minn. 2015) (noting that "[i]f expert disclosure is required for a particular element [of malpractice]," the court must then determine if the disclosure for that element is satisfactory). The *Guzick* court held that the plaintiff's affidavit did not pass this process. *Id.* at 51.

9. See *id.* at 48–49.

10. *Id.* at 49 (citing *Hill v. Okay Constr. Co.*, 312 Minn. 324, 337, 252 N.W.2d 107, 116 (1977)).

11. See *id.* at 51–52; see also *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 217–19 (Minn. 2007).

12. The previous Minnesota Supreme Court case on section 544.42 was an accounting malpractice case. See *Brown-Wilbert*, 732 N.W.2d 209.

13. *Firoved v. Gen. Motors Corp.*, 277 Minn. 278, 283, 152 N.W.2d 364, 368 (1967).

This Note begins with a history of legal malpractice and the statutory framework underlying *Guzick*.¹⁴ The facts, procedural history, and majority analysis of *Guzick* follow.¹⁵ The analysis of this Note argues that courts should not dismiss cases on the basis of a defective affidavit without providing time to remedy defects.¹⁶ The court's unforgiving approach contradicts legislative intent to avoid dismissing meritorious lawsuits and needlessly goes beyond the plain language of section 544.42.¹⁷ The court's self-imposed ability to grant extra time on an evaluative basis¹⁸ also opens the door for inconsistent and unpredictable application. This, in turn, may result in public distrust in the legal profession. On a plain reading of the statute, extra time is automatically granted to remedy a defect.¹⁹ Consequently, when the court has the opportunity, it should overrule *Guzick* and adopt a plain reading of the statute.²⁰

II. HISTORY

This section explains the history of a narrow area of malpractice law: Minnesota's requirement for expert affidavits certifying medical and non-medical malpractice claims. To understand these certification requirements, this section begins with a brief historical overview of legal malpractice in Minnesota. This discussion then shifts to a period of radical change in Minnesota medical malpractice law: the years before and after the 1986 Tort Reform Act became effective. As one of its many new provisions, the Tort Reform Act created a statutory requirement for expert affidavits in medical malpractice lawsuits.²¹ In 1997, this requirement was extended to non-medical professional

14. See *infra* Part II.

15. See *infra* Part III.

16. See *infra* Part IV; see also *Guzick*, 869 N.W.2d at 55 (Lillehaug, J., concurring) (arguing that not providing additional time for plaintiffs to remedy affidavit defects might "damage [] our bedrock principle of statutory interpretation" and cause "the premature death of potentially meritorious claims").

17. *Guzick*, 869 N.W.2d at 52–56.

18. See *id.* at 53 (noting that the "concepts of 'major' and 'minor' deficiencies [] are judicial concoctions").

19. See *id.* at 55 (citing *Wesely v. Flor*, 806 N.W.2d 36, 41 (Minn. 2011)).

20. See *id.*

21. Tort Reform Act of Mar. 25, 1986, ch. 455, § 60, 1986 Minn. Laws 840, 871–72 (creating section 145.682, a new statute for expert certification in medical malpractice).

malpractice, including legal malpractice, in a separate but very similar statute.²² Finally, this section provides an in-depth look at how Minnesota courts have applied and interpreted these statutory requirements for expert affidavits.

A. *A General History of Legal Malpractice*

The Minnesota Supreme Court has long held that if an attorney's negligence harms a client, the attorney is responsible for the damages.²³ The court recognized early on that it is not always clear when an attorney-client relationship exists.²⁴ But when there is an attorney-client relationship, the court has articulated that the scope of a lawyer's duty to her client is to act "in good faith to the best of [her] skill and knowledge"²⁵ An attorney abiding by this standard does not breach her duty because of a simple error or mistake.²⁶

Putting much of this common law into a modern framework, the court adopted four elements that are now required for a prima facie legal malpractice claim: (1) an attorney-client relationship, (2) a negligent act, (3) proximate causation, and (4) but-for causation.²⁷ Soon after the court established these elements, it also established a general rule that a negligent act—the duty and breach components—must be supported by expert testimony.²⁸ The court took this standard directly from its medical malpractice jurisprudence.²⁹ If these elements were not supported by proper

22. Act of May 30, 1997, ch. 212, § 2, 1997 Minn. Laws 1917, 1917–20 (creating section 544.42, a new statute for expert certification in non-medical malpractice).

23. See, e.g., *Schoregge v. Bishop*, 29 Minn. 367, 371, 13 N.W. 194, 196 (1882) ("The attorney is answerable to his clients in damages for any abuse of his trust, or the consequences of his ignorance, negligence, or indiscretion").

24. See *Ryan v. Long*, 35 Minn. 394, 394, 29 N.W. 51, 51 (1886) (holding that an attorney-client relationship existed when an attorney provided solicited legal advice); see also *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 692 (Minn. 1980) (recognizing *Ryan* as the first Minnesota case to question whether an attorney-client relationship existed).

25. *Sjobeck v. Leach*, 213 Minn. 360, 365, 6 N.W.2d 819, 822 (1942) (quoting 5 AM. JUR. *Attorneys at Law* § 125 (1936)).

26. *Id.*

27. *Togstad*, 291 N.W.2d at 692 (citing *Christy v. Saliterman*, 288 Minn. 144, 150, 179 N.W.2d 288, 293–94 (1970)).

28. *Hill v. Okay Const. Co.*, 312 Minn. 324, 337, 252 N.W.2d 107, 116 (1977).

29. *Id.*

expert testimony at trial, the consequence was typically a directed verdict in favor of the defendant.³⁰ Notably, the court made an exception for the requirement of expert testimony when the lawyer's duty and breach of that duty "are within the area of common knowledge and lay comprehension."³¹

Today, the standards for expert testimony are much stricter. Section 544.42 requires that a properly-identified expert supports a legal malpractice claim well before trial even begins.³² As the discussion below explores, medical malpractice law influenced the development of these stricter procedural limitations.³³

B. *Minnesota's Tort Reform Act*

In the 1970s and 1980s, medical malpractice lawsuits across the nation were becoming more frequent³⁴ and jury awards were getting larger.³⁵ In turn, insurers raised their rates, and consequently, some medical services became more expensive.³⁶ This became a nationwide problem, and many states initiated tort reform to reduce the number of lawsuits and the size of damage awards.³⁷

30. See *Lhotka v. Larson*, 307 Minn. 121, 130, 238 N.W.2d 870, 876 (1976); *Silver v. Redleaf*, 292 Minn. 463, 463, 194 N.W.2d 271, 271 (1972); *Swanson v. Chatterton*, 281 Minn. 129, 130–31, 160 N.W.2d 662, 664 (1968).

31. *Hill*, 312 Minn. at 336–37, 252 N.W.2d at 116.

32. See MINN. STAT. § 544.42 (2016).

33. See *House v. Kelbel*, 105 F. Supp. 2d 1045, 1051 (D. Minn. 2000) (stating that the Minnesota legislature used a medical malpractice statute "as a blueprint" for a statute relating to legal malpractice).

34. For example, a national insurer, The St. Paul Companies, Inc. (now merged with Travelers insurance), reported 3113 physician malpractice claims in 1979; in 1983, the company reported 5870 claims—an eighty-eight percent increase. PROGRAM EVALUATION DIV., OFF. OF THE LEGIS. AUDITOR, ST. OF MINN., PUB. NO. 86-0333, INSURANCE REGULATION 81 (1986), <https://www.leg.state.mn.us/docs/pre2003/other/860333.pdf>.

35. In 1980, the average jury award was \$404,726; just four years later in 1984, it had more than doubled to \$954,858. Patricia M. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 L. CONTEMP. PROB. 57, 57–58 (1986) (citing JURY VERDICT RESEARCH, INC., INJURY VALUATION REPORTS, No. 292, CURRENT AWARD TRENDS 18–19 (1985)).

36. Shirley Qual, *A Survey of Medical Malpractice Tort Reform*, 12 WM. MITCHELL L. REV. 417, 418–19 (1986).

37. PROGRAM EVALUATION DIV., *supra* note 34, at 94 ("Many states have tried to [reduce the frequency and size of damage awards] by enacting changes in the tort liability system.").

In January 1986, a division of the Legislative Audit Commission released a report about insurance regulation in Minnesota, which noted a “rapid increase in rates” for some commercial liability insurance, including medical malpractice.³⁸ It further noted that national trends in jury awards “made certain lines of insurance appear very risky to insurance companies.”³⁹ The report also pointed towards evidence that tort reforms in other states helped contain insurance claims.⁴⁰

In March 1986, the Minnesota legislature approved the Tort Reform Act.⁴¹ A Senate session report stated that the Tort Reform Act “provide[d] a long-term approach to reducing insurance costs by providing tort reform directed at decreasing the cost of civil lawsuits, which [was] increasing at the rate of 10 to 15 percent per year.”⁴² The report also stated one of the act’s goals was “eliminating frivolous civil lawsuits.”⁴³

Part of the Tort Reform Act required affidavits from experts to support a claim for malpractice.⁴⁴ This requirement made it more difficult for plaintiffs to proceed with lawsuits.⁴⁵ This, in turn, helped prevent frivolous lawsuits.⁴⁶ The next section considers these affidavit requirements in detail.

C. *Affidavits for Medical Malpractice: Section 145.682*

Section 145.682 was drafted as part of the Tort Reform Act, in part to reduce frivolous medical malpractice lawsuits.⁴⁷ The statute

38. *Id.* at xii.

39. *Id.*

40. *Id.* at xiii.

41. Tort Reform Act of Mar. 25, 1986, ch. 455, § 60, 1986 Minn. Laws 840, 886.

42. Karen L. Clark et al., *Bill Highlights*, 12 SESSION REV., no. 2, 1986, at 1, 11, <https://www.leg.state.mn.us/docs/pre2003/other/861076.pdf> (discussing the “Omnibus insurance bill”).

43. *Id.*

44. § 60, 1986 Minn. Laws at 871–72.

45. In its report, the Program Evaluation Division mentioned that “several states have changed evidentiary and procedural aspects of trials” in order to “impose greater burdens on the plaintiffs of a personal injury case.” PROGRAM EVALUATION DIV., *supra* note 34, at 97.

46. See *Parker v. O’Phelan*, 414 N.W.2d 534, 537 (Minn. Ct. App. 1987) (stating that the primary purpose of section 145.682 was to “eliminate nuisance malpractice suits”), *aff’d*, 428 N.W.2d 361 (Minn. 1988).

47. *Id.*; see generally E. Curtis Roeder, Note, *Introduction to Minnesota’s Tort*

currently requires two affidavits of expert opinion in support of the malpractice claim.⁴⁸ The first affidavit, the affidavit of expert review, is usually filed with the plaintiff's complaint.⁴⁹ The affidavit of expert review must only disclose that an expert read the facts, concluded that the defendant breached a duty she owed to the plaintiff, and concluded that the defendant's breach caused damages.⁵⁰ The expert is qualified if it is reasonable to expect that her testimony would be admitted at trial.⁵¹ Second, an affidavit of expert disclosure must be served within 180 days of the commencement of discovery.⁵² The second affidavit, the affidavit of expert disclosure, must identify the expert and provide the substance and grounds of the opinion.⁵³ In place of a formal affidavit of expert disclosure, answering an interrogatory can also satisfy the statute.⁵⁴ If a plaintiff does not meet these requirements, the defendant can submit a motion to dismiss the case.⁵⁵

In 2001, in response to meritorious lawsuits being dismissed over minor technical errors,⁵⁶ a bill was introduced to create a safe harbor period for remedying defective affidavits of expert disclosure.⁵⁷ The House sponsor of the bill specifically said that he wanted to protect plaintiffs from a civil procedure that was "too strict."⁵⁸ He added that "there [was] a developing practice among

Reform Act, 13 WM. MITCHELL L. REV. 277, 303–06 (1987).

