Torts—Medical Malpractice: The Legislature's Attempt to Prevent Cases without Merit Denies Valid Claims

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I. INTRODUCTION

Almost everyone has heard a horror story concerning the in-

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competence of a doctor. These stories range in severity, from a doctor misdiagnosing a minor ailment to a doctor removing the wrong limb. However, these failures occur more frequently than most people would like to believe. It is estimated that up to fifteen percent of the nation’s doctors are incompetent and should not be practicing medicine. Therefore, patients encountering such doctors must have access to the legal system in order to seek relief for the harm committed by them. In the case of Lindberg v. Health Partners, Inc., however, the Minnesota Supreme Court set the recent trend of valid medical malpractice claims being dismissed on


2. Id. The Newsweek article describes some of the serious mistakes that doctors have made. Id. A doctor working at a hospital in Tampa, Florida accidentally amputated the wrong foot of one of his patients. Id. At that same hospital, 11 days later, a therapist confused the identity of two patients and removed the respirator of a patient who was depending on the respirator to breathe. Id. The patient died shortly after the respirator was removed. Id. In Michigan, a surgeon mistakenly removed the wrong breast of a woman with breast cancer. Id. An example of a less serious mistake made by a medical clinic is presented in another Newsweek article. Mediation Before Malpractice Suits? For Patients, Litigation Is Expensive And Hard To Win. The Case For Trying Talking Instead Of Suing, Newsweek, March 27, 2000, at 84, available at 2000 WL 7524673. In this article, a 3-year old girl punctured her hand on a used hypodermic needle, which was carelessly left in reach of the girl, “leaving an inch long trail of blood.” Id. The girl did not infect any diseases. Id. Furthermore, the girl’s mother dropped the pending law suit when the doctor offered her an apology and told her how the office had been improved to prevent repeat occurrences. Id.

3. Miller, supra note 1. According to a 1990 Harvard study of the occurrence of medical malpractice in New York, 4 percent of the 30,000 patients were injured by their physician, and 14 percent of that group died. Id. Furthermore, in a 1994 issue of the Journal of American Medicine, it was reported “that deaths from medical malpractice are the equivalent of ‘three jumbo jet crashes every two days.’” Debra A. Dixon, The Legal Pitfalls Of Medical Practice, Indianapolis Star, June 20, 1997, at A15, available at 1997 WL 2888816. Medical malpractice has become the third leading preventable cause of death, surpassing breast cancer and AIDS. Id.

4. Shirley Qual, A Survey of Medical Malpractice Tort Reform, 12 WM. MITCHELL L. REV. 417, 426 (1986) (discussing how many doctors are incompetent and how rarely they are actually sanctioned).

5. It has been suggested that plaintiffs need to have easy access to litigation because the medical industry fails to discipline itself, and malpractice claims brought by injured patients are the only way to keep incompetent doctors from continuing to practice. Miller, supra note 1. “Between 1986 and 1992, state medical boards disciplined only 1,070 physicians for negligence or substandard care.” Id.

6. 599 N.W.2d 572 (Minn. 1999).

7. Medical malpractice is defined as:
This note addresses the sufficiency of affidavits required by Minnesota Statute section 145.682 as interpreted by the Minnesota Supreme Court in *Lindberg.* In this case, the plaintiff brought a medical malpractice claim against her health clinic pertaining to the death of her unborn son. The plaintiff, a pregnant woman, had experienced chest pains and had called her health clinic to report her discomfort. The clinic did not instruct her to come in until it was too late and the child had died. At that time, the plaintiff brought a medical malpractice claim against her clinic for failing to instruct her to seek medical treatment. However, the Minnesota Supreme Court dismissed her claim, finding that the second affidavit required by Minnesota Statute section 145.682, which stated that her case has been reviewed by a medical expert, was insufficient. In reaching such a conclusion, the Minnesota Supreme Court narrowly interpreted Minnesota Statute section 145.682 and is setting the precedent for valid medical malpractice claims to be dismissed without receiving their day in court to be

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[Failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services or to those entitled to rely upon them. . . . In medical malpractice litigation, negligence is the predominate theory of liability. In order to recover for negligent malpractice, the plaintiff must establish the following elements: (1) the existence of the physician's duty to the plaintiff, usually based upon the existence of the physician-patient relationship; (2) the applicable standard of care and its violation; (3) a compensable injury; and, (4) a causal connection between the violation of the standard of care and the harm complained of.

BLACK'S LAW DICTIONARY 662 (Abr. 6th ed. 1991). The elements needed to establish a prima facie case of medical malpractice in Minnesota are, "(1) the standard of care recognized by the medical community as applicable to the particular defendant; (2) that the defendant departed from that standard; and (3) that the defendant's departure was a direct cause of the plaintiff's injuries." Fabio v. Bellomo, 504 N.W.2d 758, 762 (Minn. 1993) (citing Plutshack v. Univ. of Minn. Hosp., 316 N.W.2d 1, 5 (Minn. 1982)). For a general discussion of Minnesota medical malpractice, see JOHN F. EISBERG, MINNESOTA MEDICAL MALPRACTICE, (1990).]
decided on their merits.\textsuperscript{15}

This case note first examines the history of medical malpractice and the events directing the Minnesota legislature to enact Minnesota Statute section 145.682.\textsuperscript{16} The note goes on to explain Minnesota Statute section 145.682,\textsuperscript{17} and then examines Minnesota cases interpreting this statute.\textsuperscript{18} Part III examines the facts, the majority's analysis, and the dissenting opinions of the Minnesota Court of Appeals and the Minnesota Supreme Court in the \textit{Lindberg} decision.\textsuperscript{19} Part IV analyzes the implications from the Supreme Court's holding in \textit{Lindberg}\textsuperscript{20} and makes suggestions as to how the statute should be interpreted by the courts\textsuperscript{21} or modified by the legislature.\textsuperscript{22} Finally, this note will conclude that the Minnesota Supreme Court interprets Minnesota Statute section 145.682 too narrowly, which will deny valid medical malpractice cases in the future.\textsuperscript{23}

\section*{II. HISTORY}

\subsection*{A. The Emergence Of Medical Malpractice Statutes}

The first medical malpractice suit in the United States was brought in 1794.\textsuperscript{24} However, it was not until the 1930's that the number of claims against doctors began to significantly increase.\textsuperscript{25} Medical malpractice claims continued to become more common in U.S. courts until reaching a peak in the 1970's, when there were so many claims that chaos ensued.\textsuperscript{26} It was said that there were ap-

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\textsuperscript{15} \textit{Infra} Part IV.A.
\textsuperscript{16} \textit{Infra} Part II.A.
\textsuperscript{17} \textit{Infra} Part II.B.
\textsuperscript{18} \textit{Infra} Part II.C.
\textsuperscript{19} \textit{Infra} Part III.A-D.
\textsuperscript{20} \textit{Infra} Part IV.A.
\textsuperscript{21} \textit{Infra} Part IV.B
\textsuperscript{22} \textit{Infra} Part IV.C-D.
\textsuperscript{23} \textit{Infra} Part V.
\textsuperscript{24} Qual, \textit{supra} note 4, at 420 (discussing the development of medical malpractice claims). The first medical malpractice claim in the United States was Gross \textit{v. Guthery}, 2 Root 90 (Conn. 1794). \textit{Id.} at n.10; see also W. John Thomas, \textit{The Medical Malpractice "Crisis": A Critical Examination of a Public Debate}, 65 TEMP. L. REV. 459, 460 & n.6 (1992) (discussing the evolution of medical malpractice). In this case, the plaintiff sued a surgeon for "unskillful, ignorant, and cruel" surgery, which caused the death of his wife. \textit{Id.} (quoting \textit{Gross}, 2 Root at 90-91). The plaintiff was awarded 40 pounds in damages. \textit{Id.} (relying on \textit{Gross}, 2 Root at 91).
\textsuperscript{25} Qual, \textit{supra} note 4, at 420.
\textsuperscript{26} \textit{Id.} at 420-21; see also David W. Feeder, II, \textit{When Your Doctor Says, "You Have Nothing to Worry About," Don't Be Sure: The Effect of Fabio \textit{v. Bellomo} on Medical Mal-

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proximately "five malpractice suits filed annually for every 10 doctors." As the number of malpractice claims escalated, the price of medical insurance soared in an attempt to insure doctors against the increasing instances of litigation. Furthermore, doctors began practicing "defensive medicine," which required them to perform unnecessary tests in an attempt to avoid future medical malpractice claims. With the increasing price of medical malpractice insurance, many doctors could no longer afford to practice medicine, leaving hospitals with a shortage of doctors. Others refused to practice as a protest against the extremely high price of medical malpractice insurance, and many did not want to take the risk of performing surgery.

