STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0943

Jordan Handrich,
Appellant,

vs.

Woodbury Spine and Injury Center, P.A., et al.,
Respondents.

Filed January 21, 2020
Affirmed in part, reversed in part, and remanded
Bratvold, Judge

Washington County District Court
File No. 82-CV-18-1024

Wilbur W. Fluegel, Fluegel Law Office, Minneapolis, Minnesota; and

Joe Crosby, Crosby Law Office, LLC, St. Paul, Minnesota (for appellant)

Thomas H. Schaefer, Erstad & Riemer, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Ross, Presiding Judge; Rodenberg, Judge; and Bratvold, Judge.

U N P U B L I S H E D O P I N I O N

BRATVOLD, Judge

Appellant challenges the district court's order dismissing her medical-malpractice complaint with prejudice after denying her request to enlarge the expert-identification-affidavit deadline established by Minn. Stat. § 145.682, subd. 2 (2018). Appellant asserts

that the district court erred by denying her request to enlarge the deadline and dismissing her complaint during the safe-harbor period established by Minn. Stat. § 145.682, subd. 6(c) (2018). We conclude that the district court did not abuse its discretion by denying appellant's motion to enlarge, and therefore, we affirm in part. But because appellant timely filed an amended expert-identification affidavit after respondents articulated claimed deficiencies in the initial expert-identification affidavit, and the district court dismissed appellant's complaint without considering the amended affidavit, we reverse the district court's dismissal of appellant's complaint and remand for further proceedings consistent with this opinion.

FACTS

Over two days in October 2013, appellant Jordan Handrich received chiropractic adjustments as a patient at respondent Woodbury Spine and Injury Center, P.A. Four years later, Handrich sued Woodbury Spine and respondents Justin Nye, D.C. and Ross Crain, D.C. (collectively, Woodbury Spine) for medical malpractice in a pro se complaint. Handrich's complaint alleged that Woodbury Spine failed to warn her of the possible side effects of chiropractic treatments she received in October 2013, and that the doctor treating her negligently administered treatments with "undue force, causing [her] extreme pain." Handrich claimed that, on the second day Woodbury Spine treated her, she experienced a severe headache, went to a hospital emergency room, and, following an MRI, learned that she may have suffered a stroke. Handrich alleged that, as a result of Woodbury Spine's negligence in failing to perform a "low-velocity manipulation" of her neck, she experienced a "life threatening vertebral artery dissection" and permanent injuries.

Along with her complaint, Handrich served an affidavit of expert review, which stated that she was "an attorney representing [herself]," that she had "reviewed the facts of the case with an expert," and that the expert opined that Woodbury Spine "deviated from the applicable standard of care, and by that action, caused injury to [her]." *See* Minn. Stat. § 145.682 (2018). In its answer, served on November 3, 2017, Woodbury Spine denied Handrich's allegations and asserted affirmative defenses.

On December 13, 2017, Handrich served an "amended affidavit of expert review," which stated the names of several medical experts and the substance of their expected testimony, along with several exhibits, including an electronically-signed letter from one of the experts (December 2017 affidavit). Handrich signed the December 2017 affidavit.

Woodbury Spine then served Handrich with interrogatories and document requests. Handrich failed to timely respond, and Woodbury Spine moved to compel discovery. The district court granted the motion and Handrich complied.

Handrich retained an attorney during the summer of 2018 and, on December 5, 2018, moved to amend the deadline to "disclose experts required by Minnesota [Statutes section] 145.682." On January 2, 2019, Woodbury Spine moved for summary judgment, and the district court scheduled both motions for a hearing on February 22, 2019.

Woodbury Spine filed a memorandum on January 25, 2019, arguing that it was entitled to summary judgment because the December 2017 affidavit was deficient in several ways: it was not signed by a physician, it "only briefly summarize[d] expected testimony in one or two sentences," and none of the disclosed experts opined that Woodbury Spine's "chiropractic adjustments caused her stroke."