48. MINN. STAT. § 145.682, subdiv. 2 (2016).

49. *Id.*

50. *Id.* § 145.682, subdiv. 3(a).

51. *Id.* As an example, a general pediatrician with no specialization in pediatric oncology was not qualified to provide an affidavit regarding a bone marrow transplant. *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 427–28 (Minn. 2002).

52. MINN. STAT. § 145.682, subdiv. 2.

53. *Id.* § 145.682, subdiv. 4(a).

54. *Id.*

55. *Id.* § 145.682, subdiv. 6(a).

56. *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 217 (Minn. 2007) (citing Minn. S., S. Deb. on S.F. 0936, 82d Minn. Leg., Reg. Sess. (May 16, 2001) (audio tape) (statement of Sen. Neuville)). Before the enactment of the safe harbor provision, it was well established that section 145.682 could have harsh outcomes. See generally Jason Leo, Comment, *Torts—Medical Malpractice: The Legislature's Attempt to Prevent Cases without Merit Denies Valid Claims*, 27 WM. MITCHELL L. REV. 1399, 1419–22 (2000).

57. H.F. 1051, 82d Leg., 2d Sess. (Minn. 2001).

58. MINN. HOUSE OF REPRESENTATIVES: PUB. INFO. OFF., NEW LAWS 2001: A COMPLETE SUMMARY OF THE REGULAR LEGISLATIVE SESSION AND SPECIAL SESSION 88

medical malpractice defense attorneys to move to dismiss otherwise legitimate complaints” because of minor technical errors.⁵⁹ Although Governor Jesse Ventura vetoed the bill because of an issue unrelated to safe harbor in 2001,⁶⁰ he signed another bill containing the safe harbor provision in 2002⁶¹ that became effective on May 22, 2002.⁶² Section 145.682 now contains a safe harbor provision that provides plaintiffs at least forty-five days to correct errors upon service of a motion to dismiss.⁶³

D. Affidavits for Legal and Other Non-Medical Malpractice: Section 544.42

In 1997, the legislature enacted section 544.42 to expand the scope of the principles in section 145.682 to include non-medical professionals.⁶⁴ Not surprisingly, the language, content, and timing requirements of section 544.42 closely track section 145.682.⁶⁵ The two-affidavit requirement is virtually identical.⁶⁶ First, the affidavit of expert review, which is typically served with the complaint, only needs to verify that a qualified expert reviewed the facts of the case

(2001), <https://www.leg.state.mn.us/docs/2008/other/080895.pdf>.

59. *Id.*

60. *See id.*

61. *See* Act of May 22, 2002, ch. 403, § 1, 2002 Minn. Laws 1706, 1706–07 (codified at MINN. STAT. § 145.682, subdiv. 6 (2002)).

62. *Id.* at 1712.

63. *See* MINN. STAT. § 145.682, subdiv. 6(c)(2) (2016) (“[T]he time for hearing the motion is at least 45 days from the date of service of the motion.”).

64. *See* *House v. Kelbel*, 105 F. Supp. 2d 1045, 1051 (D. Minn. 2000); *see also* MINN. STAT. § 544.42, subdiv. 1(1) (defining “professionals” as attorneys, architects, accountants, engineers, land surveyors, and landscape architects). The hearing on the bill that created section 544.42 demonstrated that section 544.42’s purpose was to avoid frivolous lawsuits, just as it was for section 145.682: during the hearing, Senator Ranum, an author of the bill, stated that “if we begin to do what we’ve done in the medical malpractice area . . . people will look for . . . experts early and evaluate their cases earlier, and I believe that if there are frivolous lawsuits that . . . really aren’t meritorious, you will screen them out in this process.” *Hearing on S.F. 627 Before the S. Judiciary Comm.*, 80th Minn. Leg., Reg. Sess. (Mar. 25, 1997) (on file with Mitchell Hamline Law Review).

65. *See* *Meyer v. Dygert*, 156 F. Supp. 2d 1081, 1090 (D. Minn. 2001) (“[T]he statutory language for both statutes is, in major substance, the same.”); *House*, 105 F. Supp. 2d at 1051 (discussing that the two statutes have “nearly identical” content).

66. *Compare* MINN. STAT. § 145.682, subdiv. 2, *with id.* § 544.42, subdiv. 2.

and found probable negligence.⁶⁷ Then, the affidavit of expert disclosure, which outlines the expert's reasoning, must be served within 180 days of the commencement of discovery.⁶⁸ An answer to an interrogatory can serve as an affidavit of expert disclosure.⁶⁹ If a plaintiff fails to meet these requirements, the defendant can move to dismiss the case.⁷⁰

The state legislature enacted section 544.42 with a safe harbor provision similar to section 145.682's, which can provide the plaintiff sixty days to remedy any deficiencies in the second affidavit upon service of a motion to dismiss.⁷¹ However, unlike section 145.682, the defendant's motion to dismiss does not trigger safe harbor under section 544.42; the court triggers safe harbor by providing the plaintiff with notice of the affidavit's deficiencies.⁷² The purpose of the new statute was partly to avoid problems associated with the application of section 145.682, which did not have a safe harbor provision at the time.⁷³

E. Minnesota Case Law Interpreting the Statutes

Minnesota courts have decided cases interpreting these statutes with two goals in mind: avoiding frivolous lawsuits⁷⁴ and protecting meritorious lawsuits.⁷⁵ Long before these statutes were

67. *Id.* § 544.42, subdiv. 3(a)(1).

68. *Id.* § 544.42, subdiv. 4(a).

69. *Id.*

70. *Id.* § 544.42, subdiv. 6(a).

71. *See id.* § 544.42, subdiv. 6(c).

72. *Compare id.* § 145.682, subdiv. 6(c)(2) (“[T]he time for hearing the motion is at least 45 days from the date of service of the motion.”), *with id.* § 544.42, subdiv. 6(c) (“[A]fter notice by the court, the nonmoving party is given 60 days to satisfy the disclosure requirements.”).

73. *See House v. Kelbel*, 105 F. Supp. 2d 1045, 1053 (D. Minn. 2000). During the Senate Committee Hearing on the bill for section 544.42, one speaker noted that section 145.682 should also be amended to allow some leeway for plaintiffs because motions were routinely challenging cases on the basis of inadequate expert qualifications. *See Hearing on S.F. 627, supra* note 64 (statement of Mr. Carlson). Section 544.42's safe harbor provision took care of this problem, but at the time, section 145.682 did not provide this option. *See Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 725 n.1 (Minn. 2005) (noting that the legislature added the safe-harbor provision to section 145.682 in 2002).

74. *See, e.g., Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 578 (Minn. 1999) (“It is the legislative choice to implement the policy of eliminating frivolous medical malpractice lawsuits by dismissal.”).

75. *See, e.g., Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 193

enacted, the court was concerned about dismissing meritorious cases on procedural grounds.⁷⁶ The two goals regarding frivolous and meritorious cases also reflect the goals of the legislature: the initial purpose of the medical malpractice statute was to make it harder to file frivolous lawsuits,⁷⁷ but the legislature showed that it was also concerned about dismissing meritorious cases when it provided safe harbor provisions for sections 145.682 and 544.42.⁷⁸ The court has struggled to strike a balance between the two goals because they present a dichotomy: allowing too many malpractice suits to go to trial will allow many frivolous lawsuits to proceed, and trying to stamp out every potentially frivolous case will preclude meritorious cases.⁷⁹

Two recent Minnesota Supreme Court cases demonstrate that this struggle has continued. In 2007, the court considered *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*,⁸⁰ its first non-medical malpractice case involving a deficient affidavit under section 544.42.⁸¹ *Brown-Wilbert* required that plaintiffs' affidavits strictly

(Minn. 1990) (“[T]he sanction imposed by section 145.682 is the abrupt termination with prejudice of what may be a meritorious cause of action.”).

76. *Firoved v. Gen. Motors Corp.*, 277 Minn. 278, 283, 152 N.W.2d 364, 368 (1967) (“An order of dismissal on procedural grounds runs counter to the primary objective of the law to dispose of cases on the merits. Since a dismissal with prejudice operates as an adjudication on the merits, it is the most punitive sanction which can be imposed for noncompliance with the rules or order of the court or for failure to prosecute.”).

77. *Clark et al.*, *supra* note 42 (“The tort reform provided by Chapter 455 is aimed at eliminating frivolous civil lawsuits . . .”).

78. *See* MINN. HOUSE OF REPRESENTATIVES, *supra* note 58.

79. A case from before the medical malpractice statute was enacted sums up the dichotomy nicely: “Physicians should not be plagued with defending unmeritorious lawsuits, but a wronged patient is entitled to pursue a warranted claim.” *Anderson v. Florence*, 288 Minn. 351, 359, 181 N.W.2d 873, 878 (1970).

80. 732 N.W.2d 209 (Minn. 2007).

81. Although the Supreme Court of Minnesota did not address what to do with a *deficient* affidavit before *Brown-Wilbert*, lower Minnesota courts and federal courts denied safe harbor in at least three cases because the plaintiff completely failed to file the second affidavit under section 544.42. *See Meyer v. Dygert*, 156 F. Supp. 2d 1081, 1091 (D. Minn. 2001) (citing *House v. Kelbel*, 105 F. Supp. 2d 1045, 1054 (D. Minn. 2000) (noting that safe harbor only applies “where the plaintiff has filed a deficient affidavit”)); *House*, 105 F. Supp. 2d at 1051 (stating that the sixty days of safe harbor serve to “avoid[] harsh consequences arising from inadvertent drafting errors . . . and is available only when . . . filed within 180 days”); *Middle River-Snake River Watershed Dist. v. Dennis Drewes, Inc.*, 692 N.W.2d 87, 91 (Minn. Ct. App. 2005) (noting that the court has to issue specific

meet detailed substantive requirements to use safe harbor and did not provide an exception for affidavits filed in good faith.⁸² In 2011, *Wesely v. Flor*⁸³ considered the court's first medical malpractice case that analyzed section 145.682 after the legislature added the safe harbor provision to the statute in 2002.⁸⁴ *Wesely* determined that virtually all plaintiffs that timely submit an affidavit should be granted safe harbor—likely even those that do not file in good faith.⁸⁵ Despite sections 145.682 and 544.42 both containing safe harbor provisions, the two holdings end up on opposite ends of the meritorious/frivolous dichotomy. To understand this discrepancy, this subsection shows how the medical malpractice case law has shifted from a concern for protecting meritorious cases to preventing frivolous cases. The non-medical malpractice case law then followed suit. Finally, after the addition of the safe harbor provision to section 145.682, the medical malpractice case law moved back towards a greater concern for meritorious cases, but the non-medical malpractice case law did not.

1. *A Second Chance for Meritorious Cases: Sorenson v. St. Paul Ramsey Medical Center*

The Minnesota Supreme Court was initially very concerned about dismissing meritorious lawsuits in the years before and after section 145.682 was enacted.⁸⁶ The court avoided a rigid

deficiencies in the affidavit if it grants safe harbor, and there can be no deficiencies in a non-existent affidavit).

