

*This opinion is nonprecedential except as provided by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
A24-0970**

Joyce Wolling,
Appellant,

vs.

Grace Ouyang,
Respondent,

Allina Health System,
Respondent,

Physician's Group of New Ulm, Ltd.,
Respondent.

**Filed February 3, 2025
Affirmed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CV-23-18766

Michael Kemp, Met Law Office, Arden Hills, Minnesota (for appellant Joyce Wolling)

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Amie Penny Sayler, Allina Health Legal and Risk Services Department, Minneapolis, Minnesota (for respondent Allina Health System)

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Considered and decided by Bjorkman, Presiding Judge; Johnson, Judge; and
Wheelock, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant Joyce Wolling challenges the dismissal of her medical-malpractice action for failure to comply with the expert-review requirements of Minn. Stat. § 145.682 (2024). Wolling contends that the district court abused its discretion in determining that respondent Dr. Grace Ouyang made a demand for the expert-review affidavit, thereby triggering the 60-day deadline under Minn. Stat. § 145.682, subd. 6(a). We affirm.

FACTS

Wolling alleges that from September 2018 through January 2020, Dr. Ouyang provided her podiatric care, including treatment of a diabetic ulcer on her right foot. The treatment involved “multiple” procedures and culminated in surgery. After the surgery, Wolling was unable to walk.

In September 2023, Wolling commenced this medical-malpractice action against respondents Dr. Ouyang, Allina Health System, and Physician’s Group of New Ulm Ltd. The amended complaint alleges that Dr. Ouyang (1) “failed to adequately document the medical necessity for the procedures performed,” (2) “failed to obtain informed consent” from Wolling, (3) “departed from the planned course of the procedures,” and (4) “performed unnecessary procedures.” Wolling did not serve an expert-review affidavit with the complaint.

On October 9, 2023, Dr. Ouyang’s attorney sent a letter to Wolling’s attorney requesting a copy of the affidavit of service as to Dr. Ouyang. The letter states that it “also serves as a demand for strict compliance with Minn. Stat. § 145.682.” Dr. Ouyang’s

answer likewise asserted, as an affirmative defense, “that Plaintiff’s claims are governed by Minn. Stat. § 145.682, for which a demand for compliance was previously made and demand for strict compliance is continuing.”

On December 11, Dr. Ouyang, and later joined by Physician’s Group of New Ulm, moved to dismiss Wolling’s complaint under Minn. Stat. § 145.682 based on Wolling’s failure to timely serve an expert-review affidavit.¹ In response, Wolling’s attorney produced an expert-review affidavit, dated December 18, stating that he “communicated with Dr. Boc, a podiatrist qualified to offer expert testimony,” in June 2023. In a second affidavit, Wolling’s attorney averred that the expert-review affidavit was “delivered to Defendants on December 18.” The district court granted the motion to dismiss, determining that Wolling’s expert-review affidavit was untimely.

Wolling appeals.

DECISION

In a medical-malpractice action, the plaintiff must serve two affidavits if expert testimony is necessary to prove their claims. Minn. Stat. § 145.682, subd. 2. The first is an affidavit of counsel stating that they reviewed the case with an expert and that, in the expert’s opinion, the defendant “deviated from the applicable standard of care.” *Id.*, subd. 3(1). This expert-review affidavit must be served on the defendant along with the summons and complaint. *Id.*, subd. 2. The second affidavit must contain more information regarding the claimed malpractice and causation, and it must identify and be signed by the

¹ Allina Health System did not participate in the district court proceedings and has not participated in this appeal.

expert who is expected to testify on the plaintiff's behalf. *Id.*, subd. 4(a). This expert-disclosure affidavit must be served on the defendant within 180 days after commencement of discovery. *Id.*, subd. 2. The expert-review and expert-disclosure affidavit requirements are designed to be “a means of readily identifying meritless lawsuits at an early stage of the litigation,” *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 725 (Minn. 2005), and to eliminate “frivolous” lawsuits, *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 191 (Minn. 1990).

A plaintiff's failure to serve the expert-review affidavit “within 60 days after demand for the affidavit results, upon motion, in mandatory dismissal with prejudice.” Minn. Stat. § 145.682, subd. 6(a). The 60-day demand is a “prerequisite for dismissal under subd. 6.” *Paulos v. Johnson*, 502 N.W.2d 397, 399 (Minn. App. 1993), *rev. denied* (Minn. Sept. 10, 1993). We will reverse the dismissal of a medical-malpractice action for noncompliance with the expert-review requirements of Minn. Stat. § 145.682 only for an abuse of discretion.² *Sorenson*, 457 N.W.2d at 190. “A district court abuses its discretion by making findings of fact that are unsupported by the evidence, misapplying the law, or delivering a decision that is against logic and facts on record.” *Bender v. Bernhard*, 971 N.W.2d 257, 262 (Minn. 2022) (quotation omitted).

² Wolling argues that the standard of review is de novo, citing *Pfeiffer v. Allina Health Sys.*, 851 N.W.2d 626, 634 (Minn. App. 2014), *rev. denied* (Minn. Oct. 14, 2014). But *Pfeiffer* presented the legal issue of whether the safe-harbor provision of Minn. Stat. § 145.682, subd. 6(c), applied to cure deficiencies in the appellant's expert-disclosure affidavit. *Pfeiffer*, 851 N.W.2d at 634. Here, the issue is whether Wolling satisfied the expert-affidavit requirements under Minn. Stat. § 145.682, subd. 6(a).