In an effort to remedy the rising cost of medical insurance, almost every state has enacted legislation designed to limit the
number of medical malpractice claims brought each year.32 There are a number of different approaches that state legislatures have taken to accomplish this goal.33 Nearly every state has a special statute of limitations for medical negligence actions, requiring the claim be brought sooner than a claim for other types of negligence.34 In addition to shortening the statute of limitations, some states have established damage caps limiting the amount of damages a plaintiff can receive.35 Other states have mandated binding arbitration.36 A number of states have imposed screening panels, both mandatory and discretionary, which predetermine whether a case has merit.37 Minnesota, along with a number of other states, requires an affidavit of expert review be submitted with the complaint to demonstrate that an expert believes the plaintiff has a valid claim.38 The purpose of the Minnesota statute is to reduce the

32. Eleanor D. Kinney, Malpractice Reforms in the 1990s; Past Disappointments, Future Success?, 20 J. HEALTH POL. POL’Y & L. 99, 99 (1995) (analyzing tort reform efforts made by federal and state governments); Feeder, supra note 26, at 948 (“In response to the medical malpractice insurance ‘crisis,’ nearly every state enacted some measure of ‘tort reform.’”); Qual, supra note 4, at 427 (analyzing different states’ reactions to the increasing amount of medical malpractice litigation); Catherine Yang, Commentary: Tort Reform Needs Reforming, BUS. WK., Apr. 15, 1996, at 67, available at 1996 WL 7614020 (commenting that “[n]early all 50 states now have some tort reform in place”).

33. Infra notes 34-38 and the accompanying text.

34. Qual, supra note 4, at 427. Forty-one states have statutes in place limiting the amount of time in which a medical malpractice action can be brought. Id. The only states that do not have special statutes of limitations of negligence actions are Alaska, Arkansas, Connecticut, Idaho, New Jersey, Pennsylvania, Vermont, Virginia, and West Virginia. Id. at n.46. For a discussion on the problems associated with a shorter statute of limitations in Minnesota see Feeder, supra note 26, at 959-73.

35. Kinney, supra note 32, at 125. The states that have damage caps on the plaintiff’s recovery are: Alaska, California, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin. Id.; see also Qual, supra note 4, at 434 (discussing damage caps).

36. Kinney, supra note 32, at 125. The states that currently have binding arbitration are: Alaska, California, Colorado, Georgia, Hawaii, Illinois, Louisiana, Michigan, Mississippi, New Jersey, New Mexico, New York, South Dakota, Utah, and Virginia. Id.; see also Qual, supra note 4, at 429 (discussing the aspects of arbitration).

37. Kinney, supra note 32, at 125. The states that have screening panels are: Colorado, Connecticut, Delaware, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, New York, North Dakota, Tennessee, Utah, and Virginia. Id.; see also Qual, supra note 4, at 430-31 (discussing pre-trial screening panels).

38. FLA. STA. ch. 766.203 (2000); GA. CODE ANN. § 9-11-9.1 (2000); 735 ILL.
cost of medical insurance by preventing frivolous medical malpractice claims.\(^{39}\)


B. Minnesota’s Medical Malpractice Statute

Minnesota Statute section 145.682 sets out the procedure to be used when bringing a medical malpractice claim. Before the statute is applied, however, it must first be determined whether the plaintiff’s claim requires expert testimony. If the plaintiff brings a prima facie case that does not require expert testimony, this statute does not apply. However, if expert testimony is required, section 145.682 subd. 2.

While expert testimony is not required in every case, most likely a medical expert will be needed. Tousignant v. St. Louis County, 615 N.W.2d 53, 58 (Minn. 2000) ("There are, however, exceptional cases in which expert testimony is not necessary."); Canfield v. Grinnell Mut. Reinsurance Co., 610 N.W.2d 689, 693-94 (Minn. Ct. App. 2000) (allowing a case to proceed against an independent medical examiner in which the plaintiff is asserting an assault and battery claim); Black v. Trevilla Nursing Home of New Brighton, No. C4-91-353, 1991 WL 132756, at *1 (Minn. Ct. App. July 23, 1991) (allowing a claim to proceed against a nursing home for permitting patients access to smoking material, which caused the plaintiff to die of burn injuries). Many more cases have required expert witnesses to provide the standard of care. Becker v. Bashiouni, No. C5-98-2359, 1999 WL 343915, at *2 (Minn. Ct. App. June 1, 1999) (holding that an expert witness was needed to determine the amount of damage resulting from breast implants larger than those consented to by the patient during cosmetic breast surgery); McCollar v. Mayo Clinic, No. CX-97-936, 1997 WL 714743, at *1 (Minn. Ct. App. Nov. 18, 1997) (holding that expert testimony was required to determine whether the doctor performed a nasal antrostomy without gaining the patient’s consent); Bailey v. Sheppard, No. C9-92-1928, 1993 WL 99446, at *2 (Minn. Ct. App. Apr. 6, 1993) (holding that an expert witness is required to bring a malpractice claim against the Minnesota Security Hospital); Way v. Foley Dental Office, No. C8-91-1506, 1992 WL 43301, at *3 (Minn. Ct. App. Mar. 10, 1992) (requiring an expert witness to show that the defendant provided improper dental treatment); Broich v. Springfield Cnty. Hosp., No. C7-92-180, 1992 WL 166789, at *2 (Minn. Ct. App. July 21, 1992) (finding that a expert witness was required "to show that some act or omission by the hospital caused [the plaintiff’s]
Section 145.682 requires the plaintiff to submit two affidavits identifying an expert to verify that the plaintiff's claim has merit. The first affidavit, served with the complaint, must acknowledge that an expert has reviewed the claim and that, in the expert's opinion, there has been a deviation from the applicable standard of care. The second, and most important affidavit, which is due 180 days after the commencement of the lawsuit, must be signed by the experts and make three disclosures. It must identify the expert's qualifications and provide a reasonable expectation that the expert's opinions could be admissible at trial and that, in the opinion of the expert, one or more defendants deviated from the applicable standard of care and by that action caused injury to the plaintiff. If an affidavit is executed pursuant to this paragraph, the affidavit in paragraph (a) must be served on defendant or the defendant's counsel within 90 days after service of the summons and complaint.

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43. MINN. STAT. § 145.682 subd. 3 (2000).
44. Id. § 145.682. Subdivision 2 of the statute states that: In an action alleging malpractice, error, mistake, or failure to cure, whether based on contract or tort, against a health care provider which includes a cause of action as to which expert testimony is necessary to establish a prima facie case, the plaintiff must: (1) unless otherwise provided in subdivision 3, paragraph (b), serve upon defendant with the summons and complaint an affidavit as provided in subdivision 3; and (2) serve upon defendant within 180 days after commencement of the suit an affidavit as provided by subdivision 4.