82. *Brown-Wilbert*, 732 N.W.2d at 216 (“[W]e read section 544.42, subdivision 4, to describe objective requirements for an affidavit of expert disclosure that can be measured on the face of any document that is claimed to be such an affidavit, without inquiry into counsel’s intent.”).

83. 806 N.W.2d 36 (Minn. 2011).

84. *Id.* at 40 (“This is our first opportunity to interpret the safe-harbor provision of section 145.682.”).

85. *See id.* at 41–42 (“Here, under section 145.682, the safe-harbor period is an automatic, 45-day delay before the court hears any arguments or makes any decisions regarding deficiencies in the affidavit.”).

86. *See, e.g., Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 404 (Minn. 1986). *Dennie* was a medical malpractice case decided just before the enactment of section 145.682. Quoting an older case, *Dennie* noted that “[a]n order of dismissal on procedural grounds runs counter to the primary objective of the law to dispose of cases on the merits.” *Id.* (quoting *Firoved v. Gen. Motors Corp.*, 277 Minn. 278, 283, 152 N.W.2d 364, 368 (1967)).

application of the statute that might dismiss meritorious cases.⁸⁷ This meant that when a plaintiff filed a potentially deficient affidavit, or even no affidavit at all, the court would err on the side of avoiding dismissal.⁸⁸ *Sorenson v. St. Paul Ramsey Medical Center* was a major case in this trend.⁸⁹

In *Sorenson*, a woman sued a hospital and two doctors for medical malpractice over the stillbirth of her child.⁹⁰ Her counsel properly filed the first affidavit and timely filed the second affidavit.⁹¹ The defendants were not satisfied with the second affidavit, so they moved to compel the plaintiff to answer interrogatories and filed interrogatories requesting the substance of the expert's testimony.⁹² The plaintiff timely answered the interrogatories, and the defendants then withdrew their motion to compel answers.⁹³ Defendants then "wait[ed] out the 180 days" and moved for summary judgment on the basis that the plaintiff did not meet the affidavit requirements.⁹⁴

The *Sorenson* court acknowledged that the plaintiff's interrogatory answers were defective and could not serve as a second affidavit.⁹⁵ The court reasoned that the answers simply

87. For example, see *Sorenson's* discussion of "borderline cases." *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 193 (Minn. 1990).

88. Where no affidavit is filed at all, the Minnesota Supreme Court has allowed additional time on the basis of excusable neglect. For example, in *Stern*, a plaintiff sued her dentist for medical malpractice and failed to file a second affidavit before the 180-day deadline. *Stern v. Dill*, 442 N.W.2d 322, 323 (Minn. 1989). The plaintiff requested her dental records from the defendant, but he did not release the records for about three months. *Id.* This reduced the amount of time the plaintiff's expert had to determine a causal relationship for the alleged negligence; partly on this basis, the court granted the plaintiff an extension for excusable neglect. *Id.* at 325. Although section 145.682 did not allow for this extension, Minnesota Rule of Civil Procedure 6.02 provides the court discretionary power to hear motions after a statute's timing requirement expires if there is excusable neglect. *Id.* at 324 (citing MINN. R. CIV. P. 6.02). And the rules supersede a statute when a statute conflicts with a procedural rule relating to "pleading, practice, [or] procedure." *Id.* (quoting MINN. R. CIV. P. 81.01(c)). Since the court found that section 145.482 was procedural in nature, Rule 6.02 superseded it to provide an extension. *Id.*

89. See 457 N.W.2d 188 (Minn. 1990).

90. *Id.* at 189.

91. *Id.* at 189–90.

92. *Id.* at 190.

93. *Id.*

94. *Id.*

95. *Id.* at 192.

contained empty conclusions, such as that the defendant “failed to properly evaluate” and “failed to properly diagnose.” The court held that there was malpractice without a causal connection.⁹⁶ Nevertheless, the court did not dismiss the lawsuit.⁹⁷ The court noted that the defendants removed their motion to compel answers after receiving the plaintiff’s answers.⁹⁸ From the plaintiff’s perspective, this signaled that the answers were satisfactory.⁹⁹ But instead, the defendants surprised them by waiting out the 180 days and filing a motion to dismiss.¹⁰⁰ Because of the defendants’ behavior, the court ruled they were “estopped from receiving a procedural dismissal.”¹⁰¹

Sorenson made two significant observations in dicta that became perhaps the most influential parts of the case. First, *Sorenson* noted that the plaintiff in the case could have easily offered a more detailed affidavit.¹⁰² Consequently, *Sorenson* offered a disclosure standard for future cases where the plaintiff had “no valid reason” for the defective affidavit.¹⁰³ After *Sorenson*, a proper disclosure requires a statement on the appropriate standard of care, the alleged negligent act, and a causal connection between the negligent act and the plaintiff’s damages.¹⁰⁴

Second, *Sorenson* recognized there are “borderline cases”: cases where the plaintiff makes a good faith effort to identify the expert and provide “some meaningful disclosure of what the testimony will be,” but the disclosure is not substantively adequate.¹⁰⁵ *Sorenson* recognized that a mechanical application of the statute could dismiss meritorious cases in this category.¹⁰⁶ *Sorenson*, therefore, made an opening for the court to consider more than the statute’s

96. *Id.* at 192–93 (quoting language from the plaintiff’s second affidavit).

97. *Id.* at 193.

98. *Id.*

99. *Id.*

100. *Id.* at 190.

101. *Id.* at 193 (citing *Thorson v. Rice Cty. Dist. One Hosp.*, 437 N.W.2d 410, 416 (Minn. 1989)).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*; see also *House v. Kelbel*, 105 F. Supp. 2d 1045, 1053 (D. Minn. 2000) (defining borderline cases as “situations in which an affidavit is submitted in good faith, but is not deemed substantively sufficient . . .”).

106. *Sorenson*, 457 N.W.2d at 193.

language in its analysis.¹⁰⁷ Plaintiffs could avoid dismissal if affidavits were filed in good faith—as long as the affidavit did not significantly prejudice the defendant.¹⁰⁸ In place of outright dismissal, *Sorenson* suggested imposing lesser sanctions, such as allowing the defendant to depose the plaintiff's expert at the plaintiff's expense or restricting testimony to the affidavit's content.¹⁰⁹

Another significant medical malpractice case that followed *Sorenson* is *Stroud v. Hennepin County Medical Center*.¹¹⁰ *Stroud* dismissed the plaintiff's lawsuit, but the decision was arguably consistent with *Sorenson* because the plaintiff had plenty of warning to remedy the affidavit.¹¹¹

2. *No Second Chances*: Lindberg v. Health Partners, Inc.

At the turn of the century, the court moved away from *Sorenson*'s concern over meritorious lawsuits and more towards a concern over frivolous lawsuits, which led to a stricter application

107. *House*, 105 F. Supp. 2d at 1053 (“[T]he Court has left an opening in which the court can take an alternative action to mandatory dismissal and allow a case to proceed on the merits.”).

108. *Id.* at 1052 (citing *Sorenson*, 457 N.W.2d at 193).

109. *Sorenson*, 457 N.W.2d at 193.

110. 556 N.W.2d 552 (Minn. 1996).

111. See *id.* at 556. In *Stroud*, a woman went to the hospital three times in eight days with medical issues. *Id.* at 553. She was examined and sent home twice. *Id.* The third time she was admitted after suffering a hemorrhage and died just over two weeks later in the hospital. *Id.* Her estate sued, and there were two defendants: a hospital and a medical group. *Id.* A few months into the lawsuit, the hospital served interrogatories on the plaintiff requesting a causal explanation for the malpractice claim. *Id.* at 554. The plaintiff answered by simply referring the defendant back to the first affidavit in the complaint. *Id.* The hospital again served formal interrogatories and also sent two letters to the plaintiff requesting a causal explanation. *Id.* The 180-day deadline passed without a further submission from the plaintiff. *Id.* Once again, the hospital attempted to elicit interrogatory answers—this time with a motion to compel answers—but the plaintiff again referred back to the initial affidavit. *Id.* The plaintiff eventually filed a new affidavit, but the hospital joined a motion for summary judgment that the medical group had already filed. *Id.* at 555. The supreme court upheld the district court's original granting of this motion, noting not only that the initial affidavit was conclusory under *Sorenson* but also that the plaintiff's failure to provide an adequate affidavit was “especially troubling” because of the multiple attempts the hospital made to obtain a proper affidavit. *Id.* at 556.

of the statute.¹¹² *Lindberg v. Health Partners, Inc.*¹¹³ started this line of cases.¹¹⁴

In *Lindberg*, a pregnant patient contacted her health care provider three times within roughly twenty-four hours.¹¹⁵ She first called about leg swelling and later called with further complications.¹¹⁶ She was told to stay home both times.¹¹⁷ The third time she called, the provider advised her to go to the hospital.¹¹⁸ Later that day, her baby was delivered stillborn.¹¹⁹ A medical malpractice lawsuit ensued, and the plaintiff timely submitted both expert affidavits that section 145.682 requires.¹²⁰

The court dismissed the case because the second affidavit contained “nothing more than broad and conclusory statements as to causation.”¹²¹ The affidavit noted that the provider’s “failure to instruct Ms. Lindberg to seek prompt medical attention . . . caused the death of [Ms. Lindberg’s child].”¹²² However, this statement did not outline a chain of causation tracing the provider’s negligent act to the child’s death.¹²³ Following *Sorenson*’s disclosure standard, the *Lindberg* court noted that a proper affidavit disclosure requires, in part, a causal connection between the negligent act and the plaintiff’s damages.¹²⁴ Because this was missing, the court dismissed the case.¹²⁵ In reaching this decision, *Lindberg* explicitly stated that there is no exception to excuse an affidavit that “fall[s] short” of the substantive requirement for statements on causation.¹²⁶ This contrasts with *Sorenson*’s approach to borderline cases, which considers the plaintiff’s good faith.¹²⁷

112. See Leo, *supra* note 56, at 1400–01 (noting that *Lindberg* set the trend for dismissal of meritorious claims over technicalities in affidavits).

113. 599 N.W.2d 572 (Minn. 1999).

114. See Leo, *supra* note 56, at 1400–01.

115. See *Lindberg*, 599 N.W.2d at 573–74.

116. *Id.*

117. *Id.*

118. *Id.* at 574.

119. *Id.*

120. *Id.*

121. *Id.* at 577–78.

122. *Id.* at 577.

123. *Id.* at 578.

124. *Id.* at 577 (citing *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 193 (Minn. 1990)).

125. *Id.* at 579.

126. *Id.* at 578.

127. See *House v. Kelbel*, 105 F. Supp. 2d 1045, 1052–53 (D. Minn. 2000)

In reaching its decision, the *Lindberg* court steered away from *Sorenson*'s concern for meritorious cases and focused narrowly on the legislature's intent to eliminate frivolous cases:

Dismissal is mandated under [section 145.682] 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. *It is the legislative choice to implement the policy of eliminating frivolous medical malpractice lawsuits by dismissal.*¹²⁸

Thus, the court directly connected the dismissal to the legislature's goal of eliminating frivolous cases.

