MINNESOTA LAWYER

December 20, 2010 minnlawyer.com THE DOLAN COMPANY Vol. 14, No. 51

Plaintiffs' med-mal safe harbor imperiled

By Michelle Lore
michelle.lore@minnlawyer.com

Plaintiffs' medical malpractice attorneys say a decision from the Court of Appeals last week eviscerates their interpretation of the safe-harbor provision contained in the med-mal statute.

Minnesota Stat. sec. 145.682, subd. 2, requires med-mal plaintiffs to serve an affidavit of expert review with the summons and complaint and an expert-disclosure affidavit within 180 days. A 2002 amendment to the statute states that dismissal is mandatory if the affidavit is deficient, unless the plaintiff serves an amended affidavit that corrects the deficiencies within 45 days of the defendant's motion to dismiss the action.

In *Wesely v. Flor, DDS, et al.*, the Court of Appeals, in a 3-0 decision, determined that the safe-harbor provision did not allow the plaintiff to serve an expert-disclosure affidavit that identified a new expert witness when her previously identified expert was not qualified to give an expert opinion.

"We conclude that [the plaintiff's] second expert-disclosure affidavit, which identified and was signed by a different expert than [the plaintiff] identified in her first affidavit, was not an amended affidavit that corrected the deficiencies in the first affidavit," Judge Randolph Peterson wrote.

Minneapolis attorney Terry Wade, who represents plaintiffs in med-mal actions, was shocked by the decision.

"We all assumed that one way to address an alleged deficiency in an affidavit is to call an additional expert witness or substitute an expert witness," he said. "There's no safe harbor now in that circumstance according to this opinion. The safe harbor is gone."

Julie Matonich, a Minneapolis attorney who represents plaintiffs in med-mal claims, said plaintiffs' lawyers will likely be reviewing the decision in depth.

"It's surprising because there did seem to be expert support for this case," she said. "And it's always been our belief that the legislative intent was to give plaintiffs some leeway to proceed with meritorious cases that had that support."

Affidavit not amended

The plaintiff began a dental malpractice claim against A. David Floor and Uptown Dental on Feb. 24, 2009. After her attorney withdrew from the case, acting pro se, the plaintiff served an expert-disclosure affidavit that identified an internal-medicine physician as the expert who would testify at trial.

On Sept. 11, 2009, the defendants moved to dismiss the claim, arguing that the plaintiff's expert was not qualified to give an expert opinion in her case.

Thirty-five days later, the plaintiff's new attorney, Michael Zimmer of Minneapolis, served an expert-disclosure affidavit identifying a doctor of dental surgery. He argued that the affidavit cured the deficiencies in the first affidavit and was timely because it was filed within the 45-day safe-harbor provision in the med-mal statute.

A Freeborn County District Court judge dismissed the action, finding that the statute does not allow a plaintiff to amend a deficient expert-disclosure affidavit by substituting a new expert's affidavit.

Melissa Riethof, attorney for the defendants

The plaintiff appealed.

The Court of Appeals said that because a valid affidavit must be sworn to or affirmed by the affiant, a statement in a valid affidavit cannot be amended by the affidavit of another affiant.

In effect, Zimmer explained, the decision means that if you select the right expert, but that expert's affidavit is deficient, the plaintiff may correct it. But if the plaintiff selects the wrong expert — someone not qualified to testify — the safe-harbor provision doesn't provide protection.

MED-MAL | PAGE 2A

Med-mal If plaintiff selects the wrong expert, safe harbor doesn't apply

Continued from page 1

Legislative intent

Plaintiffs' lawyers say the decision defies the legislative intent behind the safe-harbor provision.

"It's a highly technical reading of the statute that in my view violates the spirit of the statutory scheme," Wade said.

According to Wade, there is no question that the Legislature intended to give the plaintiff a chance to cure a mistake.

"Before the amendment, either you got it right or you got your head cut off," Wade said. "That was pretty harsh.

"Now we're back to where we were before the statutory scheme was softened to being with. … Now we're back to where a mistake is fatal."

Zimmer said that the decision changes the nature of safe-harbor provision.

"The safe-harbor provision, as I understand it, was put into place to make the [med-mal] statute less restrictive and to serve the policy of the statute, that is to prevent frivolous lawsuits," he said. The Court of Appeals' decision "is going to bar meritorious lawsuits like this one."

James Carey, the president of the Minnesota Association for Justice, said that if the plaintiff had a valid claim, the system failed in this case.

"If this was simply a matter of disclosing and identifying an appropriate expert, that's unfortunate," he said. "Then you have a meritorious claim that was kicked out by the very statute that was designed to prevent frivolous claims."

Defense attorneys who handle med-mal cases say the decision simply confirms the plain language of the statute.

"The courts have always held a fairly strict view of that statute," said Steven Schwegman, an attorney from St. Cloud who represents defendants in med-mal cases. "It certainly lets everyone know that this process or procedure is not going to meet the requirements of the statute."

Minneapolis attorney Melissa Riethof, who represented the defendants, said that defense attorneys have been dealing with this issue in the district courts for years, so she welcomed an appellate opinion on the matter.

> "The decision makes it clear that the 45-day safe-harbor provision is not additional time to substitute with an entirely new expert affidavit."
>
> —Melissa Riethof, attorney for the defendants

Riethof said that absent any other decision, parties facing the 180-day deadline could put in an affidavit by someone they knew they would not qualify as an expert in the case. They would view the affiant as a placeholder and then get another 45 days to find a new expert, she said.

"The decision makes it clear that the 45-day safe-harbor provision is not additional time to substitute with an entirely new expert affidavit," she said.

Tread carefully

Practitioners say the decision serves as a warning to plaintiffs.

"Lawyers are going to have to be extraordinarily certain their expert is qualified to render an opinion on the subject at issue, because they do not get a second chance," Wade said.

Gerald Maschka, an attorney from Mankato who represents plaintiffs in med-mal cases, said that is the main message for lawyers.

"You just have to be extremely careful because you don't want to create a situation where you can end up with a decision like this," he said. "There's no substitute for being extremely careful."

Nonetheless, Zimmer feels bad for his client, who thought she was being careful.

"When her lawyer withdrew, she really did her best to try to comply with that statute," he said. "[But] the moment she made the decision and selected the wrong expert and served [the affidavit], the defendant waited for the time limit to run. Then it's too late for her to correct that deficiency. Then they have you; they have you right where they want you."