45. Id. at subd. 2.
46. MINN. STAT. § 145.682 subd. 4(a) (2000). Subdivision 4 of the statute states: (a) The affidavit required by subdivision 2, clause (2), must be signed by each expert listed in the affidavit and by the plaintiff's attorney and state
experts likely to testify at trial, the substance of what the experts will testify about, and a “summary of the grounds for each opinion.”\textsuperscript{47} The statute also permits the plaintiff to make these disclosures in answering interrogatories submitted by the defendant.\textsuperscript{48} Failure to comply with section 145.682 results in mandatory dismissal with prejudice of the plaintiff’s claim.\textsuperscript{49}

C. Cases Interpreting Minnesota’s Statute

I. Sorenson v. St. Paul Ramsey Medical Center

The first case that attempted to interpret Minnesota Statute section 145.682 was \textit{Sorenson v. St. Paul Ramsey Medical Center}.\textsuperscript{50} In \textit{Sorenson}, the plaintiff, Mrs. Sorenson, brought a medical malpractice claim against doctors who allegedly contributed to the stillbirth of her son.\textsuperscript{51} Mrs. Sorenson obtained legal representation a month before the statute of limitations was to run.\textsuperscript{52} Her counsel served a
complaint upon the defendants shortly thereafter, along with an affidavit that satisfied the statutory requirement "indicating that [plaintiff's attorney] was unable to obtain expert review prior to the expiration of the statute of limitations...." 53

Two months later, the defendants filed an answer to the complaint and included interrogatories requesting the plaintiff provide a "specific and detailed description of all facts upon which you base your allegation [of medical negligence]." 54 Complying with the interrogatories, the plaintiff served a second affidavit identifying Dr. Watson as an expert who would testify at trial. 55 Following a request made by the defendants in a motion to compel discovery, the plaintiff then submitted a supplemental affidavit providing a more detailed summary of the testimony Dr. Watson was prepared to give. 56 The defendants withdrew the motion to compel discovery and waited for the 180-day deadline to expire, at which time the defendants moved for summary judgment. 57 The district court granted

claim in Minnesota was two years at the time of Sorenson's claim. MINN. STAT. § 541.07 subd. (1)(1992); see also Marshall Tanick, Medical Malpractice Cases Bode Ill for Claimants, MINN. LAWYER, July 3, 2000 at 11 (describing how the Minnesota Statute of limitations was expanded from two to four years).

53. Sorenson, 457 N.W.2d at 189; see also MINN. STAT. § 145.682 subd. 3(b) (2000) (providing an exception when "the expert review required by paragraph (a) could not reasonably be obtained before the action was commenced because of the applicable statute of limitations.").

54. Sorenson, 457 N.W.2d at 190. By providing detailed answers to the interrogatories, the plaintiff would have satisfied the requirements of the second affidavit required by Minnesota Statute. MINN. STAT. § 145.682 subd. 4(a).

55. Sorenson, 457 N.W.2d at 190.

56. Id. The plaintiff submitted the supplemental affidavit intending to satisfy the requirements of Minnesota Statute section 145.658. Id. The affidavit stated that:

[Upon admission to the hospital, Mrs. Sorenson had]a history of eight hours of persistent abdominal pain * * *. There was [sic] obvious symptoms of fetal distress and probable abruptial placenta that should have been identified by nurse-midwife Birch and Dr. Bezidicek [sic]. Each of them failed to properly evaluate Theresa [sic] Sorenson's condition and failed to properly care and treat Theresa [sic] Sorenson thereafter. Shortly thereafter, it should have been apparent that the contractions were abnormal and that the fetal heart rate was abnormal and that there should have been timely intervention by a physician but there was not. At some point in time between 12:25 p.m. and 1:40 p.m., the plaintiff was also examined by either Dr. Ditmanson or Dr. Koszalka while there were still viable heart tones for John Sorenson, and they failed to properly diagnose an abruptial placenta and fetal distress and failed to take proper steps to deliver John Sorenson prior to his death.

Id. at 192.

57. Id. at 190; see also MINN. STAT. § 145.682 subd. 6 (2000) (stating that "fail-
the summary judgment motion.\textsuperscript{56}

The Minnesota Supreme Court agreed with the district court in finding the second affidavit insufficient.\textsuperscript{59} The court stated that "it is not enough simply to repeat the facts in the hospital or clinic record," which is the only information that the plaintiff's affidavit provided.\textsuperscript{60} In \textit{Sorenson}, however, this standard was not applied.\textsuperscript{61}

The court reasoned that by "withdrawing their pending motion to compel answers to interrogatories, the defendant doctors were signifying their acceptance of the plaintiffs' answers in satisfaction of the requirements of section 145.682."\textsuperscript{62} Because the plaintiff was induced to believe that the second affidavit was sufficient, the court ruled that the defendants were estopped from moving for summary judgment.\textsuperscript{63}

While estoppel allowed the plaintiff to proceed in this case, the court stated that it would require future plaintiffs to set out, in detail, the expert's testimony in regards to the applicable standard of care as well as the acts of the doctor that allegedly breached this standard of care.\textsuperscript{64} Although the court required that this strict rule be strictly applied in future cases, it also noted "there may be less

\textsuperscript{58.} \textit{Sorenson}, 457 N.W.2d at 191.
\textsuperscript{59.} \textit{Id.} at 193.
\textsuperscript{60.} \textit{Id.} at 192.
\textsuperscript{61.} \textit{Id.} at 193.
\textsuperscript{62.} \textit{Id.}
\textsuperscript{63.} \textit{Id.} (relying on Thorson v. Rice County Dist. One Hosp., 437 N.W.2d 410, 416 (Minn. 1989)). Equitable estoppel is:

[t]he doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had....Elements or essentials of such estoppel include change of position for the worse by party asserting estoppel; conduct by party estopped such that it would be contrary to equity and good conscience for him to allege and prove the truth; false representation or concealment of facts; ignorance of party asserting estoppel of facts and absence of opportunity to ascertain them; injury from declarations, acts, or omissions of party where he permitted to gainsay their truth; intention that representation should be acted on; knowledge, actual or constructive, or facts by party estopped; misleading person to his prejudice; omission, misconduct or misrepresentation misleading another. It is based on some affirmative action, by word or conduct, of the person against whom it is invoked, and some action of the other party, relying on the representation made.

\textsuperscript{64.} \textit{Sorenson}, 457 N.W.2d at 193.
drastic alternatives to a procedural dismissal.\(^{65}\)

2. Stroud v. Hennepin County Medical Center

The next case that had a significant effect on the interpretation of Minnesota Statute section 145.682 was *Stroud v. Hennepin County Medical Center*.\(^{66}\) In this case, the plaintiff brought a medical malpractice action against the Hennepin County Medical Center (HCMC) because of their failure to discover a subarachnoid hemorrhage.

In *Stroud*, Ida Stroud had visited the HCMC twice, complaining of headaches, and was sent home without being given an examination.\(^{67}\) The third time she visited, it was discovered that she had a subarachnoid hemorrhage, and she was admitted to the HCMC where she died within the month.\(^{68}\)

Attempting to comply with Minnesota Statute section 145.682, Stroud's relatives, as the plaintiffs in the following action, served a complaint upon the defendants and provided an affidavit recognizing Dr. Tredal as an expert.\(^{70}\) The affidavit of Dr. Tredal stated that he was aware of the standard of care and that there was "a failure to diagnose and treat a subarachnoid hemorrhage."\(^{71}\) The defendant then served on the plaintiff a set of interrogatories requesting a more detailed summary of their expert's conclusion.\(^{72}\) The plaintiff's answers to the interrogatories referred back to their original affidavit.\(^{73}\) Dissatisfied with the plaintiff's response, the defendants,

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\(^{65}\) Id. The court in *Sorenson* provides examples of "less drastic alternatives," such as the court authorizing "a deposition of the expert at the plaintiff's expense or limiting the expert's testimony to those matters adequately disclosed." *Id.*

\(^{66}\) 556 N.W.2d 552 (Minn. 1996).

\(^{67}\) *Stroud*, 556 N.W.2d at 553. A subarachnoid hemorrhage is "a bleeding into the space between the arachnoid and the pia mater. The arachnoid is the middle of three membranes which cover the brain and the spinal cord. The pia mater is the innermost of the three membranes." *Id.* at 553 n.1.

\(^{68}\) *Id.* at 553.

\(^{69}\) *Id.* Ida Stroud died of a pulmonary embolism caused by a deep vein thrombosis resulting from her subarachnoid hemorrhage. *Id.*

\(^{70}\) *Id.* at 554; *see also* MINN. STAT. § 145.682 subd. 4(a) (listing the requirements of the two affidavits needed in medical malpractice claims).