The *Lindberg* decision was in stark contrast with *Sorenson*. *Lindberg* followed *Sorenson*'s requirements for a proper affidavit disclosure but did not consider *Sorenson*'s mitigating factor of good faith that could prevent outright dismissal in potentially meritorious cases. As the dissent noted, "This was not the 'frivolous litigation' that [section 145.682] was intended to remedy, rather it is one of those borderline cases where counsel retained a qualified expert and made a good faith effort to disclose meaningful information of what the expert testimony would be."¹²⁹ By ignoring the mitigating factor of good faith, *Lindberg* shifted the court's jurisprudence away from a concern over meritorious lawsuits and towards a narrow concern for frivolous lawsuits.¹³⁰

Less than a year after *Lindberg*, the court decided another medical malpractice case with the same narrow concern for frivolous lawsuits.¹³¹ The discussion below explores how this trend spilled over into non-medical malpractice case law.

(citing *Sorenson*, 457 N.W.2d 188).

128. *Lindberg*, 599 N.W.2d at 578 (emphasis added).

129. *Id.* at 580 (Gilbert, J., concurring in part and dissenting in part).

130. This is perhaps best demonstrated by the last sentence of Justice Anderson's concurring opinion in *Lindberg*, where he noted that "[this decision] is a harsh result, especially in light of the personal tragedy suffered by the Lindberg family, nevertheless, it is a result mandated by the law based on the record before us." *Id.* at 579 (Anderson, J., concurring specially).

131. See *Anderson v. Rengachary*, 608 N.W.2d 843 (Minn. 2000). In *Anderson*, A doctor performed surgery that caused a woman to suffer nerve severing and swelling. *Id.* at 845. The plaintiff sued the doctor, and her lawyer timely filed both affidavits. *Id.* The doctor waited out the 180-day deadline and then moved to dismiss the lawsuit on the basis that the second affidavit was defective. *Id.* The district court granted this motion because the affidavit provided no causal connection between the doctor's negligent act and the woman's injury. *Id.* The court of appeals reversed the district court, finding that the woman filed the

3. *The Most Recent Case Law on Sections 544.42 and 145.682: Brown-Wilbert and Wesely*

Brown-Wilbert arose out of a father-and-son-owned business.¹³² The business used an accounting firm to help in an acquisition of another company, but the firm allegedly acted as the father's personal accountant and contrary to the son's interests.¹³³ This allegedly resulted in numerous damages to the company;¹³⁴ for example, the firm "allowed [the father] to misappropriate hundreds of thousands of dollars of [the company's] money."¹³⁵ The son first sued his father in a shareholder rights action, resulting in the son buying out all of the father's company shares in a settlement.¹³⁶ With the son controlling the company, the company sued for accounting malpractice.¹³⁷

Brown-Wilbert affirmed the dismissal of an action for accounting malpractice because the requirements for the second affidavit were unfulfilled.¹³⁸ In a response to an interrogatory requesting the grounds for expert opinion, the plaintiff named two experts and answered that they were "expected to testify as to the conclusions set forth in the Complaint."¹³⁹ This response contained no new information besides the names of two experts.¹⁴⁰ Similar to *Sorenson's* interpretation that conclusory statements do not satisfy the second affidavit requirements under section 145.682,¹⁴¹ *Brown-*

affidavits in good faith and had no notice that the second affidavit was insufficient before the 180 days expired. *Anderson v. Rengachary*, 591 N.W.2d 511, 513 (Minn. Ct. App. 1999), *rev'd*, 608 N.W.2d 843. The Minnesota Supreme Court reversed, holding that "[n]o language in [section 145.682] suggests that a plaintiff is entitled to notice of the insufficiency of the affidavit prior to the expiration of the 180 days," and that the court of appeals "created a good-faith exception to the statute of uncertain proportions." *Anderson*, 608 N.W.2d at 849.

132. *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 212–13 (Minn. 2007).

133. *Id.* at 213.

134. *Id.*

135. Complaint ¶ 54, *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, No. A05-340 (Minn. Ct. App. Nov. 22, 2005), 2005 WL 3111959.

136. *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, No. A05-340, 2005 WL 3111959, at *1 (Minn. Ct. App. Nov. 22, 2005), *aff'd on other grounds*, 732 N.W.2d 209 (Minn. 2007).

137. *See id.*

138. *Brown-Wilbert*, 732 N.W.2d at 219–20.

139. *Id.* at 214.

140. *See id.*

141. *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 190 (Minn.

Wilbert held that the conclusory allegations made in the interrogatory answers did not meet the minimum standards under section 544.42.¹⁴² As interpreted by *Brown-Wilbert*, the minimum standards for a proper disclosure are that the second affidavit must contain (1) the expert's identity and (2) the expert's opinion supporting the elements of a prima facie malpractice case.¹⁴³ The court applied this standard objectively to determine whether to grant the plaintiff sixty days of safe harbor or grant pretrial dismissal of the case.¹⁴⁴ Although the plaintiff in *Brown-Wilbert* met the first requirement by identifying experts,¹⁴⁵ there were only conclusory statements to support the opinion.¹⁴⁶ Consequently, the court dismissed the action.¹⁴⁷

Sorenson and *Lindberg* both influenced the *Brown-Wilbert* decision. *Brown-Wilbert* explicitly stated that it was influenced by *Sorenson*'s discussion of "borderline cases"¹⁴⁸ and adopted *Sorenson*'s opening for extra-statutory considerations by implementing minimum standards for the second affidavit.¹⁴⁹ However, one notable difference between the cases is that *Brown-Wilbert*'s standards are strictly objective,¹⁵⁰ while *Sorenson* considers the plaintiff's good faith balanced against the prejudice the defendant may sustain from allowing an affidavit remedy.¹⁵¹ Because *Brown-*

1990) (citing MINN. STAT. § 145.682, subdiv. 2(2) (2014)).

142. See *Brown-Wilbert*, 732 N.W.2d at 219.

143. *Id.* These standards are considered objectively; subjective intent to submit an affidavit in good faith is irrelevant. *Id.* at 216. *But see* House v. Kelbel, 105 F. Supp. 2d 1045, 1053 (stating that courts can take alternative action to dismissal when an affidavit is "submitted in good faith").

144. *Brown-Wilbert*, 732 N.W.2d at 218–19.

145. *Id.* at 214.

146. *Id.* at 219.

147. *Id.* at 219–20.

148. *Id.* at 219.

149. See *id.*; see also House v. Kelbel, 105 F. Supp. 2d 1045, 1053 (D. Minn. 2000) (noting that *Sorenson* "left an opening in which the court can take an alternative action to mandatory dismissal and allow a case to proceed on the merits"); *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 193 (Minn. 1990).

150. *Brown-Wilbert*, 732 N.W.2d at 216 (holding that the statutory requirements are objective).

151. *House*, 105 F. Supp. 2d at 1052 ("In dicta, the *Sorenson* Court acknowledged that mandatory dismissal of a suit in which a party provides a substantively deficient affidavit in good faith might be a harsh result."). Specifically, *Sorenson* suggested that dismissal may not be appropriate if the

Wilbert rejected a good faith standard and set its own objective standards,¹⁵² the case marks a significant difference with *Sorenson*.

Brown-Wilbert also makes no mention of *Sorenson*'s discussion of lesser sanctions than outright dismissal, such as allowing the defendant to depose the plaintiff's expert at the plaintiff's expense.¹⁵³ This was likely omitted because *Brown-Wilbert* followed *Lindberg*'s lead in following the legislature's original intent of the statute to dismiss frivolous cases.¹⁵⁴ Towards this end, *Brown-Wilbert* connected its decision to dismiss the case to the legislature's intent to eliminate frivolous cases:

[I]f we look to the purpose for section 544.42, to provide a mechanism for the early dismissal of frivolous actions, the minimum standards for such an affidavit should be that it contains meaningful information on each of the issues for which expert testimony will be required at trial to avoid a directed verdict.¹⁵⁵

By way of contrast, in the first medical malpractice case interpreting section 145.682's safe harbor provision, the *Wesely v. Flor* court declined to extend *Brown-Wilbert* and took an entirely new approach to interpreting the statute.¹⁵⁶ Looking at the safe harbor provision's plain language, the *Wesely* court determined that any timely affidavit would automatically be granted forty-five days of safe harbor upon a motion to dismiss.¹⁵⁷ The *Wesely* court reasoned that, on a plain reading of the statute, the court plays no role in determining the adequacy of the second affidavit before safe harbor is exhausted.¹⁵⁸

After *Wesely*, a question remained as to whether the discrepancy between *Wesely* and *Brown-Wilbert* is justified. *Wesely* maintained that its holding did not overrule *Brown-Wilbert* because the court identifies the deficiencies in the affidavit under section 544.42; under section 145.682, the defendant identifies the

plaintiff provides some "meaningful disclosure" and the defendant is not severely prejudiced by the defective affidavit. *Sorenson*, 457 N.W.2d at 193.

152. *Brown-Wilbert*, 732 N.W.2d at 216–18.

153. *See Sorenson*, 457 N.W.2d at 193.

154. *See Brown-Wilbert*, 732 N.W.2d at 217.

155. *Id.* at 218 (emphasis added).

156. *See* 806 N.W.2d 36, 41 (Minn. 2011).

157. *Id.* ("[Section 145.682] does not limit the safe-harbor period to only certain types of deficiencies.").

158. *Id.* at 42–43.

deficiencies.¹⁵⁹ Thus, under *Wesely*, the court plays a role in section 544.42 in a way that it does not in section 145.682.¹⁶⁰ However, despite section 544.42's reference to the court's role in identifying deficiencies, it is not entirely clear how section 544.42 allows the court to deny safe harbor strictly because of a defective affidavit.¹⁶¹

Amidst this background, the Minnesota Supreme Court decided *Guzick v. Kimball*. Because *Guzick* was a legal malpractice case, section 544.42 controlled. Consequently, it was likely that *Guzick* would follow *Brown-Wilbert's* interpretation of section 544.42. But *Guzick* presented a new challenge: it was the supreme court's first legal malpractice case interpreting section 544.42; as such, it was unclear what elements of legal malpractice required expert support. Moreover, although *Wesely* was not controlling, it was lurking in the background with a radically different holding on a virtually identical statute. It remained to be seen whether the court would take steps to address this discrepancy.

III. THE *GUZICK* DECISION

A. *Facts and Procedural History*

Colleen Bennett ("Bennett") was the legal assistant of attorney Larry Kimball ("Kimball") at Kimball Law Office.¹⁶² In 2008, Louis Nyberg, Jr. ("Tony") asked Bennett to draft a power of attorney form that would allow Tony to act as attorney-in-fact on behalf of his uncle, George Nyberg ("George").¹⁶³

Per office procedure, Bennett printed a standard form and filled in George's information.¹⁶⁴ The form contained a pre-checked box that would allow Tony full access to all of George's property.¹⁶⁵ Bennett gave the form to Tony, who obtained George's signature.¹⁶⁶ However, neither Bennett nor Kimball, as Bennett's

159. *Id.* at 41–42.

160. *See id.*

161. This was central to the dissent in *Brown-Wilbert*, which argued that the case should have been allowed to proceed on the basis of good faith. *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 228 (Minn. 2007) (Anderson, J., concurring in part and dissenting in part).

