

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1803**

Angie M. Barsness, et al.,
Appellants,

vs.

Fairview Health Services,
Respondent.

**Filed July 29, 2024
Affirmed; motion denied
Jesson, Judge***

Washington County District Court
File No. 82-CV-20-4332

Robert A. Parsons, Bye, Goff & Rohde, Ltd., River Falls, Wisconsin (for appellants)

Mark R. Whitmore, Madeline M. Gustafson, Bassford Remele, P.A., Minneapolis,
Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Larson, Judge; and Jesson,
Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

Appellant Angie M. Barsness fell and hit her head after a nurse encouraged her to
get out of bed and take a bath despite the fact that she had given birth only two hours earlier.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

She now appeals the dismissal of her medical-malpractice claim, arguing that the district court abused its discretion by determining that expert testimony was needed to prove her claim and that the expert affidavits she did provide failed to comply with the expert-disclosure requirements in Minn. Stat. § 145.682 (2022). Barsness also asserts that the district court erred by concluding that she failed to establish a prima facie case for malpractice and therefore in granting summary judgment in favor of respondent Fairview Health Services. Because Fairview was entitled to judgment as a matter of law, we affirm. We deny as moot Fairview’s motion to strike portions of Barsness’s addendum.

FACTS

Barsness gave birth in a hospital in December 2016.¹ While in labor, she was given an epidural and a bolus for pain relief. A bolus “involves administering a larger amount of epidural medication” which increases pain relief but can lead to “more numbness and less motor control of the legs.” Approximately two hours after Barsness gave birth, a nurse approached her about taking a bath, saying it would be “therapeutic.” Barsness, who was still “experiencing numbness in her legs [and] had not regained normal motor control” initially told the nurse that she did not want to take a bath. She explained that she was still feeling the effects of the epidural, and that her right leg felt like “a noodle” or “jelly.” With some encouragement from the nurse, Barsness acquiesced. After a long hot bath, the same

¹ Our statement of the facts is based on the records submitted alongside the parties’ motions for and against summary judgment. We review the facts in the light most favorable to Barsness as the nonmoving party. *See STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002) (stating that appellate courts review the facts in the light most favorable to the nonmoving party on an appeal from a grant of summary judgment).

nurse helped Barsness out of the tub but left her standing on her own in the bathroom while the nurse changed the garbage. Barsness then fell and hit the back of her head on the tub. According to the nurse, she instructed Barsness to hold onto the sink while she helped dry Barsness off with a towel. But as the nurse was doing this, Barsness's legs started to shake, and she suddenly went stiff and fell backwards. The next day, Barsness was complaining about blurry vision, so she was taken in for a CT scan, which came back normal.

In November 2020, Barsness sued Fairview, alleging medical negligence. In her complaint, she alleged that the fall caused her to experience "concussion, post-concussion syndrome, dizziness, headache, vision problems, lumbar disc herniation, lumbar pain, lumbar radiculitis, sacral pain/dysfunction, thoracic pain/dysfunction, and cervical pain/dysfunction."

Her medical records from before and after the fall were obtained by Fairview during discovery. The records showed that in September 2016—about three months before Barsness gave birth and subsequently fell—she visited a chiropractor multiple times complaining about "pain in neck, upper back, mid back, low back and right hip. . . [,] [and] numbness/tingling in right leg." Additionally, the day before she gave birth Barsness was admitted to Fairview complaining of "headache, blurred vision (resolved) and increase in swelling in extremities." Barsness's records from after the fall state that there was a "goose egg" on her head, but that she received a CT scan that was negative.

The extent of Barsness's alleged lasting injuries from the fall became clear through depositions and answers to various interrogatories. More than four years after the fall, Barsness stated that she suffered from post-concussive syndrome, lasting and persistent

headaches, dizziness, neck and upper back pain, disc herniations, and somatic dysfunction in her lumbar, sacral, thoracic, rib cage, cervical and head regions. She also claimed that sitting for long periods of time caused her discomfort and that she had “varying degrees of tingling, weakness, achiness, and loss of tactile sense in my right arm/hand that intensifies with neck pain flares.”