Two weeks later, Handrich filed a memorandum in support of her motion to enlarge, arguing that she had "contacted a chiropractic expert and a neurologist to review the case, and their opinions are being submitted today." She also filed and served two affidavits of expert identification as exhibits to her memorandum (February 2019 affidavits). The affidavit of Dr. Kenneth Ermann, a licensed chiropractor, stated that he had reviewed Handrich's medical records and would testify to the applicable standard of care for chiropractic treatment and his opinion that Woodbury Spine's "negligent adjustment to Ms. Handrich's neck was done with excessive force," did not meet the standard of care, and "was a direct cause of her vertebral dissection." The affidavit of Dr. John Wald, a board-certified neurologist, stated he had reviewed Handrich's medical records and her deposition, and would testify, based on a reasonable degree of medical certainty, that Handrich's "left cerebellar dissection was caused by defendant's chiropractic manipulation" and led to the damages related to Handrich's stroke.

On February 15, Handrich filed a written response to Woodbury Spine's motion for summary judgment, arguing that she "did not receive any notice that her expert opinions were insufficient until January 25, 2019, when [she] was served with [Woodbury Spine's] Memorandum." Handrich also argued that "Minnesota law provides a 45-day safe harbor period following service of the motion to dismiss to submit an amended affidavit to correct the claimed deficiencies" and that the February 22 hearing date on the summary-judgment motion did not satisfy the statute.

At the February 22 hearing, Woodbury Spine stated that, in light of Handrich's safe-harbor argument and "out of an abundance of caution," the district court should

continue the summary-judgment hearing. The district court agreed to do so after some discussion about when to schedule the continued hearing. Woodbury Spine argued that, if the court denied Handrich's motion to enlarge, it is "probably dispositive of th[e] case because of the way the original disclosures were done, within the timeframe that they were obligated to be done, and how insufficient they [were] as a matter of law." Handrich argued that the February 2019 affidavits did not "have any problems at all with them." She also asserted that "even if this court doesn't enlarge [the timeline for expert identifications] . . . we've submitted affidavits that are sufficient to meet all the standard of care, causation, as well as negligence, so [Woodbury Spine] can't bring a motion to the court saying there was no expert disclosures." The district court took the motion to enlarge under advisement.

On April 24, two days before the summary-judgment hearing, the district court filed its order denying Handrich's motion to enlarge and determining that it "no longer needs to address [Woodbury Spine's] Motion for Summary Judgment." The district court found that Handrich had a reasonable case "on the merits" and noted that she had filed affidavits by Drs. Ermann and Wald on February 8. But the district court also found that Handrich had "disclosed these experts 433 days after discovery commenced in this case and beyond the January 31, 2019 discovery deadline." Because the district court determined that Handrich failed to show excusable neglect and had missed the statutory deadline, the district court denied the motion and dismissed the complaint with prejudice. Handrich appeals.

D E C I S I O N

I. The district court did not abuse its discretion by denying Handrich's motion to enlarge the deadline for serving an expert-identification affidavit.

In a lawsuit alleging medical malpractice, a plaintiff must serve two expert affidavits. Minn. Stat. § 145.682, subd. 2. The first affidavit, the affidavit of expert review, must be served with the summons and complaint, be signed by the plaintiff's attorney, and state that the attorney has reviewed the facts of the case with a qualified expert, whose opinion is that the defendant was negligent. *Id.*, subds. 2, 3. Woodbury Spine does not question that Handrich served a timely expert-review affidavit.

The second affidavit, the affidavit of expert identification, "must have more information than the first." *Wesely v. Flor*, 806 N.W.2d 36, 40 (Minn. 2011).[1] The affidavit of expert identification must be served within 180 days after discovery commences, identify experts that are expected to testify, provide "the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion," and "must be signed by each expert listed." Minn. Stat. § 145.682, subd. 4.