162. *Guzick v. Kimball*, 869 N.W.2d 42, 44 (Minn. 2015).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

supervisor, determined whether George read and understood the form.¹⁶⁷ In fact, Kimball did not even see the form.¹⁶⁸

In early 2009, Tony used the power of attorney form at a Wells Fargo branch to add his name to two of George's bank accounts as a joint owner with a right of survivorship.¹⁶⁹ A few days later, George died.¹⁷⁰ Around this time—before and after George's death—Tony transferred \$226,524 to bank accounts he shared with his wife.¹⁷¹

Representing George's estate, Timothy Guzick sued Kimball for legal malpractice and alleged that Kimball had a duty to supervise Bennett and also had an independent duty to meet with George to discuss the legal consequences of the power of attorney.¹⁷² Kimball moved for summary judgment against Guzick's claims on the basis that Guzick did not provide a satisfactory affidavit of expert disclosure within the required 180-day timeframe.¹⁷³ Although Guzick referenced the affidavit of expert review in answering Kimball's interrogatories, Kimball argued that this was inadequate because the expert's opinion was conclusory and did not establish any of the four elements of legal malpractice.¹⁷⁴

The district court agreed with Kimball and granted the motion for summary judgment.¹⁷⁵ It held that Guzick's answers to Kimball's interrogatories were "grossly deficient in meeting the statutory requirements."¹⁷⁶ The court also held that all four elements of legal malpractice should have been supported by expert opinion and

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 44–45. Before suing Kimball, Guzick sued Tony and Tony's wife for conversion. *Id.* at 44. They filed for bankruptcy, and Guzick won a sum in bankruptcy court. *Id.* Guzick also sued Wells Fargo. *Id.* Wells Fargo settled the case. Brief of Appellants Larry Alan Kimball, Kimball Law Off., and Kimball and Udem, *Guzick v. Kimball*, 869 N.W.2d 42 (2015) (No. A14-0429), 2015 WL 1070344, at *4. One of Kimball's defenses was that these previous lawsuits showed the damages were the result of third parties, and therefore, Kimball could not be liable. *Id.* at *8.

173. *Guzick*, 869 N.W.2d at 45; *see also* MINN. STAT. § 544.42 (2016).

174. *Guzick*, 869 N.W.2d at 45–46.

175. *Guzick v. Kimball*, No. 11-CV-13-689, 2014 WL 9963420, at *2 (Minn. Dist. Ct. Jan. 3, 2014), *rev'd*, No. A14-0429, 2014 WL 4957973 (Minn. Ct. App. Oct. 6, 2014), *rev'd*, 869 N.W.2d 42 (Minn. 2015).

176. *Id.* at *2.

that Guzick supported none of them.¹⁷⁷ In finding that all four elements required expert support, the court noted that a lay juror could not understand how the facts of the case establish any element of legal malpractice.¹⁷⁸

Guzick appealed the decision, and the court of appeals reversed.¹⁷⁹ The court first noted that expert support is generally not required to prove the first element of legal malpractice, the existence of an attorney-client relationship.¹⁸⁰ Next, the court stated that the remaining three elements—a negligent act, but-for cause, and proximate cause—generally require expert testimony and that only “exceptional” or “rare” cases will not require expert testimony for these elements.¹⁸¹ However, the court held that this case presented an exception for establishing a but-for cause.¹⁸² This is because “lay-witness testimony” could establish pertinent questions relating to cause-in-fact issues, such as whether Wells Fargo or Tony was the but-for cause of George’s damages.¹⁸³ Consequently, the court held that expert opinion was only required to fulfill two elements of legal malpractice: a negligent act and proximate causation.¹⁸⁴ Finally, the court held that Guzick’s affidavit was sufficient to satisfy these two elements.¹⁸⁵

B. *The Minnesota Supreme Court’s Decision*

Kimball appealed the court of appeals’ decision, and the Minnesota Supreme Court reversed on the basis that Guzick’s second affidavit was conclusory and failed the *Brown-Wilbert* standards.¹⁸⁶ First, the court noted that Guzick procedurally met the 180-day limit on the second affidavit by answering Kimball’s interrogatories.¹⁸⁷ As such, Guzick potentially qualified for statutory safe harbor, which would have required the court to give him

177. *Id.* at *3.

178. *Id.*

179. *Guzick*, 2014 WL 4957973, at *1.

180. *Id.* at *3.

181. *Id.* (citing *Fontaine v. Steen*, 759 N.W.2d 672, 677 (Minn. Ct. App. 2009)).

182. *Id.* at *5.

183. *Id.*

184. *Id.* at *6.

185. *Id.* at *11.

186. *Guzick v. Kimball*, 869 N.W.2d 42, 51–52 (Minn. 2015).

187. *Id.* at 48.

notice of deficiencies in the affidavit and sixty days to remedy those deficiencies.¹⁸⁸ As a result, *Brown-Wilbert* applied, and the court considered whether Guzick satisfied the minimum standards.¹⁸⁹ Guzick plainly satisfied the first *Brown-Wilbert* element: disclosure of the expert to be called upon.¹⁹⁰ Consequently, the case hinged on the outcome of a two-step process: The court had to determine (1) which elements of legal malpractice required expert opinion, and (2) whether Guzick's affidavit was satisfactory for each of these elements under *Brown-Wilbert*.¹⁹¹

Generally, the court noted that it considers each element of malpractice on a "case-by-case" basis.¹⁹² First, expert opinion is generally always required to establish a negligent act.¹⁹³ Since this case presented no exception, the court required expert opinion on this element.¹⁹⁴ However, because the parties did not dispute that the affidavit established a negligent act,¹⁹⁵ this was not part of the court's analysis.

The court held that the other three elements of legal malpractice—but-for cause, proximate cause, and the existence of an attorney-client relationship—do not generally require expert support.¹⁹⁶ This holding directly rejected the court of appeals' position that both causation elements typically require expert support as a general rule.¹⁹⁷ The court reasoned that the court of appeals unjustifiably relied on medical malpractice case law to derive its rule.¹⁹⁸ Rather than provide a general rule with a lay juror exception, the court asked whether the facts relating to an element are "within an area of common knowledge and lay comprehension

188. MINN. STAT. § 544.42, subdiv. 6(c) (2016).

189. *Guzick*, 869 N.W.2d at 48.

190. *Id.*

191. *See id.* at 49–50 (stating the main issue as whether or not the affidavit was satisfactory for the elements requiring expert opinion).

192. *Id.* at 48–49.

193. *Id.* at 49.

194. *Id.*

195. *See id.* at 49–50 (noting that the parties dispute whether the "expert disclosure . . . satisfied Brown-Wilbert's standard for but-for causation, proximate causation, and the existence of an attorney-client relationship").

196. *See id.* at 50 (quoting *Tousignant v. St. Louis Cty.*, 615 N.W.2d 53, 58 (Minn. 2000)) ("Although legal malpractice claims may involve complex causation issues, 'complex issues of science or technology' are generally not found in legal malpractice cases.")

197. *Id.* (citing *Tousignant*, 615 N.W.2d at 58).

198. *Id.* (citing *Tousignant*, 615 N.W.2d at 58).

such that they can be adequately evaluated by a jury in the absence of an expert.”¹⁹⁹

Applying this method, the court found that an expert was not required to establish but-for cause.²⁰⁰ The court reasoned that a lay juror could make causal inferences about whether Kimball’s negligent acts were a but-for cause of the overbroad power of attorney form and whether this form was a but-for cause of the vulnerability of George’s funds.²⁰¹ Consequently, the court did not consider the second step of the process: whether but-for cause was satisfactory under *Brown-Wilbert*.

Next, the court considered proximate cause, and this is what decided the case. Notably, Guzick did not dispute that expert certification was required for proximate cause, which is perhaps the only reason the court required it.²⁰² Since expert support was required for proximate cause, *Brown-Wilbert* applied, and the court ruled that Guzick’s second affidavit was plainly conclusory because it only stated that Kimball’s negligent acts “caused damages.”²⁰³ Consequently, this defect in the affidavit precluded Guzick from safe harbor under *Brown-Wilbert*.²⁰⁴

Finally, because the affidavit was already deemed defective, the court considered it unnecessary to discuss the requirements for an attorney-client relationship.²⁰⁵ Thus, the court only required an expert to establish a negligent act and proximate cause.²⁰⁶

IV. ANALYSIS

This section begins by placing *Guzick* in the historical context discussed in Part II. When deciding whether to grant safe harbor for a defective affidavit, *Guzick* followed *Brown-Wilbert*’s minimum

199. *Id.* (citing *Hill v. Okay Constr. Co.*, 312 Minn. 324, 337, 252 N.W.2d 107, 116 (1977)).

200. *Id.* at 50–51.

201. *Id.* at 50.

202. *Id.* Justice Lillehaug noted in his concurring opinion that if Guzick had not agreed that an expert was required for proximate cause, “it would have been a close call as to whether an expert was necessary to establish proximate cause under the facts of this case.” *Id.* at 52 (Lillehaug, J., concurring).

203. *Id.* at 51 (majority opinion) (noting that Guzick should not be allowed safe harbor because he had been pursuing other lawsuits, which were based on the same facts, for multiple years).

204. *Id.* at 51–52; *see also* MINN. STAT. § 544.42, subdiv. 6(c) (2016).

205. *Guzick*, 869 N.W.2d at 48 n.5.

206. *Id.* at 48.

standards and did not consider the plaintiff's good faith.²⁰⁷ The discussion in this section explores how this approach runs counter to the legislature's intent to avoid dismissing meritorious cases. To demonstrate how *Brown-Wilbert* can dismiss meritorious cases, this section traces the procedural history of *Wesely* through the district court and the court of appeals.

The analysis then shifts to the Minnesota Supreme Court's decision in *Wesely*, which reversed the court of appeals and declined to extend *Brown-Wilbert* to medical malpractice.²⁰⁸ This created tension between *Wesely* and *Brown-Wilbert* because the cases' underlying statutes—sections 145.682 and 544.42, respectively—have only minor differences.²⁰⁹ None of these differences, however, lend support to the *Brown-Wilbert* standards.²¹⁰ Consequently, *Wesely's* approach, which follows the plain language of the statute, makes more sense.²¹¹

Finally, this section ends with a discussion on how the *Brown-Wilbert* standards will not provide fair warning to plaintiffs before their claims are dismissed. This is not only unfair, but it may also have a detrimental impact on the public's perception of the legal profession.

A. Guzick's *Historical Foundation Runs Against Legislative Intent*

Guzick followed the *Brown-Wilbert* minimum standards for the second expert affidavit in non-medical malpractice actions.²¹² In establishing these standards, *Brown-Wilbert* claimed to be influenced by *Sorenson's* discussion of "borderline cases."²¹³ In the medical malpractice context, *Sorenson* attempted to ease the crudeness of an "all or nothing" application of section 145.682 in potentially meritorious cases.²¹⁴ Plaintiffs could avoid dismissal if affidavits were filed in good faith and as long as they did not prejudice the

207. *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 216 (Minn. 2007).

208. *Wesely v. Flor*, 806 N.W.2d 36, 44 (Minn. 2011).

209. Compare MINN. STAT. § 145.682, with *id.* § 544.42.

210. See *Guzick*, 869 N.W.2d at 53 (Lillehaug, J., concurring).

211. *Id.*

212. *Id.* at 47 (majority opinion).

213. *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 219 (Minn. 2007).