\(^{71}\) *Stroud*, 556 N.W.2d at 554. The affidavit of Dr. Tredal stated that "I, Dr. Tredal, will testify that as a result of the breach of the standard of care on 1/1/94 and 1/4/94, as discussed, there was a failure to diagnose and treat a subarachnoid hemorrhage which ultimately resulted in a complicated hospital course and death of the Plaintiff." *Id.*

\(^{72}\) *Id.*

\(^{73}\) *Id.*
on five different occasions, requested a more detailed explanation.\footnote{Id.} After the 180-day deadline expired, the defendants then moved for summary judgment.\footnote{Id. at 555.} At that time, the plaintiff finally amended their answers to the interrogatories, providing sufficient information.\footnote{Id. at 556.} However, the trial court ruled that it was too late and dismissed the action.\footnote{Id. at 556.}

The supreme court affirmed the district court's discretion to dismiss the claim and reasoned the answers to the interrogatories did not satisfy the standard articulated in \textit{Sorenson}.\footnote{Id. at 556.} The responses failed to "provide an outline of the chain of causation between the alleged violation of the standard of care and the claimed damages."\footnote{Id. at 556.} The court had initially considered allowing a claim of estoppel to permit the claim to proceed, but the defendant had already given the plaintiff a number of opportunities to amend the affidavit after the statutory deadline.\footnote{Id. at 556-57; supra note 38 and the accompanying text.} The court therefore concluded that justice would not require that the plaintiff be given another chance to amend the affidavit.\footnote{Stroud, 556 N.W.2d at 556.}

3. \textit{The Impact Of} \textit{Sorenson And Stroud}

After \textit{Sorenson} and \textit{Stroud}, the sufficiency of the second affidavit
required by Minnesota Statute section 145.682 was uncertain. The court in Sorenson stated that it was strictly applying the statute, but then allowed a claim to proceed based on estoppel. Then, in Stroud, the court again claimed that it was applying the statute strictly, but it did not consider estoppel because of the poor effort made by the plaintiff to comply with the statute. After these two supreme court decisions, it was uncertain as to what standard the court would apply in interpreting Minnesota Statute section 145.682 and when estoppel would allow a claim to advance. Therefore, the court in Lindberg was faced with the task of answering these unresolved questions and determining the fate of the affidavits required in medical malpractice cases.

III. THE LINDBERG DECISION

A. The Facts

On March 28, 1994, Ms. Lindberg, several months pregnant, called her clinic to report swelling in her lower legs. A midwife at Group Health advised her not to come in, but to keep her next scheduled appointment three days later. Early the next morning, Ms. Lindberg was awakened by severe chest pains, a headache, a tight abdomen, and noticed the baby was not moving. She called Group Health again to report these conditions, and then called a half-hour later to report that the conditions were worsening. After the third phone call, she was instructed to go to Fairview Riverside Hospital, where her son was delivered stillborn.

On March 25, 1996, Ms. Lindberg commenced this lawsuit claiming that the clinic was negligent in not instructing her to seek treatment when she first called to report her condition. Along with the complaint, she submitted the first of two affidavits re-
quired by Minnesota Statute section 145.682. The second affidavit was submitted on September 20, 1996, about 178 days after the lawsuit had begun. The second affidavit identified Dr. Cruikshank as an expert familiar with the standard of care. The affidavit stated that Ms. Lindberg’s son probably would not have died if she had received medical treatment at the time of her first call to Group Health, and that the child’s death was the result of the clinic’s negligence.

In August of 1997, over a year after the lawsuit had begun, Health Partners moved for a dismissal. They claimed that Lindberg had failed to meet the requirements of Minnesota Statute section 145.682 by not providing a sufficient affidavit of an expert within the 180-day deadline. Two months later, Lindberg supplied a legally sufficient supplemental affidavit of Dr. Cruikshank. However, the district court ruled in favor of Health Partners and dismissed Lindberg’s claim as a result of her failure to provide the

93. Id.; see also MINN. STAT. § 145.682 (2000).
94. Lindberg, 599 N.W.2d at 574.
95. Id.
96. Id. at 575. The complete affidavit states:
   1. I am a board-certified specialist in obstetrics and gynecology.
   2. This affidavit is to explain my opinions in this case pursuant to Minn.Stat. § 145.682.
   3. I am familiar with the standard and duty of care applicable to doctors, midwives, nurses and other medical personnel in the Twin Cities of Minnesota area.
   4. Based upon a reasonable degree of medical certainty, it is more probable than not, that if, among other things, Debra Lindberg had been instructed to seek medical treatment at the time of her phone call on the morning of March 28, 1994, Lukas Stewart Lindberg would not have died.
   5. Based upon a reasonable degree of medical certainty, Lukas Stewart Lindberg died as a result of the negligent and careless conduct of the Defendants and/or their agents and employees, including midwife Sharon Nichols and Donn[a] Mathiwitz.
   6. That the opinions contained in this affidavit, are based upon my years as a board certified specialist in obstetrics and gynecology, the review of the medical records concerning Debra Lindberg, my experience in working with patients having similar medical conditions, diagnosis and treatment, and my general familiarity with medical literature.
97. Id.
98. Id.; see also MINN. STAT. § 145.682 subd. 2 (providing that the affidavits must be “served upon defendant within 180 days after commencement of the suit”).
99. Lindberg, 599 N.W.2d at 575.
affidavit before the 180-day deadline. 100

B. The Minnesota Court Of Appeals’ Analysis

The Minnesota Court of Appeals reversed the lower court’s summary judgement motion, finding that the September 1996 affidavit was sufficient to meet the requirements of Minnesota Statute section 145.682.101 The court found that the affidavit satisfied the most important part of the statute, which was to provide the name of the expert whom the plaintiff intended to use at trial.102

In adhering to Sorenson, the court recognized that the expert’s affidavit must provide a summary of the applicable standard of care and describe how the acts of the practitioner violated this standard.103 The court found this to be the weakest segment of the affidavit.104 However, under unique circumstances, the basic outline provided was sufficient in satisfying the requirement.105 Furthermore, the court found that allowing the case to proceed conformed to the judicial preference of allowing a case to be decided upon its merits.106

While the court did not have to consider estoppel because it found that the affidavit was sufficient in satisfying the statutory requirement, it noted that the defendants did not object to the sufficiency of the affidavit for eleven months.107 The court stated that the “long delay in acting on the statute tends to suggest that the medical basis for the suit had been sufficiently disclosed to fulfill the purposes of the statute.”108

C. The Minnesota Supreme Court’s Analysis

The Minnesota Supreme Court rejected the Court of Appeals

100. Id. The district court dismissed the plaintiff’s claim on a summary judgment motion pursuant to Rule 56. Id.
103. Id.; see also Sorenson v. St. Paul Ramsey Med. Ctr., 457 N.W.2d 188, 192 (Minn. 1990) (describing the level of detail need to satisfy the second affidavit).
105. Id.
106. Id.; see also infra note 147 (providing support for the notion that a fundamental concept of the United States legal system is that claims be dismissed on their merits).
108. Id.
decision and reinstated the district court’s grant of summary judgment.\textsuperscript{109} The court stated that Minnesota Statute section 145.682 should be strictly adhered to because it is “uncomplicated and unambiguous.”\textsuperscript{110}

The court applied the standard that was developed in \textit{Sorenson},\textsuperscript{111} and which \textit{Stroud} appeared to be applying.\textsuperscript{112} Following these cases, the court interpreted Minnesota Statute section 145.682 as requiring “far more information than simply identification of the expert...or a ‘general disclosure.’”\textsuperscript{113} The court reasoned that by strictly following the statute, it “cuts with a sharp but clean edge” and relieves the confusion in future cases.\textsuperscript{114}