A district court may extend the 180-day deadline for serving an expert-identification affidavit for "good cause shown." *Id.*, subd. 4(b); *see also Stern v. Dill*, 442 N.W.2d 322, 323-24 (Minn. 1989). And a district court may extend the 180-day deadline "at any time"

[1] Our caselaw sometimes refers to the affidavit of expert of identification as an affidavit of expert disclosure. *See Wesley*, 806 N.W.2d at 36. These terms are interchangeable and refer to the same type of affidavit.

before or after the deadline expires. Minn. R. Civ. P. 6.02. If a plaintiff moves to enlarge the 180-day deadline, a district court may do so if it finds that four elements are met:

> the 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 Minn. Stat. § 145.682, subd. 2, (3) acted with due diligence after receiving notice of the time limit, and (4) no substantial prejudice results to the defendant.

Anderson v. Rengachary, 608 N.W.2d 8430, 850 (Minn. 2000). We review a district court's decision to deny or grant a motion to enlarge for abuse of discretion. *Parker v. O'Phelan*, 414 N.W.2d 534, 537 (Minn. App. 1987), *aff'd*, 428 N.W.2d 361 (Minn. 1988).

Handrich argues that the district court abused its discretion by denying her motion to enlarge the expert-identification-affidavit deadline. The district court found that Handrich satisfied only the first of the four required elements, concluding that Handrich likely had a reasonable case on the merits based on her February 2019 affidavits.

Regarding the second element, the district court found that Handrich did not have a reasonable excuse for failing to serve the February 2019 affidavits within the 180-day deadline. Handrich argued in her motion that she reasonably missed the deadline because she "did not possess the cognition to prosecute her case" as a self-represented litigant. But the district court determined that "the evidence presented does not establish that [Handrich] did not possess the cognition to prosecute her case."

On appeal, Handrich argues that the district court failed to consider her attorney's affidavit that she did not "understand the importance of [the section] 145.682 expert [identification] affidavit." But this argument does not address the district court findings that Handrich maintained her license to practice law for "almost 4 years after the underlying

treatment," practiced in a personal-injury law firm, "was familiar with medical malpractice claims and had a network of attorneys to consult with."[2] The district court also found that Handrich successfully served her complaint and two expert affidavits, including "an amended expert disclosure within the deadline," and responded to the court's order compelling discovery.

Regarding the third element, the district court determined that Handrich did not act with due diligence in asking for enlargement 188 days after the deadline for serving an expert-identification affidavit, reasoning that Handrich also did not respond to Woodbury Spine's discovery requests, causing delays. On appeal, Handrich argues that Woodbury Spine also caused delays by "waiting 395 days" to move to dismiss the case. But Handrich ignores that she could have sought enlargement for the affidavit deadline "at any time," *see* Minn. R. Civ. P. 6.02, and that she moved to enlarge just a few weeks before respondents sought summary judgment.

Regarding the fourth element, the district court found that enlarging the deadline would cause substantial prejudice to Woodbury Spine, stating that "the parties are more than 5 years after the purported negligence in the case and will be at 500 days after discovery commenced" if an enlargement were granted, which would cause Woodbury

[2] The district court's memorandum also commented that Handrich is "the number 1 ranked female poker player in Minnesota" and "went professional in 2013." The district court commented that "[t]his hardly suggests a cognitive inability to prosecute her case." It is not clear what evidence the district court is relying on to reach this conclusion. Because Handrich's ability to play poker is unnecessary to our analysis of the second element, we do not consider these comments.

Spine to "incur additional and unnecessary expenses to begin its defense anew." On appeal, Handrich argues that a motion to enlarge does not cause "substantial prejudice" when the only prejudice is having to "address the case on the merits."[3] But district courts have broad discretion to determine whether a delay is prejudicial under the particular facts of the case. *See, e.g.*, *Parker*, 414 N.W.2d at 538 (concluding that the district court did not abuse its discretion in granting an enlargement when plaintiff promptly moved for additional time to serve an expert affidavit after finding an attorney). Long after the alleged negligent treatment, Handrich moved to enlarge the deadline.