214. See *Sorenson v. St. Paul Ramsey Med. Ctr.* 457 N.W.2d 188, 193 (Minn. 1990).

defendant.²¹⁵ In such cases, *Sorenson* offered a middle ground and suggested lesser sanctions for plaintiffs than outright dismissal.²¹⁶ *Sorenson*, therefore, made an opening for the court to go beyond the statute in borderline cases.²¹⁷

Brown-Wilbert adopted *Sorenson*'s opening for extra-statutory considerations, but then it rejected *Sorenson*'s good faith standard and set its own objective "minimum standards."²¹⁸ This is problematic for two reasons. First, by invoking *Sorenson*, *Brown-Wilbert* takes us back to *Sorenson*'s time, before there was a safe harbor provision.²¹⁹ *Sorenson*'s application is therefore questionable because section 145.682 is more favorable to plaintiffs after the addition of safe harbor, and section 544.42 has always had safe harbor.²²⁰ Second, *Brown-Wilbert* actually adds an additional burden for plaintiffs by switching out good faith for detailed objective standards.²²¹ Consequently, it is probable that *Brown-Wilbert*'s standards, which burden plaintiffs despite section 544.42's safe harbor provision, are even harsher than *Sorenson*'s approach, which the court used before safe harbor even existed for section 145.682.²²² Thus, the *Brown-Wilbert* standards arguably run against

215. *House v. Kelbel*, 105 F. Supp. 2d 1045, 1052 (D. Minn. 2000) (citing *Sorenson*, 457 N.W.2d at 193).

216. *Sorenson*, 457 N.W.2d at 193.

217. *House*, 105 F. Supp. 2d at 1053.

218. *Brown-Wilbert*, 732 N.W.2d at 216–18.

219. *See* *Guzick v. Kimball*, 869 N.W.2d 42, 54 (Minn. 2015) (Lillehaug, J., concurring).

220. *See id.* (citing Act of May 22, 2002, ch. 403, § 1, 2002 Minn. Laws 1706, 1706–07) (noting that there is "no real value" to citing medical malpractice cases that were decided before safe harbor was even enacted).

221. *See Brown-Wilbert*, 732 N.W.2d at 227 (Anderson, J., concurring in part and dissenting in part) (noting that *Brown-Wilbert*'s approach is much narrower than *Sorenson*'s standard and that *Brown-Wilbert* causes "great potential for unfairness and unduly harsh results").

222. *See id.* Also consider the fact that Guzick's affidavit was dismissed despite containing ten specific departures from the standard of care. Respondent's Brief, *Guzick v. Kimball*, 869 N.W.2d 42 (No. A14-0429), 2015 WL 1070341, at *29. For example, Mr. Kimball "failed to supervise [his legal assistant] . . . in the drafting of the [Power of Attorney form]" and "failed to meet and talk with George Nyberg" to assess his legal competency and why he wanted an attorney-in-fact. *Id.* at *27. This is arguably more detailed than the affidavit in *Sorenson*, where it vaguely noted that a fetal anomaly "should have been apparent" to the doctor on duty and that the doctor on duty "failed to properly diagnose" fetal distress and "failed to take proper steps" to deliver the baby. *Sorenson v. St. Paul Ramsey Med. Ctr.* 457 N.W.2d 188, 192 (Minn. 1990). The affidavits in *Sorenson* and *Guzick* were both

the legislature's intent for safe harbor to prevent dismissals of meritorious cases.²²³ As the next section explores, this potential for dismissing meritorious cases is very real.

B. Brown-Wilbert and Guzick Might Lead to Unjust Outcomes and Dispose of Meritorious Lawsuits

The facts and procedural history of *Wesely v. Flor*²²⁴ provide a good example of how *Guzick* and *Brown-Wilbert* might dismiss meritorious cases. While Ms. Wesely was receiving dental care, the power went out and her dentist became distracted.²²⁵ Consequently, the dentist's drill damaged Ms. Wesely's teeth and lip.²²⁶ The dentist then tried to repair the damage.²²⁷ While doing so, the dentist allegedly rested his hand on her jaw and forced her jaw into various abnormal directions.²²⁸ The pressure allegedly displaced her jaw and caused disfigurement.²²⁹ Consequently, Ms. Wesely sued the dentist and the dental office.²³⁰

To make matters worse for Ms. Wesely, her attorney withdrew from the case eighty-three days before the 180-day deadline for submitting a second affidavit.²³¹ The attorney had Ms. Wesely's medical records, and Ms. Wesely did not receive the records until twenty days before the expiration of the 180-day deadline.²³² With no attorney, Ms. Wesely acted *pro se*, finding an expert and serving the second affidavit eleven days before the deadline.²³³ Ms. Wesely met with a new attorney two days after the 180-day deadline passed, and the new attorney told her the expert supporting the submitted

deemed insufficient. *Guzick*, 2015 WL 1070341, at *29; *Sorenson*, 457 N.W.2d at 193. However, *Guzick's* affidavit was arguably much more detailed.

223. For example, the point of adding a safe harbor provision to section 145.682 was to ease a civil procedure that was "too strict." MINN. HOUSE OF REPRESENTATIVES, *supra* note 58.

224. *Wesely v. Flor*, 806 N.W.2d 36 (Minn. 2011).

225. *Id.* at 38.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. Appellant's Brief and Appendix at 1, *Wesely v. Flor*, 791 N.W.2d 583 (Minn. Ct. App. 2010) (No. A10-478), 2010 WL 5493722.

232. *Wesely v. Flor*, 791 N.W.2d 583, 589 (Minn. Ct. App. 2010), *rev'd*, 806 N.W.2d 36 (Minn. 2011).

233. *See id.* at 585.

affidavit might not be suitable because he was not a dentist.²³⁴ Shortly after this, the defendant moved to dismiss the lawsuit over a deficient affidavit.²³⁵ Within forty-five days of this motion, Ms. Wesely, now represented by the new lawyer, served a new affidavit with a new expert.²³⁶

In the district court, Ms. Wesely argued that her first lawyer's withdrawal and the subsequent delay in receiving her medical records should provide her with an extension on the basis of excusable neglect.²³⁷ She also argued that she "did her best," implying that her good-faith effort, combined with the pressing circumstances, should grant her an extension.²³⁸

The district court rejected Ms. Wesely's arguments. The court noted that the expert's identity is the most important part of the affidavit,²³⁹ and because the new affidavit had a new expert, it could not amend the previous affidavit.²⁴⁰ On this basis, the court dismissed the lawsuit with prejudice.²⁴¹

In its decision, the district court acknowledged the merit of Ms. Wesely's case.²⁴² The district court specifically stated that "despite a deficient expert affidavit, it appears that the Plaintiff has a reasonable suit on the merits."²⁴³ The court also stated it was "sympathetic to [Ms. Wesely], but that does not allow the court to bend what is a strict and clear time limit under the statute."²⁴⁴

The district court's argument runs against legislative intent. If Ms. Wesely's case was "app[arently] . . . reasonable . . . on the

234. *Id.*

235. *Id.*

236. *See id.* The new expert pointed to the dentist's negligent failure to refer Ms. Wesely to "immediate medical care" after displacing her jaw. Appellant's Brief and Appendix at 8, *Wesely v. Flor*, 791 N.W.2d 583 (Minn. Ct. App. 2010) (No. A10-478), 2010 WL 5493722. The new expert also stated that there "is limited expectation that treatment will ever restore [Ms. Wesely's] jaw to its pre-trauma condition" and noted Ms. Wesely's "constant, consistent and persistent pain." *Id.*

237. *See Wesely v. Flor*, No. 24-CV-09-1592, 2010 WL 5577258, at *9 (Minn. Dist. Ct. Jan. 21, 2010), *aff'd*, 791 N.W.2d 583 (Minn. Ct. App. 2010), *rev'd*, 806 N.W.2d 36 (Minn. 2011).

238. *See id.*

239. *Id.* at *10.

240. *Id.* at *7 ("[The statute] does not state that a new affidavit by a new expert is an acceptable method of curing the deficiencies.").

241. *Id.* at *10.

242. *Id.* at *9.

243. *Id.*

244. *Id.* at *7.

merits,”²⁴⁵ her case could not have been frivolous.²⁴⁶ And because her case was not frivolous, allowing it to proceed would have aligned with the legislature’s intent to stop frivolous cases.²⁴⁷ Moreover, the 2002 safe harbor provision was enacted to prevent meritorious cases from being dismissed.²⁴⁸ Here, the court admitted the lawsuit was probably meritorious but still dismissed the case.²⁴⁹ This interpretation of section 145.682 is not what the legislature intended.

The situation did not improve in the Minnesota Court of Appeals. In *Wesely*, the court of appeals not only upheld the district court’s decision, it found further support for the district court’s conclusion in *Brown-Wilbert*:

[Ms. Wesely] also argues that she made a good-faith effort to comply with [section 145.682]. But the *Brown-Wilbert* court declined to adopt a good-faith standard for complying with [section 544.42, subdivision 4], because it would inject a subjective element into the requirements for an affidavit of expert [disclosure]. The district court did not abuse its discretion in declining to extend the 180-day period to allow appellant to submit an expert-disclosure affidavit.²⁵⁰

245. *Id.* at *9.

246. *Frivolous Claim*, BLACK’S, *supra* note 1 (defining a frivolous claim as “[a] claim that has no legal basis or merit, esp[ecially] one brought for an unreasonable purpose such as harassment” (citing Fed. R. Civ. P. 11(b))).

247. *See* Clark et al., *supra* note 42.

248. *See* MINN. HOUSE OF REPRESENTATIVES, *supra* note 58; *see also* *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 217 (Minn. 2007) (citing *S. Deb. on S.F. 0936*, 82d Minn. Leg. (May 16, 2001) (statement of Sen. Neuville)).

249. *See* *Wesely*, 2010 WL 5577258, at *10–11.

250. *Wesely*, 791 N.W.2d at 589 (citation omitted). Readers should note that the language in this quote was altered by the author to correct two small errors in the court’s opinion. The court’s opinion incorrectly states that *Brown-Wilbert* “declined to adopt a good-faith standard for complying with [section] 544.42, *subd[ivision] 3*, because it would inject a subjective element into the requirements for an affidavit of expert *review*.” *Id.* (emphasis added). The *Brown-Wilbert* court made it clear that it declined to adopt good faith for the affidavit of expert *disclosure*, which is in subdivision 4 of section 544.42, not subdivision 3. The *Brown-Wilbert* opinion reads: “We decline to adopt a ‘good faith’ standard because it would inject a subjective element into the requirements for an *affidavit of expert disclosure*. . . . [W]e read section 544.42, *subdivision 4*, to describe objective requirements for an *affidavit of expert disclosure* . . .” *Brown-Wilbert*, 732 N.W.2d at 216 (emphasis added).

By referencing the Minnesota Supreme Court decision of *Brown-Wilbert*, the court of appeals authoritatively disposed of Ms. Wesely's good-faith intentions²⁵¹ and arguably disposed a meritorious lawsuit as a result.²⁵² The court isolated the issue to the affidavit defects alone. Notably, the court did not consider Ms. Wesely's lawyer who withdrew from representation,²⁵³ her receipt of the medical records twenty days before the 180-day deadline,²⁵⁴ her *pro se* attempt to timely file the affidavit after being unable to find a new attorney,²⁵⁵ and her retention of a new attorney as soon as she could find one.²⁵⁶ To proceed with her claim under the pressing circumstances, Ms. Wesely had to act *pro se* and file the affidavit herself despite allegedly suffering "constant, consistent and persistent pain."²⁵⁷ These facts minimally establish Ms. Wesely's good faith effort to appropriately file the second affidavit. *Brown-Wilbert's* minimum standards do not account for this effort. As a result, if the story ended here, *Brown-Wilbert's* influence would have provided extra credibility and authority to dispose of what was arguably a meritorious lawsuit.