During discovery, Barsness served Fairview with an expert witness affidavit from a labor and delivery nurse, Kristen Nordahl. The affidavit contained Nordahl’s opinion on the standard of care for bathing after delivery when the mother had received an epidural during labor. Nordahl explained that “given the concerns about full movement and sensation in [Barsness’s] legs, it was a breach of the standard of care to take Ms. Barsness for a bath.” Nordahl then stated that this breach “was the cause of [Barsness’s] fall and injury.”

Fairview filed a motion to dismiss and/or for summary judgment in September 2023. It argued that Barsness’s case should be dismissed because she failed to comply with the expert-witness disclosure requirements listed in Minnesota Statutes section 145.682, subdivisions 2 and 4. Specifically, Fairview claimed that Barsness had not produced an expert witness on the issues of causation, which was grounds for dismissal. Fairview argued that summary judgment should be granted for the same reason.

A hearing on Fairview’s motion was set for the end of September. The day before the hearing, Barsness produced two additional expert witness affidavits in an attempt to cure any deficiencies found in the Nordahl affidavit regarding causation. The two expert witnesses were chiropractors who had worked with Barsness before and after her fall. Their

affidavits, which were almost identical, stated that the pair would “opine that the Plaintiff was injured as a direct and proximate result of the incident alleged in the Complaint.” The affidavits then listed the injuries that were allegedly the result of Barsness’s fall.

After the hearing, the district court granted Fairview’s motion to dismiss because it determined that Barsness’s expert affidavits “failed to comply with the mandatory requirements of Minn. Stat. [§] 145.682 in that they have not disclosed expert testimony on the issues of causation and damages.” In its analysis, the district court noted that the affidavits did not explain “how [Barsness’s] claimed injuries differ[ed] from her pre-existing injuries.” The court also granted Fairview’s motion for summary judgment because Barsness “failed to create a disputed issue of material fact on the issues of causation and damages.”

Barsness appeals.

DECISION

As a preliminary matter, we address our standard of review. This standard differs depending on whether we are reviewing the district court’s grant of Fairview’s motion to dismiss or its motion for summary judgment. Here, because the district court relied on matters outside the pleadings when ruling on Fairview’s motions, we review only the district court’s grant of summary judgment.²

² A district court’s analysis of a motion to dismiss a medical malpractice claim for failure to comply with Minnesota Statutes section 145.682, subdivision 4, “is limited to examining the four corners of the expert affidavit instead of the record as a whole.” *Rygwall, as Tr. for Rygwall v. ACR Homes, Inc.*, 6 N.W.3d 416, 428 (Minn. 2024). If, when analyzing a motion to dismiss such a claim, the district court considers “matters outside the pleading” and the four corners of the expert affidavits, a reviewing court will treat a motion to dismiss

We review a district court's summary judgment decision de novo by determining if a genuine issue of material fact exists and by reviewing whether the district court properly applied the law. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010); Minn. R. Civ. P. 56.01. "A material fact is one of such a nature as will affect the result or outcome of the case depending on its resolution." *Zappa v. Fahey*, 245 N.W.2d 258, 259-60 (Minn. 1976). When considering whether there are genuine issues of material fact, we view the evidence in the light most favorable to the nonmoving party, against whom summary judgment was granted. *STAR Ctrs.*, 644 N.W.2d at 76-77.

In a medical-malpractice case like the one before us, a plaintiff's failure to establish a prima facie case for medical malpractice mandates that a district court grant summary judgment in favor of the defendant. *Leubner v. Sterner*, 493 N.W.2d 119, 121 (Minn. 1992). "The guiding principle behind this rule is that a jury should not be permitted to speculate as to possible causes of a plaintiff's injury or whether different medical treatment could have resulted in a more favorable prognosis for the plaintiff." *Id.* A medical-malpractice claim requires a plaintiff to prove "(1) the standard of care recognized by the

as if it were one for summary judgment. Minn. R. Civ. P. 12.02; *see, e.g., Dickhoff ex rel. Dickhoff v. Green*, 836 N.W.2d 321, 328-29 (Minn. 2013) (treating an appeal from a motion to dismiss as a motion for summary judgment in a medical-malpractice case where the district court relied on "matters outside the pleadings"); *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (stating that the district court "considered matters outside the pleadings" and treating the motion to dismiss in a medical-malpractice case as a motion for summary judgment).