Based on the record, we conclude that the district court did not abuse its discretion by denying Handrich's motion to enlarge the expert-identification-affidavit deadline, and therefore, we affirm in part.

II. The district court erred by dismissing Handrich's medical-malpractice complaint with prejudice during the safe-harbor period and without considering the amended expert-identification affidavits.

Handrich contends that the district court did not "faithfully apply" the "medical malpractice expert affidavit statute" because she amended the December 2017 expert-identification affidavit by serving the February 2019 expert-identification affidavits within the "safe harbor period." Woodbury Spine responds that the district court correctly dismissed Handrich's complaint because the February 2019 affidavits were not "amended

[3] Handrich relies on an unpublished case from this court. But unpublished opinions are not precedential. *See* Minn. Stat. § 480A.08, subd. 3(c); *Gen. Cas. Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 575 n.2 (Minn. 2009) (stating that unpublished opinions do not constitute precedent).

expert disclosures" that "corrected any deficiencies" raised by Woodbury Spine, and Handrich failed to claim the safe-harbor period applied until she filed her brief on appeal.

This court reviews for abuse of discretion a district court's decision to dismiss a medical-malpractice claim for failure to comply with the requirements of Minn. Stat. § 145.682, subd. 4(a) (2018). *See Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 429 (Minn. 2002). But when the district court's dismissal is based on the applicability of the safe-harbor provision, we review the decision de novo. *See Pfeiffer ex rel. Pfeiffer v. Allina Health Sys.*, 851 N.W.2d 626, 634 (Minn. App. 2014) ("The applicability of the safe-harbor provision is a question of law subject to de novo review."), *review denied* (Minn. Oct. 14, 2014).

When a plaintiff in a medical-malpractice action breaches the expert-identification affidavit requirements set out in section 145.682, "mandatory dismissal with prejudice" follows in two circumstances.[4] First, a plaintiff's failure to timely submit an expert-identification affidavit results "upon motion, in mandatory dismissal with prejudice." Minn. Stat. § 145.682, subd. 6(b). As mentioned above, a plaintiff must serve an expert-identification affidavit "within 180 days after commencement of discovery." *Id.*,

[4] A plaintiff's failure to timely submit an expert-review affidavit within 60 days of a demand also may lead to dismissal. Minn. Stat. § 145.682, subd. 6(a). Woodbury Spine did not challenge the timeliness of Handrich's expert-review affidavit served with her complaint.

subd. 2.[5] Woodbury Spine does not dispute that Handrich served the December 2017 expert-identification affidavit within 180 days of commencement of discovery.[6]

Second, if a plaintiff timely serves an expert-identification affidavit, but the affidavit is deficient, "mandatory dismissal with prejudice" follows "upon motion" if three conditions are satisfied:

> (1) the motion to dismiss the action identifies the claimed deficiencies in the affidavit or answers to interrogatories;
>
> (2) the time for hearing the motion is at least 45 days from the date of service of the motion; and
>
> (3) before the hearing on the motion, the plaintiff does not serve upon the defendant an amended affidavit or answers to interrogatories that correct the claimed deficiencies.

Minn. Stat. § 145.682, subd. 6(c); *see also Wesely*, 806 N.W.2d at 41.

Woodbury Spine contends that dismissal of Handrich's case for deficiencies in the December 2017 affidavit was appropriate because all three conditions were satisfied under the safe-harbor provision. It is undisputed that Woodbury Spine's January 2019 summary-judgment memorandum, for the first time, identified deficiencies in Handrich's

[5] Discovery "commences" either when the discovery conference or discovery plan occurs or "30 days from the initial due date for an answer, whichever is earlier." *Firkus v. Harms*, 914 N.W.2d 414, 422 (Minn. App. 2018). Here, the district court did not hold a discovery conference so discovery commenced on December 3, 2017, which is 30 days from the initial due date for the answer.