It is undisputed that Wolling did not serve the expert-review affidavit with the summons and complaint, or within 60 days of Dr. Ouyang’s attorney’s October 9 letter. The issue before us is whether the district court abused its discretion by determining that the October 9 letter stating that it “serves as a demand for strict compliance with Minn. Stat. § 145.682” constitutes a demand for the expert-review affidavit. Wolling argues that it does not because it “never identifies any failure to comply with a requirement to provide an affidavit of expert review,” and its general reference to the statute is too vague to serve as a demand for the expert-review affidavit. We are not persuaded.

Our supreme court has observed that “[t]he requirements of Minn. Stat. § 145.682 are uncomplicated and unambiguous.” *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 577 (Minn. 1999). And it has repeatedly emphasized that plaintiffs must strictly comply with the statute’s requirements. *See Broehm*, 690 N.W.2d at 726 (stating “we have stressed that plaintiffs must adhere to strict compliance with the requirements of Minn. Stat. § 145.682”); *Lindberg*, 599 N.W.2d at 573 (stating that the court “granted review to once again address the strict statutory requirements of Minn. Stat. § 145.682”); *see also Sorenson*, 457 N.W.2d at 193 (stating “[i]n future cases, plaintiffs will be expected to set forth, by [expert-disclosure] affidavit or answers to interrogatories, specific details concerning their experts’ expected testimony”). The statute unambiguously requires a plaintiff to serve two affidavits on the defendant—the expert-review affidavit must be served with the complaint, and the expert-disclosure affidavit must be served within 180 days after discovery commences. Minn. Stat. § 145.682, subd. 2. At the time of the October 9 letter, the only one of the two affidavits that was required was the expert-review

affidavit. In other words, the letter's reference to "strict compliance" with the entire statute was not unclear; it could only be understood to demand the expert-review affidavit.

Wolling's reliance on *Brown-Wilbert Inc v. Copeland Buhl & Co.*, 732 N.W.2d 209 (Minn. 2007), does not persuade us otherwise for two reasons. First, *Brown-Wilbert* is not binding because it was an accounting-malpractice action governed by a different expert-affidavit statute. *Wesely v. Flor*, 806 N.W.2d 36, 41 (Minn. 2011) (stating *Brown-Wilbert* does not control in a medical-malpractice action).

Second, *Brown-Wilbert* is factually distinguishable. In that case, the plaintiff did not serve an expert-review affidavit with the complaint, but the defendants did not make a specific demand for the affidavit. *Brown-Wilbert*, 732 N.W.2d at 212-15. Instead, the defendants served expert interrogatories to which the plaintiff responded by identifying the expert witnesses it expected to testify and the substance of their opinions. *Id.* at 214. The defendants moved to dismiss, arguing that the interrogatory answers did not satisfy the applicable statute's expert-review *and* expert-disclosure affidavit requirements. *Id.* The district court granted the motion, reasoning in part that the expert interrogatories constituted a demand for an expert affidavit under the statute. *Id.* The supreme court reversed on the ground that the defendants' interrogatories did not "constitute[] a demand that triggered the running of the 60-day period" to provide the expert-review affidavit. *Id.* at 215. While leaving open the possibility that interrogatories could do so, the court concluded that the defendants' interrogatories did not constitute such a demand because they did not reference the applicable statute, "use the words 'expert review,'" or "request the specific type of information that is to be included in an affidavit of expert review." *Id.*

Unlike the interrogatories in *Brown-Wilbert*, the October 9 letter specifically references Minn. Stat. § 145.682. Wolling had only one obligation under the statute at that time—to serve the expert-review affidavit on respondents. Accordingly, we conclude that the district court did not abuse its discretion in determining that the October 9 letter was sufficient to put Wolling on notice that Dr. Ouyang was demanding the required expert-review affidavit. *See Daulton v. TMS Treatment Ctr., Inc.*, 2 N.W.3d 331, 334 (Minn. App. 2024) (noting that the plaintiff treated the defendant’s motion to dismiss in a wrongful-death action as a demand for compliance with section 145.682 when the plaintiff served the expert-review affidavit within the 60-day safe-harbor period); *see also Lombardo v. Seydow-Weber*, 529 N.W.2d 702, 705 (Minn. App. 1995) (concluding the plaintiff’s medical-malpractice claim must be dismissed with prejudice for failing to comply with both affidavit requirements), *rev. denied* (Minn. Apr. 27, 1995).³

In sum, Wolling’s 60-day period to serve an expert-review affidavit began to run on October 9, when Dr. Ouyang’s attorney demanded that she strictly comply with the statute. Wolling did not serve the expert-review affidavit within those 60 days. Because the

³ Respondents’ brief urges us to affirm the district court’s determination that there is “no basis on which to find excusable neglect sufficient to extend the statutory deadline.” Wolling argues in her reply brief that the district court abused its discretion because the “generic and boilerplate language” contained in the October 9 letter and affirmative defense are “insufficient to comply with the purpose of the statute: to put a plaintiff on notice of a deficiency and demand that the deficiency be cured.” Because Wolling cites no supporting legal authority, we need not consider this argument. *See Scheffler v. City of Anoka*, 890 N.W.2d 437, 451 (Minn. App. 2017) (appellate argument that lacks supporting authority “is forfeited and need not be considered unless prejudicial error is obvious on mere inspection”), *rev. denied* (Minn. Apr. 26, 2017).

statutory penalty for noncompliance is mandatory dismissal of the action with prejudice, we discern no abuse of discretion by the district court in doing so.

Affirmed.