When reviewing Fairview's motion to dismiss, the district court relied not just on the pleadings and expert affidavits, but also on Barsness's medical records. These medical records were the only source of evidence that showed Barsness suffered from pre-existing injuries similar to those she claimed were caused by the fall, and these pre-existing injuries were an important part of the district court's analysis.

medical community as applicable to the particular defendant's conduct, (2) that the defendant in fact departed from that standard, and (3) that the defendant's departure from the standard was a direct cause of [the patient's] injuries." *Dickhoff*, 836 N.W.2d at 329 (quoting *Plutshack v. Univ. of Minn. Hosps.*, 316 N.W.2d 1, 5 (Minn. 1982)). A plaintiff establishes a prima facie case for medical malpractice if they produce evidence on these elements and make an initial showing that they would "prevail[] in the absence of evidence invalidating" the claim. *Tousignant v. St. Louis Cnty.*, 615 N.W.2d 53, 59 (Minn. 2000).

Barsness asserts that Fairview's motion for summary judgment should have been denied. She argues first that the district court erred by determining that her case was one in which expert testimony was required to establish a prima facie case. Additionally, she contends that the court erroneously determined that she failed to establish a prima facie case because, according to the court, her expert affidavits contained insufficient information on the element of causation. We address each argument in turn.³

I. Expert testimony is required to prove Barsness's claim.

Expert testimony is generally required to establish all three elements of a medical-malpractice claim. *Id.* at 59. Such testimony is required to establish not only the standard of care but also the departure from, or breach of, that standard, *id.* at 58, and whether said departure caused the plaintiff's injuries, *Rygwall*, 6 N.W.3d at 431. Built into this

³ We note that prior to oral arguments, Fairview filed correspondence with the court that we interpret as a motion to strike arguing that portions of Barsness's addendum must be stricken from the appellate record. Because we do not rely on the information in Barsness's addendum that Fairview claims were improperly before this court, we deny the motion as moot.

requirement is the understanding that medical-malpractice cases usually involve complex scientific and technological issues, which can only be explained to a jury through expert testimony. *Tousignant*, 615 N.W.2d at 59.

There are, however, a small number of “exceptional” medical-malpractice cases where expert testimony is not required. *Id.* at 58. In those cases, such testimony is not needed because “the acts or omissions complained of are within the general knowledge and experience of lay persons.” *Id.* (quoting *Atwater Creamery Co. v. Western Nat’l Mut. Ins. Co.*, 366 N.W.2d 271, 279 (Minn. 1985)). To determine if a case falls within this “exceptional” category, a court must decide if expert testimony is necessary to establish the elements of a plaintiff’s prima facie case for medical malpractice. *Expose v. Thad Wilderson & Assocs., P.A.*, 863 N.W.2d 95, 110 (Minn. App. 2015), *aff’d*, 889 N.W.2d 279 (Minn. 2016).

Here, we address only the question of whether expert testimony was required as to the element of causation.⁴ The district court concluded that it was, and we agree. A plaintiff must support their claim of causation with expert testimony if “a layperson could not reasonably understand and make inferences concerning the connection between the breach of duty and injury.” *Rygwall*, 6 N.W.3d at 431. We do not believe that a reasonable lay

⁴ Barsness argues on appeal that expert testimony is not required to establish *any* of the three elements of her medical-malpractice claim. But we need not address whether such testimony is required to establish the standard of care or a breach of that standard because—like the district court—we conclude that (1) expert testimony is required on the element of causation and (2) the expert disclosures submitted are insufficient to make a prima facie case as to this element. Thus, Barsness’s claim fails regardless of whether her expert affidavits sufficiently describe the standard of care and the departure from that standard.

person would know how receiving an epidural with a bolus could affect the body to the point of causing a patient to fall. Nor would a lay person be able to understand how a fall like this one could cause the specific injuries Barsness says she is experiencing. While a lay person may be able to comprehend that a fall could cause a “goose egg” like the one Barsness had, her alleged injuries are far more medically complex than a simple bump on the head. For example, it is not readily apparent how falling and hitting one’s head could lead to pain in the thoracic and sacral regions of the spine. And it is exceptionally unlikely that a lay person could parse out how Barsness’s post-fall injuries differ from those she was experiencing prior to giving birth.