In the present case, the court held that the September 1996 affidavit was “broad” and contained merely “conclusory statements as to causation.”\textsuperscript{115} The court also denied Lindberg’s claim of estoppel, stating that the burden of supplying the affidavit was on the plaintiff, and that it was not the responsibility of the defendant to object to the adequacy of the plaintiff’s affidavit.\textsuperscript{116}

\begin{enumerate}
\item[109.] Lindberg v. Health Partners, Inc., 599 N.W.2d 572, 578 (Minn. 1999).
\item[110.] \textit{Id.} at 577; see also \textsc{Minn. Stat.} § 145.682 (2000).
\item[111.] Sorenson v. St. Paul Ramsey Med. Ctr., 457 N.W.2d 188 (Minn. 1990); see also supra notes 62-65 and accompanying text.
\item[112.] Stroud v. Hennepin County Med. Ctr., 556 N.W.2d 552 (Minn. 1996); see also supra notes 70-81 and accompanying text.
\item[113.] \textit{Lindberg}, 599 N.W.2d at 578; see also \textsc{Minn. Stat.} § 145.682 (2000).
\item[114.] \textit{Lindberg}, 599 N.W.2d at 578. \textit{Contra} Anderson v. Rengachary, 608 N.W.2d 843 (Minn. 2000) (Anderson, J., concurring in part and dissenting in part). In Justice Anderson’s dissenting opinion, he comments on this quote by stating “[i]n essence, the majority’s decision transforms this statute from a shield against unwarranted medical malpractice litigation into a sword that will be used to prematurely cut off actions with a ‘sharp but clean edge’ before it can be properly determined whether they should be disposed of on the merits.” \textit{Id.} at 852 (Anderson, J., concurring in part and dissenting in part) (quoting \textit{Lindberg}, 599 N.W.2d at 578).
\item[115.] \textit{Lindberg}, 559 N.W.2d at 578.
\item[116.] \textit{Id.} In rejecting Lindberg’s estoppel claim, the court stated “failure of defendant to prove plaintiff’s claim is frivolous or failure of defendant to alert plaintiff to the inadequacy of the affidavit of expert identification will not excuse or justify an affidavit or expert identification falling short of the substantive disclosure requirement.” \textit{Id.} Since the Minnesota Supreme Court’s decision on September 2, 1999, the Minnesota courts have heard seven cases addressing Minnesota Statute section 145.682. The first case decided after \textit{Lindberg} was \textit{Tousignant} v. St. Louis County, 602 N.W.2d 882 (Minn. Ct. App. 1999). In this case, the court dismissed a claim of medical malpractice because the plaintiff’s affidavit did not set forth the applicable standard of care and was not signed by the plaintiff’s attorney. \textit{Tousignant}, 602 N.W.2d at 886; see also \textit{infra} notes 153-54 and accompanying text. However, the Minnesota Supreme Court found a prima facie case of malpractice, therefore the expert affidavit was unnecessary and the appellate court was over-
\end{enumerate}
D. Concurring And Dissenting Opinions

turned. Tousignant v. St. Louis County, 615 N.W.2d 53 (Minn. 2000). The next case decided by a Minnesota court was Ellingson v. Walgreen Co., 78 F. Supp. 2d 965 (D. Minn. 1999). The court in Ellingson dismissed a claim because the plaintiff's affidavits were not submitted before the 180-day deadline. Ellingson, 78 F. Supp. 2d at 969. The court of appeals decided the next case, Palmer v. Erlandson, No. C8-99-891, 2000 WL 2621 (Minn. Ct. App. Dec. 27, 1999). In this case, the court deemed the plaintiff's affidavit insufficient and refused to allow the claim to continue under the theory of estoppel or excusable neglect. Id. at *5. Recently, on March 16, 2000, the Minnesota Supreme Court again analyzed Minnesota Statute section 145.682. See generally Anderson v. Rengachary, 608 N.W.2d 843 (Minn. 2000). In Anderson, the plaintiff brought a medical malpractice claim against Dr. Rengachary, who performed an anterior cervical diskectomy on Anderson. Id. at 844. Anderson claimed that the defendant's negligence "caused a severed vagus nerve and swelling of her esophagus and thyroid." Id. at 845. Shortly after filing the complaint, the plaintiff furnished both of the affidavits required by Minnesota Statutes section 145.682. Id. In the second affidavit, the plaintiff identified Dr. Goodman as her expert, who stated that the surgeon violated the standard of care by not staying clear of the esophagus and the vagus nerve. Id. After the 180-day deadline had expired, the defendant moved for summary judgment. Id. The Minnesota Supreme Court found that the plaintiff's affidavit was insufficient because "it did not clearly set forth the standard of care, the defendant's acts or omissions that allegedly violated that standard, and the chain of causation between these violations and the plaintiff's injuries." Id. at 848. The court also rejected the argument that the plaintiff should be allowed an opportunity to amend her affidavit and proceed with her claim. Id. at 849. The court relied on Lindberg to find that the defendant does not have to object to the adequacy of the affidavit in order to move for summary judgment after the 180-day deadline has expired. Id. In Anderson, the plaintiff had an opportunity to submit sufficient affidavits, but failed to do so. Id. at 850. Therefore, nothing prevented the defendant from succeeding in a summary judgment motion. Id. The majority's opinion was not unanimous. Justice Paul H. Anderson and Justice Gilbert wrote sharply worded dissents criticizing the harsh result of the court. Id. at 851-53. Justice Anderson stated that while it is true that the affidavit was insufficient to satisfy the statutory requirement imposed by Minnesota Statute section 145.682, the plaintiff should have been granted an opportunity to amend the affidavit and proceed with the valid claim. Id. at 851. Justice Gilbert, however, was disturbed by the legislature's infringement on the court's power to make its own rules of court. Id. at 852. Gilbert believed that under constitutional separation of powers only the Minnesota Supreme Court had the power to enact procedural rules. Id. at 852-53; see also infra notes 188-94 and accompanying text; Barbra L. Jones, Dismissal Over Expert Affidavit Defects OK, MINN. LAWYER, Mar. 20, 2000, at 1, 13 (analyzing the court's decision). For the next case addressing section 145.682, see House v. Kelbel, 105 F. Supp. 2d 1045(D. Minn. 2000). In this case, the court examined section 145.682 to determine legislative intent behind section 554.42 pleadings. Id. at 1051; see also infra notes 175-87 and accompanying text. One of the most recent cases decided by a Minnesota court was Canfield v. Grinnell Mut. Reinsurance Co., 610 N.W.2d 689 (Minn. Ct. App. 2000). In this case, the plaintiff brought a medical malpractice claim against a doctor who had performed an independent medical exam. Id. at 690-91. The court held that section 145.682 does not apply to an independent medical exam and allowed the case to proceed. Id. at 694.
The court wrote three opinions in *Lindberg*.\(^{117}\) Justice Paul H. Anderson wrote a concurring opinion and Justice Gilbert wrote an opinion concurring in part and dissenting in part with the majority's decision.\(^{118}\) Justice Anderson believed the language used in the majority's opinion was too harsh, and he expressed concerns about the future implications that the opinion could have.\(^{119}\) While the majority believed that there was a "sharp edge" as to what is to be considered sufficient in analyzing affidavits required by Minnesota Statute section 145.682,\(^{120}\) Anderson believed that there are borderline cases in which less drastic alternatives than a procedural dismissal should be employed.\(^{121}\) However, Anderson found that the present case was not to be considered borderline and that the claim had properly been dismissed.\(^{122}\)

Justice Gilbert agreed with the majority and Justice Anderson, finding that the affidavit submitted by the plaintiff failed to satisfy Minnesota Statute section 145.682.\(^{123}\) However, unlike Justice Anderson, Justice Gilbert believed that this was a borderline case that deserved a "less drastic alternative" than a procedural dismissal.\(^{124}\) He considered it a borderline case because the plaintiff made an honest attempt to satisfy the statute by "retain[ing] a qualified expert and mak[ing] a good faith effort to disclose meaningful information of what the expert testimony would be."\(^{125}\)

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118. *Id.*
119. *Id.* Justice Paul H. Anderson disagreed with the majority opinion because they stated that the statute was "uncomplicated and unambiguous." *Id.* at 579. Anderson worried the majority's strong language would encourage future courts to act harshly when considering the sufficiency of affidavits required by Minnesota Statute section 145.682. *Id.* at 579.
120. *Lindberg*, 599 N.W.2d at 579. The majority opinion found that the statute "cuts with a sharp but clean edge." *Id.* at 578. In the majority's opinion, the affidavit either satisfied the requirement of Minnesota Statute section 145.682, or else the case should be dismissed. *Id.; see also supra* note 114 and accompanying text (quoting Justice Anderson disagreeing with the majority's contention that the statute has a "sharp edge").
121. *Id.* at 579. Justice Anderson is conveying the idea first articulated in *Sorenson*. *Sorenson*, 457 N.W.2d at 193. In *Sorenson*, the court stated that it would apply "less drastic alternatives" when it was faced with a borderline case. *Id.; see also supra* note 65 and accompanying text (setting out the "less drastic alternative" mentioned by the court).
122. *Lindberg*, 599 N.W.2d at 579.
123. *Id.*
124. *Id.* at 580.
125. *Id.*
practice Gilbert suggested that in borderline cases, the plaintiff's claim should be allowed to proceed unless the defendant can show that prejudice will result from doing so.26