[6] Although Handrich served the December 2017 affidavit titled as an "amended affidavit of expert review," Woodbury Spine and the district court have referred to the December 2017 affidavit as an affidavit of expert identification or disclosure. Indeed, the district court determined that the December 2017 affidavit was "an amended expert disclosure" that Handrich provided "within the deadline."

December 2017 affidavit.[7] We therefore conclude that Woodbury Spine satisfied the first condition because it filed a memorandum on January 25, 2019, identifying deficiencies in the December 2017 affidavit. *See* Minn. Stat. § 145.682, subd. 6(c)(1).

We also conclude that the safe-harbor period started on January 25. The supreme court has held that a 45-day "safe-harbor period applies *every time the defendant moves to dismiss* under Minn. Stat. § 145.682, subd. 6." *Wesely*, 806 N.W.2d at 41 (emphasis added). "[T]he safe-harbor period is an automatic, 45-day delay before the court hears any arguments or makes any decisions regarding deficiencies in the affidavit." *Id.* at 41-42.

Woodbury Spine contends that it satisfied the second condition requiring "at least" a 45-day delay after the motion identifies deficiencies and before "hearing the motion" for dismissal. Minn. Stat. § 145.682, subd. 6(c)(2); *see also Pfeiffer*, 851 N.W.2d at 636. It is true that the district court continued the summary-judgment hearing until April 26, 2019, more than 45 days after Woodbury Spine served its memorandum identifying deficiencies. But the district court dismissed Handrich's case on April 24, 2019, *two days before* the

[7] The parties and the district court refer to Woodbury Spine's motion as one for "summary judgment," the title used by Woodbury Spine in its district court motion. We conclude that it is more properly characterized as a motion to dismiss. In *Sorenson v. St. Paul Ramsey Med. Ctr.*, we determined that a defendant seeking a dismissal under Minn. Stat. § 145.682 was not seeking an "actual summary judgment," but was rather seeking "a statutory dismissal." 444 N.W.2d 848, 851 (Minn. App. 1989), *aff'd*, 457 N.W.2d 188 (Minn. 1990). The supreme court agreed. *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 189 n.1 (Minn. 1990). Woodbury Spine's "summary judgment" memorandum requested dismissal under section 145.682, subdivisions 2(2) and 4, therefore, it sought a "statutory dismissal." *See Sorenson*, 444 N.W.2d at 851. Still, we track the parties' language and refer to Woodbury Spine's motion as one for "summary judgment."

scheduled hearing on Woodbury Spine's motion for summary judgment. Thus, the second condition was not satisfied because the district court dismissed Handrich's complaint before hearing Woodbury Spine's motion for summary judgment.

Still, Woodbury Spine contends that the district court correctly dismissed Handrich's complaint because Handrich did not preclude dismissal by satisfying the third condition—"before the hearing on the motion, the plaintiff" must "serve upon the defendant an amended affidavit or answers to interrogatories that correct the claimed deficiencies." Minn. Stat. § 145.682, subd. 6(c)(3). Woodbury Spine makes two arguments related to the third condition.

First, Woodbury Spine argues that Handrich never asserted in district court that "the February of 2019 expert disclosures correct[ed] any of the alleged deficiencies in the December of 2017 disclosures."[8] It is true that Handrich attached the February 2019 affidavits to her memorandum in support of her motion to enlarge the expert-identification deadline and did not clearly discuss in her memorandum that the affidavits corrected deficiencies in the December 2017 affidavit. But to avoid dismissal under the third condition, the statute requires only that the plaintiff timely "serve upon the defendant an