C. *Guzick Should Have Rejected Brown-Wilbert and Followed the Plain Statutory Language of Section 544.42*

Ms. Wesely's story did not end at the court of appeals. In 2011, the Minnesota Supreme Court declined to extend *Brown-Wilbert* to medical malpractice in *Wesely v. Flor*.²⁵⁸ The court reasoned that, under the plain language of section 145.682, the triggering of the forty-five day safe harbor period is entirely procedural and automatic.²⁵⁹ Thus, there is no place for a substantive *Brown-Wilbert* analysis of an affidavit's content.²⁶⁰ In contrast, under section

251. See *Fid. Union Trust Co. v. Field*, 311 U.S. 169, 178 (1940) (citing *Beals v. Hale*, 45 U.S. 37, 54 (1846)) ("The highest state court is the final authority on state law."); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

252. *Wesely*, 2010 WL 5577258, at *9 (noting that the lawsuit was "app[arently] . . . meritorious").

253. Appellant's Brief and Appendix, *Wesely v. Flor*, 791 N.W.2d 583 (Minn. Ct. App. 2010) (No. A10-0478), 2010 WL 5493722, at *1.

254. *Wesely*, 791 N.W.2d at 589.

255. *Id.* at 585.

256. *Id.*

257. Appellant's Brief, *supra* note 253, at *8.

258. 806 N.W.2d 36, 42 (Minn. 2011).

259. *Id.* at 41.

260. *Id.* at 42.

544.42, the court triggers the safe harbor period and issues specific deficiencies in the affidavit.²⁶¹ Therefore, *Wesely* reasoned that *Brown-Wilbert* fits into the statutory framework of section 544.42.²⁶²

Wesely is persuasive regarding the differences in the statutes. Under section 544.42, the court identifies the deficiencies and initiates the plaintiff's sixty days of safe harbor.²⁶³ Under section 145.682, the defendant identifies the deficiencies and the plaintiff has at least forty-five days to remedy the affidavit upon service of the motion.²⁶⁴ In sum, the court is involved in the safe-harbor process in section 544.42, but all references to the court are absent from the plain statutory language of section 145.682.²⁶⁵

However, under the rules of statutory interpretation, the differences in the two statutes are not enough for *Guzick* to uphold *Brown-Wilbert*.²⁶⁶ The first step in statutory interpretation is to determine whether the statute's words are clear and unambiguous.²⁶⁷ If the statute is unambiguous, the court applies the plain meaning of the statute.²⁶⁸ Section 544.42 is clear and unambiguous—it does not state that the court plays a substantive role in granting safe harbor.²⁶⁹ Rather, subdivision 6(c) states that “an initial motion to dismiss an action . . . shall not be granted, unless after notice by the court, the nonmoving party is given 60 days to satisfy the disclosure requirements in subdivision 4.”²⁷⁰ This plain language suggests that the court's role is limited to providing notice that the sixty days have started.²⁷¹ In other words, the court does not *grant*

261. *Id.*

262. *See id.*

263. MINN. STAT. § 544.42, subdiv. 6(c) (2016).

264. *Id.* § 145.682, subdiv. 6(c)(2).

265. *See Wesely*, 806 N.W.2d at 41.

266. *See Guzick v. Kimball*, 869 N.W.2d 42, 53 (Minn. 2015) (Lillehaug, J., concurring).

267. *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 72 (Minn. 2012); *see* MINN. STAT. § 645.16 (“When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.”).

268. *Staab*, 813 N.W.2d at 73.

269. *See Guzick*, 869 N.W.2d at 53; *see also* MINN. STAT. § 544.42, subdiv. 6(c).

270. MINN. STAT. § 544.42, subdiv. 6(c) (emphasis added); *see also Guzick*, 869 N.W.2d at 53 (citing MINN. STAT. § 544.42, subdiv. 6(c)).

271. *Guzick*, 869 N.W.2d at 53. In *Guzick's* only concurring opinion, Justice Lillehaug noted that *Brown-Wilbert* invented the court's authority to substantively decide an affidavit's merits before granting sixty days of safe harbor. *Id.* at 53–54. Provided that the language of section 544.42 unambiguously provides sixty days of

safe harbor at the time of notice; the court only *notifies* the plaintiff that the clock has started ticking, and the court cannot dismiss the case until the clock stops.²⁷² And, while the court must identify deficiencies in the affidavit, the plaintiff has sixty days to remedy the deficiencies.²⁷³

Brown-Wilbert reasoned its interpretation of the statute was necessary because allowing affidavits with little or no content “would render the 180-day requirement meaningless.”²⁷⁴ After all, a plaintiff could submit a “placeholder” affidavit to delay submitting a proper affidavit.²⁷⁵ However, *Wesely* convincingly explained that this is unlikely because the first affidavit requires that the plaintiff already “[be] in contact with an expert.”²⁷⁶ Therefore, the plaintiff would usually have little reason to use such a tactic.²⁷⁷ Moreover, even if a plaintiff uses this tactic, it is risky because it only leaves sixty days to submit an affidavit, and a failure to submit an affidavit in good faith could shift the defendant’s attorney fees and other costs to the plaintiff.²⁷⁸ Finally, even if some “placeholder” affidavits arise, this does not render the 180-day requirement meaningless.

safe harbor before a motion can be dismissed, this “judicial concoction” is unwarranted. *Id.* Thus, while he reluctantly concurred with the majority’s application of *Brown-Wilbert*, Justice Lillehaug argued that the court should eventually return to the plain language of the statute. *Id.* at 55–56.

272. *See id.* at 53.

273. MINN. STAT. § 544.42, subdiv. 6(c); *Guzick*, 869 N.W.2d at 53.

274. *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 217–18 (Minn. 2007). The general rule is that, if at all possible, parts of a statute should not be rendered meaningless. *State v. Wilson*, 830 N.W.2d 849, 853 (Minn. 2013) (citing *State v. Orsello*, 554 N.W.2d 70, 74 (Minn. 1996), *as amended on reh’g* (Oct. 31, 1996)) (“In [applying the plain meaning of the statute], we interpret the statute in a manner that renders no part of it meaningless.”); *see also* MINN. STAT. § 645.16 (“Every law shall be construed, if possible, to give effect to all its provisions.”).

275. *Wesely v. Flor*, 806 N.W.2d 36, 42 (Minn. 2011). *Brown-Wilbert* does not explicitly express the worry that a plaintiff might submit a “placeholder” affidavit, but it is implied. *See Brown-Wilbert*, 732 N.W.2d at 217–18.

276. *Wesely*, 806 N.W.2d at 42.

277. *Id.*

278. *Id.* Subdivision 7 of sections 145.682 and 544.42 contain essentially the same language, and both allow sanctions if the plaintiff or the plaintiff’s attorney does not certify the “affidavit or answers to interrogatories” in good faith. *Compare* MINN. STAT. § 544.42, subdiv. 7, *with id.* § 145.682, subdiv. 7. The fact that subdivision 7 includes answers to interrogatories, which can only serve as the second affidavit under subdivision 4, suggests that the good faith standard for sanctions applies to both affidavits. *See Wesely*, 806 N.W.2d at 42.

Under the plain language of section 544.42, plaintiffs still must file an affidavit to access the sixty days of safe harbor.²⁷⁹ Without an affidavit at all, there is no safe harbor.²⁸⁰ Although the need for any affidavit at all sets a low bar, it is not a meaningless bar.²⁸¹ Consequently, the court must apply the plain language of the statute.

Finally, even if there is something ambiguous about the safe harbor provision, this ambiguity can be resolved by considering the legislative intent of section 544.42. The Senate Judiciary Committee, which heard the bill that created section 544.42, intended the safe harbor provision to be available for all types of affidavit defects.²⁸² Nothing in the bill hearing indicates that the safe harbor provision is only available for affidavits that can pass a test resembling the *Brown-Wilbert* standards.

Without statutory support, historical support, or a reason to engage in statutory interpretation, there is no reason for *Brown-Wilbert's* minimum standards to exist. This leaves a plain reading of

279. The statute's plain language states that when providing notice, "the court shall issue specific findings as to the deficiencies of the affidavit . . ." MINN. STAT. § 544.42, subdiv. 6(c). This indicates that a filed affidavit must exist for a plaintiff to potentially access safe harbor. *House v. Kelbel*, 105 F. Supp. 2d 1045, 1051 (D. Minn. 2000).

280. *House*, 105 F. Supp. 2d at 1051.

281. Indeed, this is *Wesely's* interpretation of section 145.682. Moreover, at least one other state also agrees the low bar of "any affidavit at all" is not a meaningless standard; Georgia's analogous statute, which covers both medical and non-medical malpractice, has "no express limitation on the nature of the alleged defect subject to remedy." *Gala v. Fisher*, 770 S.E.2d 879, 883 (Ga. 2015) (quoting *Porquez v. Washington*, 492 S.E.2d 665, 668 n.3 (Ga. 1997) (citing GA. CODE ANN. § 9-11-9.1)).

282. A bill summary that was provided to members of the Senate Judiciary Committee noted that "[f]ailure to comply with [section 544.42's requirements] would result, upon motion, in mandatory dismissal with prejudice, except that *in an initial motion to dismiss . . . based on a deficient response, the party must be given 60 days to satisfy the disclosure requirements.*" KATHLEEN PONTIUS, S. COUNSEL & RESEARCH, SUMMARY OF S.F. NO. 627 (Minn. Mar. 25, 1997) (emphasis added) (on file with Mitchell Hamline Law Review). This summary is as clear as it can be: sixty days are available to remedy a deficient response in an initial motion to dismiss. *See id.* There is no limitation for major defects. Moreover, when the Judiciary Committee heard the bill, Senator Cohen noted that "if there is some type of defect, minor or otherwise, . . . the other party gets the opportunity to provide that correction." *Id.* He argued that this opportunity should be extended to medical professionals under section 145.682. *Id.* All of this indicates that the legislature intended for safe harbor to be available for all affidavit defects.

the statute, which grants safe harbor to all plaintiffs that timely submit any affidavit.²⁸³ *Wesely* acknowledges this plain reading by granting safe harbor to all plaintiffs who timely submit any affidavit—likely even those who do not file in good faith (but those who fail to file in good faith are subject to sanctions).²⁸⁴ *Wesely* lets safe harbor do its job, and the court’s non-medical malpractice case law should, too. *Guzick* missed an opportunity to return the court to the plain statutory language of section 544.42.

A legitimate question may arise at this point: why have separate statutes for medical and non-medical malpractice if the statutes are essentially the same? Besides the fact that section 145.682 grants forty-five days of safe harbor and section 544.42 grants sixty days, there is little separating the two statutes. One attractive solution to this problem is to simply eliminate section 145.682 and place all professionals, including medical professionals, under section 544.42.²⁸⁵ As potential models, Georgia²⁸⁶ and Arizona²⁸⁷ have analogous statutes covering all professionals.