IV. THE ANALYSIS

A. The Lindberg Holding

One of the most essential components of our legal system is that a case be decided upon its merits, and that it not be dismissed as a result of a procedural flaw.127 Dismissing a case on a procedural error is the most "punitive sanction" that can be imposed on a party for not complying with a procedural rule, and it should only be used as a last resort and under "exceptional circumstances."128

126. Id. In forming his opinion, Justice Gilbert relied on Dennie v. Metropolitan Medical Center, 387 N.W.2d 401 (Minn. 1986), which was decided before Minnesota Statute section 145.682 was enacted. Lindberg, 599 N.W.2d at 580. In Dennie, the plaintiff did not respond to interrogatories until after the discovery deadline had expired. Dennie, 387 N.W.2d at 403. The defendant then sought to suppress the testimony of an expert who would testify at trial as to the defendant's negligence because the interrogatories inquiring about this testimony were answered in an untimely manner. Id. at 404. The Minnesota Supreme Court rejected the defendant's motion. Id. The court stated that "[t]he defense has the burden of showing particular prejudice of such a character that some substantial right or advantage will be lost or endangered if plaintiff is permitted to dismiss and reinstitute the action." Id. at 405. (quoting Firoved v. General Motors Corp., 277 Minn. 278, 283-84, 152 N.W.2d 364, 368 (1967)). Therefore, because the defendant could not show any prejudice they had incurred by receiving the answers to the interrogatories after the discovery deadline had expired, and because they could have anticipated what the expert's testimony would be, the court allowed plaintiffs' claim to proceed. Id. at 407.

127. Anderson v. United States & Veterans Admin., No. Civ. 5-96-235, 1998 WL 92460, at *4 (D. Minn. Jan. 5, 1998) (stating that malpractice claims, should be decided, if at all possible, on the merits); Sorenson, 457 N.W.2d at 192 ("the primary objective of the law is to dispose of cases on the merits"); Dennie v. Metropolitan Medical Center, 387 N.W.2d 401, 404 (Minn. 1986) ("[a]n order of dismissal on procedural grounds runs counter to the primary objective of the law to dispose of cases on the merits"); Lunzer v. Qualey, No. C7-97-862, 1997 WL 729226, at *1 (Minn. Ct. App. Nov. 25, 1997) ("[t]he primary objective of the law is to dispose of cases on their merits"); Henke v. Dunham, 450 N.W.2d 595, 598 (Minn. Ct. App 1990) (quoting Firoved v. Gen. Motors Corp., 277 Minn. 278, 283, 152 N.W.2d 364, 368 (1967) that "the primary objective of the law [is] to dispose of cases on the merits"); Rozhansky v. Bergstrand, No. C2-87-1951, 1988 WL 12759, at *2 (Minn. Ct. App. Feb. 23, 1998) ("dismissal on procedural grounds runs counter to the primary objective of the law to hear cases on their merits and should be granted only under exceptional circumstances"); Parker v. O'Phelan, 414 N.W.2d 534, 537 (Minn. Ct. App. 1987) ("The policy behind the rules of civil procedure, however, is to try cases on the merits and seek a just determination of every action.").

128. Dennie v. Metro. Med. Ctr., 387 N.W.2d 401, 404 (Minn. 1986); see also
However, the holding in *Lindberg* departs demonstratively from this basic notion of justice and is setting the precedent for cases with merit to be dismissed on technicalities.

In an effort to create a distinctive test to judge what a plaintiff must include in their affidavit, the Minnesota Supreme Court went too far. Before *Lindberg*, courts were more apt to allow plaintiffs to have their day in court. However, after the *Lindberg* decision, there have been a number of cases in which lower courts have hesitantly applied the *Lindberg* standard, denying medical malpractice claimants the judgments to which they are entitled. An example of this is the case of *Tousignant v. St. Louis County*.

In this case, the Court of Appeals is forced to dismiss a claim that is "clearly not frivolous," denying a plaintiff recovery because the affidavit was not signed by the plaintiff's experts and the court did not believe the

supra note 126 and the accompanying text. Justice Gilbert saw Minnesota Statute section 145.682 as being a reversion back to code pleading. *Anderson*, 608 N.W.2d at 852 (Gilbert, J., concurring in part and dissenting in part). "The statute was never meant to require plaintiffs in medical malpractice cases to literally try their cases in pre-trial affidavits." *Id.* at 853.

129. *Anderson*, 608 N.W.2d at 851 (Anderson, J., concurring in part and dissenting in part) (stating that the majority’s opinion is departing from deciding cases on their merits).

130. *Lindberg*, 599 N.W.2d at 579 (Anderson, J., concurring specially). Justice Anderson believes that the court has gone too far and expresses concern about the future implications of the decision. *Id.*


133. 602 N.W.2d 882 (Minn. Ct. App. 1999).
While procedural dismissals may be appropriate in cases where the plaintiff makes no effort to comply with the statute and supplies no expert witness at all, there should be alternatives in "border-
line" cases, or cases in which a plaintiff has made an effort to comply with Minnesota Statute section 145.682. A logical approach would be to follow the pattern set in Sorenson and Stroud. In these cases, the court applied the statute strictly, but then applied estoppel in order to reach a just outcome. In accomplishing this type of result, the courts have three tools at their disposal that they can utilize in implementing justice.

B. Possible Ways Of Expanding The Statute

1. Good Cause Shown

The first tool that the courts have at their disposal, to be applied before the 180-day statutory deadline, is written into Minnesota Statute section 145.682. This is evidence of the legislature attempting to avoid unjust outcomes such as the decision in
Lindberg.\footnote{141} Minnesota Statute section 145.682 states that “the court for good cause shown, may by agreement, provide for extensions of the time limits.”\footnote{142} The legislature put no limits on the court’s power in interpreting what “good cause shown” means, allowing the courts to extend the 180-day deadline whenever justice requires it.\footnote{143} Consequently, if the courts want to interpret this statute strictly, they must then interpret the idea of “good cause” liberally to comply with the legislature’s intent.\footnote{144}

2. 

**Excusable Neglect**

The next tool that the courts have, excusable neglect, can be applied either before or after the statute’s 180-day deadline has expired.\footnote{145} The Minnesota Supreme Court has held that excusable neglect is eligible to be applied, according to Rule 6.02 of the Minnesota Rules of Civil Procedure.\footnote{146} Rule 602 states that “when by

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\item \footnote{141} Lindberg v. Health Partners, Inc., 599 N.W.2d 572, 579 (Minn. 1999) (Gilbert, J., concurring in part and dissenting in part).
\item \footnote{142} MINN. STAT. § 145.682, subd. 4(b) (2000) (“The parties or the court for good cause shown, may by agreement, provide for extensions of the time limits specified in subdivision 2,3, or this subdivision. Nothing in this subdivision may be construed to prevent either party from calling additional expert witnesses or substituting other expert witnesses.” Id.
\item \footnote{143} Id.; see also Simon v. Univ. of Minn. Sch. of Dentistry, No. C7-87-1315, 1987 WL 28912, at *1 (Minn. Ct. App. Dec. 29, 1987). In Simon, the court of appeals remanded the plaintiff’s claim back to the district court to decide whether justice would require that the plaintiff receive a continuance to submit expert affidavits, the court further noted that “continuances should be liberally granted.” Simon, 1987 WL 28912, at *1.
\item \footnote{144} Id.
\item \footnote{145} Stern v. Dill, 442 N.W.2d 322, 324 (Minn. 1989) (stating that “[t]he statute does not specify that extensions may only be granted before the expiration of the 180 days”). Excusable neglect is defined as:
\item In practice, and particularly with reference to the setting aside of a judgment taken against a party through his “excusable neglect,” this means a failure to take the proper steps at the proper time, not in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party. As used in rule (e.g. Fed.R.Civ. P. 6(b)) authorizing court to permit an act to be done after expiration of the time within which under the rules such act was required to be done, where failure to act was the result of “excusable neglect”, quoted phrase is ordinarily understood to be the act of a reasonable prudent person under the same circumstances.
\item BLACK'S LAW DICTIONARY 393 (Abr. 6th ed. 1991).
\item \footnote{146} Stern, 442 N.W.2d at 324. In determining whether excusable neglect would be eligible for application, the court examined Rule 81.01(c) which stated that “all statutes ‘inconsistent or in conflict with these rules are superceded insofar
an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion, permit the act to be done where the failure to act was the result of excusable neglect."\(^\text{147}\) In considering the elements establishing excusable neglect, the court expects plaintiff "(1) has a reasonable suit on the merits, (2) has a reasonable excuse for failure to comply with the time limit set forth by [statute], (3) acted with due diligence after receiving notice of the time limit, and (4) no substantial prejudice results to the defendant."\(^\text{148}\) If the plaintiff has made a real effort to bring a medical malpractice claim, she most likely will satisfy the elements of excusable neglect.\(^\text{149}\)