Still, Barsness, likening her case to *Tousignant*, claims that a reasonable lay juror would understand not only that someone with a numb right leg that felt like “jelly” would be considered a fall risk, but also that if someone falls, a “subsequent injury [is] likely to occur.” We are not persuaded. In *Tousignant*, the plaintiff was admitted to a nursing home while she was recovering from hip surgery. 615 N.W.2d at 55-56. The plaintiff’s patient form specifically advised staff that the plaintiff needed to have “vest restraint on at all times” to prevent her from falling. *Id.* at 56. She was subsequently left unattended and unrestrained, and as a result, fell and re-fractured her hip. *Id.* While the primary dispute in *Tousignant* was whether expert testimony was required to establish the applicable standard of care, the supreme court did briefly address the issue of needing expert testimony to establish causation. *Id.* at 60. The supreme court stated that “[i]t is a matter of common

knowledge and experience that an elderly person, confused and recovering from a fractured hip, who was likely to attempt to walk without assistance if left unattended, also likely would fall.” *Id.* at 60. But as we discussed above, Barsness needs to establish not just that she was a fall risk, but also that the nurse’s alleged departure from the standard of care *caused* her fall and her lasting injuries. And again, we do not believe a reasonable lay juror would be able to understand whether and how Barsness’s fall caused injuries that were different than those she was suffering before giving birth.

Accordingly, we conclude that the district court did not err by concluding that expert testimony was required to establish a *prima facie* case on the element of causation. Given this conclusion, we now turn to analyzing whether the expert disclosures and other evidence in the record supports granting summary judgment in Fairview’s favor.

II. Because Barsness failed to establish a *prima facie* case as to the element of causation, the district court did not err by granting summary judgment in favor of Fairview.

The district court granted summary judgment in favor of Fairview because it determined that Barsness’s case lacked proof of causation and damages and therefore “failed to create a disputed issue of material fact on the issues.” Barsness argues that her three expert affidavits establish a *prima facie* case for medical malpractice, including causation. She claims that the Nordahl affidavit states that “there was a deviation from the standard of care, and that the deviation led to the fall and injury,” and that the two affidavits from her chiropractors list the injuries they claim were a “direct and proximate result” of her fall.

These statements are sufficient to create a dispute of material fact, she argues, because expert-affidavit expectations “do[] not require that every link in chain of causation be explicitly described and explained.”

Recently, the Minnesota Supreme Court reviewed its own caselaw and clarified what information related to causation needs to be included in an expert affidavit for a plaintiff’s medical-malpractice case to survive summary judgment. *Rygwall*, 6 N.W.3d at 431-34. According to the supreme court, expert affidavits must lay enough foundation for their opinions on the cause of a plaintiff’s injuries to ensure a jury can decide the issue without speculating. *Id.* at 434-35. The supreme court stated that,

To support a summary judgment motion in a medical malpractice case where expert testimony is needed, the expert must provide an opinion *with proper foundation* and enough *information about the specific case* to reassure the court that the jury will have sufficient information to draw a reasonable inference—without speculating—that the provider’s conduct caused the plaintiff’s injury.

Id. (emphasis added). The court acknowledged that the issue of causation was usually one for the jury but emphasized that “a finding of causation cannot be based upon mere speculation or conjecture.” *Id.* at 430.

Rygwall mirrors previous cases in which the supreme court has stated that expert affidavits cannot contain merely broad and conclusory statements as to causation. *Teffeteller v. Univ. of Minnesota*, 645 N.W.2d 420, 429 (Minn. 2002). Rather, they must provide an outline of the chain of causation between the breach and the injury. *Id.*⁵

⁵ See also *Anderson v. Rengachary*, 608 N.W.2d 843, 847 (Minn. 2000) (stating that plaintiffs are required to “set forth by affidavit or answers to interrogatories, specific details

Here, the affidavits submitted by Barsness's experts do not satisfy the standard articulated in *Rygwall*. On the issue of causation, the Nordahl affidavit states: "It is my opinion to a reasonable degree of professional certainty, that [the] decision to take Ms. Barsness for a bath under the . . . circumstances, was a breach of the standard of care, and was the cause of her fall and injury." And the affidavits from Barsness's chiropractors declare that "the Plaintiff was injured as a direct and proximate result of the incident alleged in the Complaint" and then opine that Barsness's head pain, back pain, neck pain, mid-back pain, low-back pain, rib pain, and concussion were "caused by the fall."