D. Following the Statute’s Plain Language Will Provide Fair Warning to Plaintiffs and Improve Public Confidence in the Legal Profession

Guzick noted that the court should determine whether but-for causation requires expert support by considering whether the facts relating to but-for causation fall within an area of common understanding for a lay juror.²⁸⁸ Presumably, the court would typically apply this standard to the legal malpractice elements of attorney-client relationship and proximate cause as well.²⁸⁹

283. *Guzick v. Kimball*, 869 N.W.2d 42, 53 (Minn. 2015) (Lillehaug, J., concurring).

284. *Wesely v. Flor*, 806 N.W.2d 36, 42 (Minn. 2011).

285. Leo, *supra* note 56 at 1429 (“The legislature should abandon section 145.682 and allow all malpractice claims, whether against doctors or other professionals, to be governed by statute section 544.42.”).

286. GA. CODE ANN. § 9-11-9.1 (West, Westlaw through 2016 Sess. of the Gen. Assemb.).

287. ARIZ. REV. STAT. ANN. § 12-2602 (West, Westlaw through 2016 2d Reg. Sess. of the 52d Leg.).

288. *Guzick*, 869 N.W.2d at 50 (citing *Hill v. Okay Const. Co.*, 312 Minn. 324, 337, 252 N.W.2d 107, 116 (1977)).

289. *Guzick* only indicates that expert testimony is generally required to establish a negligent act in a legal malpractice claim. *Id.* at 49. *Guzick* distinguishes this from the other elements of legal malpractice by stating that the court has “never required expert testimony on the other elements of a prima facie case of

When this inexact standard is combined with the power to dismiss a case with prejudice under *Brown-Wilbert*, its immediate application may unfairly dismiss the cases of unsuspecting plaintiffs.²⁹⁰ *Brown-Wilbert* and *Guzick* do not require the court to specify its expectations for expert opinion before deciding a motion to dismiss with prejudice. However, plaintiffs need to know the expectations of the presiding court and must have adequate notice to abide by these expectations.²⁹¹ After all, what falls within the common understanding for a lay juror might change over time, and different courts might have different interpretations. Indeed, as the procedural history of *Guzick* demonstrates, the district court and the court of appeals disagreed about what elements of a prima facie legal malpractice case require expert testimony.²⁹² The Minnesota Supreme Court's decision in *Guzick* did nothing to clarify this confusion. In fact, *Guzick* arguably made the confusion worse because it rejected the rule that expert testimony is generally required for both causation elements of legal malpractice.²⁹³ Without this general guideline, it is now more likely that courts will rely on the lay juror standard, leading to potentially more surprise dismissals.

legal malpractice." *Id.* Expert testimony is generally required to establish a negligent act in a legal malpractice claim in many jurisdictions outside Minnesota. See George L. Blum, Annotation, *Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney—Conduct Related to Procedural Issues*, 59 A.L.R. 6th 1, § 3 (2010).

290. See *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 227 (Minn. 2007) (Anderson, J., concurring in part and dissenting in part) (“[C]ourts are to consider and utilize less drastic alternatives than dismissal when a plaintiff has identified experts and given some meaningful disclosure of the expert’s testimony.”).

291. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.”). Notably, Arizona’s courts have recognized the need to provide adequate notice to plaintiffs; Arizona’s analogous statute on legal malpractice requires courts to give “fair notice to a plaintiff and an opportunity to cure . . . an expert deficiency.” *Kaufman v. Jesser*, 884 F. Supp. 2d 943, 955 (D. Ariz. 2012); see also *Warner v. Sw. Desert Images, LLC*, 180 P.3d 986, 994 (Ariz. Ct. App. 2008) (quoting ARIZ. REV. STAT. ANN. § 12-2602, subd. E (1999)) (“Section 12-2602(E) provides that when a trial court determines an affidavit is required, it must ‘set a date and terms for compliance.’”).

292. See *Guzick*, 869 N.W.2d at 45–46.

293. *Id.* at 50 (citing *Tousignant v. St. Louis Cty.*, 615 N.W.2d 53, 58 (Minn. 2000)).

Beyond the problem of unfairness a lack of fair warning imposes, plaintiffs should have fair warning in malpractice cases to help instill public confidence in the legal profession. Often, a malpractice case is the only way a plaintiff can recover damages after her lawyer's negligence cost her a meritorious claim.²⁹⁴ It is bad enough that a plaintiff lost one potentially meritorious claim and must sue her former lawyer for malpractice. But when the plaintiff's new attorney in the malpractice suit fails a basic procedural requirement because of the unpredictable *Brown-Wilbert* standards, the plaintiff might lose a second meritorious claim.²⁹⁵ By this point, a plaintiff may have spent a small fortune and years of her life in litigation.²⁹⁶ Meanwhile, the plaintiff's first attorney not only avoids paying for damages but also likely keeps the plaintiff's fee. And the new attorney collects a fee from the plaintiff. It is not a stretch to think that the public might perceive this as lawyer profiteering at the expense of clients.

The problem may be compared with the debate over whether lawyers must carry malpractice insurance. An attorney's negligence may cost a plaintiff her claim, but if the attorney does not have malpractice insurance, legal malpractice attorneys typically avoid taking the case.²⁹⁷ On the plaintiff's side, the end result is that she may lose two meritorious claims.²⁹⁸ As a result, one position is that

294. This may present itself as a negligent failure to warn about a statute of limitations. *See, e.g.*, *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 695 (Minn. 1980).

295. As an example, a couple agreed to split their assets in a divorce agreement. *Mazzocchi v. Goldstein Law Office, P.A.*, No. A09-2167, 2010 WL 3463636, at *1 (Minn. Ct. App. Sept. 7, 2010). As part of the deal, the husband kept an investment and paid out half the estimated value of the investment to his wife, which was \$33,600. *Id.* Less than a year later, however, the investment was worth \$185,907. *Id.* The woman sued the attorneys for legal malpractice in their valuation of the investment. *Id.* However, her legal malpractice case was subsequently dismissed with prejudice because her new attorney did not properly state the former attorney's standard of care under the *Brown-Wilbert* minimum standards in the second affidavit. *Id.* at *4.

296. For example, in *Mazzocchi*, the woman obtained counsel in April 2004 for divorce proceedings. *Id.* at *1. The Minnesota Court of Appeals dismissed her legal malpractice claim with prejudice in September 2010—more than six years later. *Id.* at *5.

297. Susan Saab Fortney, *Law as a Profession: Examining the Role of Accountability*, 40 *FORDHAM URB. L.J.* 177, 198 (2012) (citing Manuel R. Ramos, *Legal Malpractice Insurance: The Profession's Dirty Little Secret*, 47 *VAND. L. REV.* 1657, 1727 (1994)).

298. *Id.* (citing Robert I. Johnston & Kathryn Lease Simpson, *O Brothers, O*

malpractice insurance is necessary to “maintain[] public confidence” in lawyers.²⁹⁹ The unpredictable *Brown-Wilbert* standards raise the exact same concerns.

Public perception may improve if the lawyer escapes civil liability but is appropriately disciplined. The malpractice insurance problem and the *Brown-Wilbert* standards also present a similar problem for professional discipline: Minnesota attorneys must report whether they carry malpractice insurance annually, but they do not have to actually carry malpractice insurance.³⁰⁰ Professional responsibility boards and courts are unlikely to punish attorneys for not carrying malpractice insurance when insurance is not required and the professional rules are silent on insurance ideals.³⁰¹ Similarly, if a malpractice lawyer does her best with the unpredictable *Brown-Wilbert* standards and nevertheless fails, it is difficult to point to the rule of professional conduct she violated. Perhaps the lawyer escaping civil liability in the malpractice suit can be punished for unprofessional conduct,³⁰² but depending on the rules the conduct violated, the punishment may be minimal. Because law is a self-regulated profession and it is nigh impossible to punish lawyers for something not in the professional rules, the public perception of *Brown-Wilbert*'s application may be that legal professionals are looking the other way for their friends and colleagues.

Considering that the current case law might lead to unjust results and distrust in the legal profession, it makes sense to adopt the plain statutory language of section 544.42.³⁰³ If the plain

Sisters, Art Thou Insured?, 24 PA. LAW. 28, 30 (2002)).

299. *Id.* at 189 (quoting The Law Society, *Professional Liability Insurance* § 3.2 (July 4, 2012), <http://www.lawsociety.org.uk/advice/practice-notes/professional-indemnity-insurance>).

300. *See* MINN. R. OF THE SUP. CT. ON LAW. REGIS. 6 (2010), https://www.revisor.leg.state.mn.us/data/revisor/court_rules/pr/prsupr-6_2016-03-08_01-43-03/prsupr-6.pdf.

301. For example, the Minnesota Rules of Professional Conduct are silent on insurance standards. *See generally* MINN. R. OF PROF. CONDUCT (2015).

302. Notably, the lawyer does not have to be found civilly liable for the lawyer's unprofessional actions to be punished professionally. *See In re Disciplinary Action Against Shaughnessy*, 467 N.W.2d 620, 621 (Minn. 1991) (noting that unprofessional actions “reflect adversely on the bar, and are destructive of public confidence in the legal profession”).

303. *See* *Guzick v. Kimball*, 869 N.W.2d 42, 53 (Minn. 2015) (Lillehaug, J., concurring).

statutory language applied, plaintiffs would have sixty days to remedy any defects.³⁰⁴ The plain language of section 544.42 is more forgiving and less likely to dismiss meritorious lawsuits.³⁰⁵

V. CONCLUSION

Guzick established a two-step process to determine the adequacy of expert affidavits supporting legal malpractice claims. First, on a case-by-case basis, courts determine which elements of legal malpractice require expert support.³⁰⁶ Second, of the elements that require support, courts evaluate their adequacy under the *Brown-Wilbert* minimum standards.³⁰⁷ Using this process, *Guzick* held that the plaintiff provided an inadequate expert affidavit and, as a result, dismissed the plaintiff's case without granting any time to remedy the inadequacies.³⁰⁸ This is a harsh outcome that might lead to the dismissal of meritorious cases.³⁰⁹

There is no justification for *Guzick*'s harsh outcome. *Guzick*'s pretrial evaluative process has no reason to exist when the legislature created an automatic one-step process—sixty days of safe harbor.³¹⁰ Moreover, the court's evaluative role in *Guzick*'s process makes its application unpredictable. In turn, this unpredictability might unfairly dismiss meritorious cases and even reduce the public's trust in legal professionals. Consequently, the court should follow the lead of *Wesely* in the medical malpractice context and adopt the plain language of the underlying statute,³¹¹ which is more forgiving and less likely to preclude meritorious cases.³¹²

304. MINN. STAT. § 544.42, subdiv. 6(c) (2016).

305. See *Guzick*, 869 N.W.2d at 53 (Lillehaug, J., concurring) (citing *Wesely v. Flor*, 806 N.W.2d 36, 41 (Minn. 2011)); see also *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 228 (Minn. 2007) (Anderson, J., concurring in part and dissenting in part) (quoting ARIZ. REV. STAT. ANN. § 12-2602, subd. E (1999)).

306. *Guzick*, 869 N.W.2d at 48–49.

307. See *id.* at 51.

308. *Id.*

309. See *Brown-Wilbert*, 732 N.W.2d at 228 (Anderson, J., concurring in part and dissenting in part).

310. *Guzick*, 869 N.W.2d at 53 (Lillehaug, J., concurring) (citing *Wesely*, 806 N.W.2d at 41).

311. *Id.*

312. See *id.*; see also *Brown-Wilbert*, 732 N.W.2d at 228 (Anderson, J., concurring in part and dissenting in part).

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