On a number of occasions, Minnesota courts have considered applying excusable neglect to allow a plaintiff's claim to proceed when the plaintiff's expert affidavit was deficient or when, for justifiable cause, no affidavit was submitted.\(^\text{150}\) However, the Minnesota courts have been reluctant in applying this tool.\(^\text{151}\) The case that
first applied excusable neglect to allow a claim to proceed was *Parker v. O'Phelan*. In this case, the plaintiff's original attorney submitted a complaint, but did not include the expert affidavit. Then, after the defendant made a request for "an affidavit of expert review," the original attorney referred the plaintiff to another attorney, who made a request for additional time to satisfy the affidavit. The request was denied and the second law firm declined further representation of the plaintiff. The plaintiff then retained a third lawyer, who properly submitted the affidavit. However, the time limit had already run. The court of appeals found this to be a case in which excusable neglect would allow the claim to proceed. The court found that the plaintiff had a valid claim, had a reasonable excuse for the delay, acted diligently in filing the affidavit, therefore, allowing the claim to proceed did not prejudice the defendant. By applying excusable neglect liberally, as was done in *Parker*, courts have another opportunity to ensure that a valid medical malpractice case receives its day in court.

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152. 414 N.W.2d 534 (Minn. Ct. App. 1987).
153. *Id.* at 535.
154. *Id.*
155. *Id.* at 535-36.
156. *Id.* at 536.
157. *Id.* at 537.
158. *Id.* at 537. In applying the elements of excusable neglect to the facts of the case, the court first focused on validity of the affidavit. *Id.* The court found that, although the plaintiff submitted a valid affidavit after the statutory deadline, the case had merit, thereby satisfying the first requirement of excusable neglect. *Id.* The court then found that the confusion resulting from the plaintiff having to seek different counsel was an excusable reason for delay, satisfying the second requirement. *Id.* at 538. The court then stated that "[r]espondents finally retained their present counsel, who expeditiously obtained and served upon [the defendant] the necessary affidavit," fulfilling the third requirement. *Id.* Lastly, the court found that "the delay did not prejudice [the defendant's] defense on the merits." *Id.*
valid medical malpractice case receives its day in court.\textsuperscript{159} Furthermore, if the court does employ excusable neglect and the plaintiff is given more time to comply with the details of the statute, the purpose of the statute, eliminating frivolous claims, is not harmed because the claim ultimately will not proceed to trial unless there is an expert witness.\textsuperscript{160}

3. Estoppel

A third tool accessible to the courts is estoppel.\textsuperscript{161} In the past, courts applied estoppel in a way that put the burden on the defendant to object to the plaintiff's affidavit if the defendant believed the affidavit was insufficient.\textsuperscript{162} Estoppel was used as such so that a defendant who received the plaintiff's affidavit could not wait until after the 180-day statutory deadline to move for summary judgment.

\textsuperscript{159} \textit{Id.} at 538.


\textsuperscript{161} \textit{Id.} Palmer sets out the elements of estoppel stating:

\begin{quote}
[t]o establish a claim of estoppel, [the plaintiff] ha[s] the burden of proving that (1) [the defendant] knowingly misrepresented a material fact; (2) [the defendant] intended to induce action as a result of the misrepresentation; (3) they lacked knowledge of the true facts; and (4) they relied upon [the defendant's] misrepresentation to their detriment.
\end{quote}

\textit{Id.; see also supra} note 151 and accompanying text.

\textsuperscript{162} The first case that allowed a plaintiff to proceed with a medical malpractice claim, even though the plaintiff did not submit an affidavit, was Thorson v. Rice County Dist. One Hosp., 437 N.W.2d 410 (Minn. 1989). \textit{Supra} note 164 and accompanying text. The Minnesota Supreme Court also allowed an insufficient claim to proceed in Sorenson. Sorenson v. St. Paul Ramsey Med. Ctr., 457 N.W.2d 188, 193. In this case, the defendant withdrew a motion to compel discovery, which caused the plaintiffs to believe that their affidavit was sufficient. \textit{Id.; see also supra} note 40-55 and accompanying text (providing an analysis of the court's decision). Another case where the court considered allowing estoppel to extend a plaintiff's claim was Stroud. Stroud v. Hennepin County Med. Ctr., 556 N.W.2d 552, 556 (Minn. 1996). In Stroud, however, the plaintiff already had a number of opportunities to provide sufficient affidavits and the court found that it would be unjust to give the plaintiff another chance. \textit{Id.; see also supra} note 56-71 and accompanying text (analyzing the courts decision). While most of the above mentioned decisions have allowed the plaintiff's claim to proceed under estoppel, there have also been a few courts, besides Stroud, that rejected the application of estoppel. \textit{E.g.,} Stavn v. Bd. of Regents of the Univ. of Minn., No. C7-96-1449, 1996 WL 745261, at *2 (Minn. Ct. App. Dec. 31, 1996)(refusing to apply estoppel because the defendant did not act in a way that would make the plaintiff believe that the defendant accepted the plaintiff's affidavit); Maloney v. Fairview Cmty. Hosp., 451 N.W.2d 237, 241 (Minn. Ct. App. 1990)(refusing to apply estoppel because the plaintiff did not raise this issue with the trial court).

\textsuperscript{163} Sorenson, 457 N.W.2d at 193.
The first case that applied the theory of estoppel to allow a claim to proceed was *Thorson v. Rice County District One Hospital*. In this case, the plaintiff acquired a new attorney after the 180-day statutory deadline had expired. The attorney contacted the defendant’s attorney, who stated that “he was interested in discussing settlement without incurring additional expenses relative to extensive discovery,” and the two attorneys kept in contact. The plaintiff then proceeded to find an expert and submitted answers to interrogatories that would have satisfied the requirements of Minnesota Statute section 145.682. At that point in time, the defendants sought that the claim be dismissed because the affidavit was not submitted prior to the statutory deadline. The court rejected the motion, finding that the defendants should have informed the plaintiff earlier if they intended to seek dismissal according to the running of the 180-day deadline. The court stated that the defendants’ attorney “remained silent at times it would have been normal for them to have asserted the hospital’s statutory right to claim a mandatory dismissal.” Therefore, the court found that the defendants’ silence was acceptance of having a decision based on the merits, which allowed the plaintiff’s claim to proceed.