These three affidavits contain only broad and conclusory statements about causation. The Nordahl affidavit does not contain any information about what injuries Barsness suffered from the fall, meaning the causal link between the fall and said injuries was not articulated. And although the other two affidavits list Barsness's injuries, they do not explain how and why the fall caused those specific injuries. *See Teffeteller*, 645 N.W.2d

concerning their expert's expected testimony, including the applicable standard of care, the acts or omissions that plaintiffs allege violated the standard of care and an outline of the chain of causation that allegedly resulted in damage to them"); *Stroud v. Hennepin Cty. Med. Ctr.*, 556 N.W.2d 552, 556 (Minn. 1996) (concluding that an expert affidavit "did not meet the requirements of the statute" because it "provide[d] only broad, conclusory statements as to causation[,] and did not "provide an outline of the chain of causation between the alleged violation of the standard of care and the claimed damages"); *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 578 (Minn. 1999) (affirming the dismissal of a medical-malpractice claim because the expert affidavit only contained "broad and conclusory statements as to causation"); *Maudsley v. Pederson*, 676 N.W.2d 8, 13 (Minn. App. 2004) ("The conclusory statements that generally earlier treatment results in better outcomes and that every hour counts fail to outline specific details explaining how and why [a] delay in treatment caused Maudsley's blindness. . . . [A] delay in diagnosis is not enough; if it were, expert testimony on causation would not be necessary.").

at 429 n. 4 (stating that the purpose of the expert-affidavit requirement was to illustrate “how” and “why” the alleged malpractice caused the plaintiff’s injury).

Furthermore, the medical records submitted by Fairview show that Barsness was experiencing the symptoms that she now alleges were a result of the fall *before* she gave birth. In September 2016, almost three months before she went into labor, Barsness complained to her doctor about “pain in neck, upper back, mid back, low back and right hip . . . [,] [and] numbness/tingling in right leg.” These injuries are almost identical to the ones her experts claim were caused by the fall. And the day before she gave birth, Barsness was admitted to the hospital complaining of a headache and blurred vision. Again, both injuries are on the list of damages that she alleges were a result of Fairview’s medical negligence.

Barsness’s expert affidavits do nothing to differentiate or explain why her pre-fall injuries are different from her post-fall injuries. If this evidence, without more, was presented to a jury, the jury would be required to speculate on which of Barsness’s injuries was the result of the fall or it would have to guess how the fall exacerbated these pre-existing conditions. Such speculation is impermissible. *See Rygwall*, 6 N.W.3d at 435, (holding that the information and evidence presented at trial must be sufficient to allow a jury to “draw a reasonable inference—*without speculating*—that the provider’s conduct caused the plaintiff’s injury” (emphasis added)).

Our conclusion that the expert affidavits here lack foundation with regard to causation is widely supported by precedent. In *Lindberg*, the supreme court determined that expert affidavits containing similar, if not more, information about causation failed to

establish a prima facie case for causation. 599 N.W.2d at 573. There, a plaintiff, who had been pregnant, alleged that various medical providers negligently failed to instruct her to seek an immediate physical examination when she reported experiencing certain concerning symptoms, and that this failure caused her to have a stillbirth. *Id.* at 574. The Minnesota Supreme Court affirmed a grant of summary judgment because it held that the expert affidavit submitted by the plaintiff was insufficient to establish a prima facie case. *Id.* at 577-78. As to the issue of causation, the affidavit read:

4. Based upon a reasonable degree of medical certainty, it is more probable than not, that if, among other things, [the plaintiff] had been instructed to seek medical treatment at the time of her phone call on the morning of March 28, 1994, [decedent] would not have died.