[8] Woodbury Spine also argues that the disclosures in the December 2017 affidavit were "so insufficient they outright fail on their face." *Wesely* rejected a similar argument, concluding that the safe-harbor period is not limited "to only certain types of deficiencies." 806 N.W.2d at 41. *Wesely* recognized that plaintiffs could submit "placeholder" affidavits of expert identification with no information "in order to take advantage of the 45-day safe-harbor period." *Id.* at 42. The supreme court reasoned that the legislature can amend the statute if "plaintiffs do consistently use purposefully deficient affidavits." *Id.* at 43.

amended affidavit . . . that correct[s] the claimed deficiencies." Minn. Stat. § 145.682, subd. 6(c)(3). Handrich *served* amended expert-identification affidavits within the safe-harbor period. Handrich also claimed the amended affidavits corrected the deficiencies raised by Woodbury Spine. Handrich's written memorandum in response to Woodbury's Spine's summary-judgment motion, filed before the February hearing, specifically asserted the 45-day safe-harbor period and that the statute allowed her to "submit an amended affidavit to correct the claimed deficiencies." At the February hearing, Handrich argued that dismissal was not appropriate even if the district court denied enlargement because the February 2019 affidavits were sufficient. We conclude that Handrich stated in district court what she asserts now on appeal—that the February 2019 affidavits were amended expert-identification affidavits filed within the safe-harbor period.

Second, Woodbury Spine contends that Handrich's "efforts to wholesale substitute her original expert disclosures with new experts and new opinions is not appropriate or allowed under law." *Wesely* rejected a similar contention. 806 N.W.2d at 44. In *Wesely*, the district court dismissed the case because it concluded that a previously undisclosed expert could not "amend" another expert's affidavit and correct its deficiencies. *Id.* at 39. This court affirmed. *Id.* The supreme court reversed, holding that a plaintiff can "submit an affidavit identifying a *new expert* in order to cure the deficiencies of her initial affidavit of expert [identification]." *Id.* at 44 (emphasis added); *see also* Minn. Stat. § 145.682, subd. 4(b) ("Nothing in this subdivision may be construed to prevent either party from calling additional expert witnesses or substituting other expert witnesses.").

Wesely did not address whether the safe-harbor provision allows a plaintiff to amend the expert-identification affidavit and allege new or different negligent acts to remedy a defective affidavit.[9] We decline to consider this issue because the district court did not determine whether the February 2019 affidavits corrected the deficiencies in the December 2017 affidavits. It is not appropriate for this court to evaluate the February 2019 affidavits in the first instance. *See Teffeteller*, 645 N.W.2d at 429 (reviewing district court's conclusions on expert affidavit for abuse of discretion); *see also Wesely*, 806 N.W.2d at 44 (stating that "[w]e take no position on whether the second affidavit actually cured the deficiencies claimed" by defendant).

In conclusion, Handrich timely served the February 2019 affidavits within the safe-harbor period, making dismissal inappropriate without a determination of whether those affidavits corrected the deficiencies raised by Woodbury Spine. *See* Minn. Stat. § 145.682, subd. 6(c). In its order denying Handrich's motion to enlarge, the district court rejected Handrich's February 2019 affidavits because she served them "433 days after discovery commenced in this case and beyond the January 31, 2019 discovery deadline." But when "discovery commenced" is only relevant to the 180-day deadline. The district court erred by failing to consider the February 2019 affidavits under the safe-harbor provision. *See* Minn. Stat. § 145.682, subd. 6(c); *Pfeiffer*, 851 N.W.2d at 634. For these

[9] Woodbury Spine cites an unpublished opinion from this court to argue that new allegations of negligence cannot "amend" an affidavit. But unpublished opinions are not precedential. *See* Minn. Stat. § 480A.08, subd. 3(c); *Gen. Cas*, 762 N.W.2d at 575 n.2.

reasons, we reverse the district court's dismissal and remand for the district court to consider Woodbury Spine's summary-judgment motion and Handrich's February 2019 affidavits.

Affirmed in part, reversed in part, and remanded.