While estoppel can be a powerful tool ensuring that cases are decided on their merits, as in *Thorson*, the *Lindberg* decision almost completely removed estoppel applicability. In *Lindberg*, the Min-

164. 437 N.W.2d 410 (Minn. 1989).
165. Id. at 413.
166. Id. By stating that they wanted to settle the case, the defendants’ attorney caused the plaintiff to believe the case would not be dismissed even though no expert affidavit had been submitted yet. Id. The plaintiff believed the court would decide the case on its merits and continual contact between his attorney and the defendants’ attorneys confirmed this belief, as a result, the plaintiff spent time and money finding an expert and preparing a case. Id.
167. Id.
168. Id. at 414.
169. Id. at 415.
170. Id.
171. Id.
172. *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 578 (Minn. 1999). *Accord* *Palmer v. Erlandson*, No. C8-99-891, 2000 WL 2621, at *4 (Minn. Ct. App. Dec. 27, 1999), (relying on *Lindberg*, the court of appeals denied the plaintiff’s request that a claim be continued under the theory of estoppel). The facts of *Palmer* are similar to *Thorson* in that the plaintiff and defendant were involved in settlement discussions and had chosen a mediator. Id. at *2*. Then, when the statutory deadline had run, the defendant moved for dismissal. Id. The court upheld the dismissal, by placing emphasis on the elements of estoppel that required the de-
nnesota Supreme Court stated that "failure of defendant to alert plaintiff to the inadequacy of the affidavit of expert identification will not excuse or justify an affidavit of expert identification falling short of the substantive disclosure requirement." By not allowing the plaintiff in *Lindberg* to claim estoppel, the defendant, who did not question the plaintiff's affidavit for eleven months, effectively had the case dismissed after the 180-day statutory deadline had run. In the end, a plaintiff can never feel safe. Even after submitting an affidavit that the plaintiff believes meets the statutory requirements, the defendant could attempt to oppose the affidavit at any time and escape having to defend against a valid claim.

C. *Minnesota Statute Section 544.42*

In 1997, the Minnesota legislature enacted Minnesota Statute section 544.42, which is to apply when a plaintiff brings a malpractice claim against a professional. This statute is very similar to section 145.682, which was used as a blue print in drafting section 544.42. However, there is one significant difference in the statutes that favors plaintiffs bringing malpractice claims. Subdivision 6(c) of section 544.42 provides the plaintiff bringing the claim an additional sixty days to amend their second affidavit if the court finds it insufficient. Furthermore, the court specifically notifies the defendant to purposefully mislead the plaintiff. *Id.* at *4. The court held that the defendant "had no obligation to inform [the plaintiff] that they were required to serve an affidavit of expert identification." *Id.* at *5. Therefore, because the time limit had expired and the plaintiff had submitted no affidavits, the court dismissed the claim. *Id.*

173. *Lindberg*, 599 N.W.2d at 578.
174. *Id.* at 575.
175. MINN. STAT. § 544.42 (1998). The statute defines a professional as a "licensed attorney or an architect, certified public accountant, engineer, land surveyor, or landscape architect...." *Id.* § 544.42 subd. 1(1).
177. *Id.*
178. MINN. STAT. § 544.42 subd. 6(c). Subdivision 6(c) states that: Failure to comply with subdivision 4 results, upon motion, in mandatory dismissal of each action with prejudice as to which expert testimony is necessary to establish a prima facie case, provided that an initial motion to dismiss an action under this paragraph based upon claimed deficiencies of the affidavit or answers to interrogatories 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. In providing its notice, the court shall issue specific findings as to the deficiencies of the af-
the plaintiff as to what it deems to be insufficient.\textsuperscript{179} The legislature purposefully added this subdivision to avoid the harsh ramifications they believed resulted from enforcing section 145.682.\textsuperscript{180} Initially the legislature considered amending Minnesota Statute section 145.682, which applies to medical malpractice, to include professional malpractice.\textsuperscript{181} However, to avoid valid claims from being dismissed as a result of technicalities, the legislature created a new statute to “provide the claimant with an opportunity to supplement the affidavit and proceed with the case for a determination on the merits.”\textsuperscript{182}

The legislature had finally recognized the problems that exist with Minnesota Statute section 145.682.\textsuperscript{183} Unfortunately for victims of medical malpractice, unlike victims of legal malpractice, the problems have not been corrected.\textsuperscript{184} 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. By allowing the plaintiff in a medical malpractice claim to have an additional sixty days, the purpose of section 145.682, preventing claims without merit, will not be jeopardized.\textsuperscript{185} This is noted by the court in \textit{House v. Kelbel},\textsuperscript{186} stating that “[t]his procedure allows for cases to be determined on the merits while still providing a way to prevent frivolous suits from being heard.”\textsuperscript{187} Therefore, because section 544.42 satisfies the purpose to prevent frivolous cases and allow cases to be heard on the merits, no reason exists that this statute should not apply in all malpractice cases. A plaintiff in a medical malpractice case should be allowed the same opportunity as a plaintiff in any other malpractice litigation to

\textit{Id.}

\textsuperscript{179} \textit{Id.}


\textsuperscript{181} \textit{Id.} (relying on Appendix: Senate Judiciary Committee Hearing at p. 18).

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} \textit{Id.} (relying on Appendix: Senate Judiciary Committee Hearing at p. 13-19, 27; House Judiciary Committee at 1997, p. 51-54, 59-60). The court stated that “[t]he legislative hearing on § 544.42 makes it clear that the legislature sought to remedy the problems caused in the application of § 145.682.” \textit{Id.}

\textsuperscript{184} MINN. STAT. § 544.42 subd. 1(1) (providing that legal malpractice is governed by section 554.42).

\textsuperscript{185} \textit{Supra} note 39 and accompanying text.

\textsuperscript{186} 105 F. Supp. 2d 1045 (D. Minn. 2000).

\textsuperscript{187} \textit{Id.} at 1054.
achieve a just result.

D. Constitutional Argument

Potentially a plaintiff could also escape the narrow confines of Minnesota Statute section 145.682 if this statute were found unconstitutional. This argument has been raised before, but it has never been challenged as violating the constitutional separation of powers doctrine or imposing on the inherent power of the court to establish its own procedural rules. In Anderson, Justice Gilbert insists that "judicial procedures...are inherently in the province of the judiciary." Gilbert argues that the court already has established rules for a plaintiff to follow when bringing a claim, and that the legislature has infringed on these rules by enacting section 145.682. If Gilbert is correct, this statute would violate the constitutional separation of powers doctrine and the statute would be found unconstitutional. After acknowledging that this argument has never been raised, Gilbert states that "this


189. One of the first challenges of the constitutionality of section 145.682 was whether it violated the equal protection doctrine. Henke v. Dunham, 450 N.W.2d 595, 598 (Minn. Ct. App. 1990). The court applied the rational basis test, questioning whether the statute served a legitimate purpose, and whether the statute promoted that purpose. Id. The court ruled that a legitimate purpose, to reduce medical malpractice claims, was served and that the statute "promoted" this purpose. Id. Another general constitutional challenge of the statute was made in Way v. Foley Dental Office, No. C8-91-1506, 1992 WL 43301, at *3 (Minn. Ct. App. Mar. 10, 1992). However, in this case the challenge was denied because the plaintiff did not notify the attorney general, as was required by Rule 24.04 of the Minnesota Rules of Civil Procedure. Way, 1992 WL 43301, at *3. The constitutionality of the statute was also challenged on the grounds that it violated the Seventh Amendment right to a jury trial. Carmen v. Mayo Found., No. 95-2559, 1996 WL 137272, at **1 (8th Cir. Mar. 26, 1996). The court denied this challenge, stating that, "we see no merit to the contention that a party who has failed to present a prima facie case has a right to a jury trial." Id.

190. Anderson, 608 N.W.2d at 853 (Gilbert, J., concurring in part and dissenting in part).

191. Id. at 852.

192. Id. at 852-53. Gilbert argues that certain rules were in place before the enactment of section 145.682, including Minnesota Rules of Evidence 702, 703, and 706. Id. These rules relate to expert opinions. Id. at 853. Other established Minnesota Rules of Civil Procedure rules include: (1) 26.02(d) relating to depositions and discovery of experts; (2) 35.04 relating to medical expert disclosure and depositions; (3) 4.01 and 8.01 governing summons and complaints; and (4) 7.01 relating to pleadings. Id.

193. Id. at 853.
question should give this court pause before adopting the legislature’s directives in such a wholesale fashion when this legislation may be at odds with our long established precedent and rules.' \(194\)

V. CONCLUSION

In the 1996 presidential debates over tort reform, President Clinton stated that reformation efforts "must aim to deter frivolous claims without denying justice for claims with merit." \(195\) In Lindberg, however, the Minnesota Supreme Court does just the opposite. In attempting to establish a clear standard as to what is required in the affidavit of an expert witness according to Minnesota Statute section 145.682, the Court greatly restricts the power of courts to reach a just decision. Without expanding estoppel, cases with merit will be dismissed on technicalities.

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194. Id.
195. Parness & Leonetti, supra note 38, at 578.