5. Based upon a reasonable degree of medical certainty, [decedent] died as a result of the negligent and careless conduct of the Defendants and/or their agents and employees, including [the midwives].

Id. at 575. According to the supreme court, this affidavit did not explain what facts the expert was relying on to form this opinion and did not outline the chain of causation that connected the “failure to instruct [the plaintiff] to seek immediate medical attention with the stillbirth of the decedent.” *Id.* at 578. When comparing the *Lindberg* affidavit to those at issue in this case, the second two affidavits Barsness submitted do not even connect her injuries to Fairview’s alleged negligence like the *Lindberg* expert, albeit in a conclusory statement, did. Her affidavits merely state that “the Plaintiff was injured as a direct and proximate result of the incident alleged in the Complaint.” (Emphasis added).

Similarly, in *Anderson*, 608 N.W.2d at 844-45, an expert affidavit attempted to establish that a botched surgery caused an injury to, among other things, the plaintiff's vagus nerve. The expert opined that "there was a deviation from the standard of care provided to this patient which caused the patient to have postoperative dysphasia of undetermined etiology." *Id.* at 845. The Minnesota Supreme Court in *Anderson* reasoned that the expert failed to describe the alleged negligence by the defendant and its relationship to the plaintiff's injury because "[t]he phrase 'undetermined etiology' suggests that the cause of the patient's injury is unknown and perhaps unrelated to the surgery performed." *Id.* at 848. And, as in *Anderson*, the affidavits here fail to explain how Barsness's post-fall injuries differ from her pre-existing ones, suggesting that the fall may not have been the cause of those injuries.

In sum, we conclude that the proper foundation for Barsness's experts' opinions on causation was not articulated in the affidavits.⁶ Consequently, the evidence in the record is not sufficient to show that it was more probable than not that her injuries resulted from the alleged medical negligence. *See Fabio*, 504 N.W.2d at 762 (stating that to make out a prima facie case of causation in a medical malpractice case and therefore survive a motion for summary judgment, a plaintiff must present expert testimony that, if admitted at trial, is sufficient to prove that it is more probable than not that damage resulted from malpractice).

⁶ Because we conclude that Barsness's expert affidavits are insufficient to establish a prima facie case for causation, we do not address any arguments about whether her experts were qualified to opine on the issue of causation in this case.

Because Barsness failed to establish a *prima facie* case as a matter of law, we affirm the district courts grant of summary judgment in favor of Fairview.⁷

Affirmed; motion denied.

⁷ Barsness raised additional arguments on appeal that addressed only the district court's grant of Fairview's motion to dismiss. She argued that the district court abused its discretion by not giving her the mandated 45 days to cure any deficiencies that existed with the Nordahl affidavit before holding a hearing on Fairview's motion to dismiss. *See* Minn. Stat. 145.682, subd. 6(c) (2022) (providing that if a defendant brings a motion to dismiss on the grounds that a plaintiff's expert affidavits do not comply with the requirements in section 145.682, subdivision 4, a plaintiff has 45 days to "serve upon the defendant an amended affidavit or answers to interrogatories that correct the claimed deficiencies"). She further asserts that the district court should have denied Fairview's motion for equitable reasons. But we need not address these arguments as we only reviewed the district court's grant of summary judgment and not its grant of the motion to dismiss. *See* Minn. R. Civ. P. 56.01. We further note that Barsness did not raise the 45-day statutory claim to the district court, and an appellate court generally will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

As for the concern raised by Barsness at oral argument that a defendant may seek summary judgment instead of filing a motion to dismiss to prohibit a plaintiff from curing any deficiencies in their expert affidavits, the supreme court addressed a similar argument in *Rygwall* and reasoned that:

[A] motion to dismiss under section 145.682, subdivision 6, provides the plaintiff with notice of alleged deficiencies and a chance to remedy them. That is not necessarily true in the context of a summary-judgment motion. The Legislature made a choice in section 145.682, as amended in 2002, to enact procedural protections for *both* the plaintiff and the defendant in a medical-malpractice action. Those procedural protections are not realized, however, when the defendant chooses to seek summary judgment based on the alleged failure of the plaintiff's expert instead of moving to dismiss under section 145.682, subdivision 6.

6 N.W.3d at 428 (citation omitted).