IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 17-0908
(Woodbury County No. LACV162319)

SHARON K. SUSIE and LARRY D. SUSIE

Plaintiffs-Appellants,

vs.

FAMILY HEALTH CARE OF SIOUXLAND, P.L.C. d/b/a FAMILY HEALTH CARE OF SIOUXLAND URGENT CARE, and SARAH HARTY, P.A.C.

Defendants-Appellees,

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY
HONORABLE JOHN D. ACKERMAN, JUDGE

BRIEF AND REQUEST FOR NON-ORAL SUBMISSION OF OF DEFENDANTS/APPELLEES

Jack Hilmes
Erik Bergeland
Kellen Bubach
THE FINLEY LAW FIRM, P.C.
699 Walnut Street, 1700 Hub Tower
Des Moines, IA 50309
Tel No.: (515) 288-0145
Fax No.: (515) 288-2724
jhilmes@finleylaw.com
ebergeland@finleylaw.com
kbubach@finleylaw.com
ATTORNEYS FOR DEFENDANTS/
APPELLEES

CERTIFICATE OF FILING AND SERVICE

I hereby certify:

That I filed the Defendants/Appellees' Brief with the Clerk of the Supreme Court of Iowa by EDMS on the 8th day of December, 2017 which constitutes service on all other parties to this appeal pursuant to Iowa Ct. R. §16.1215 (2016).

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/s/ Kellen Bubach
Jack Hilmes
Erik Bergeland
Kellen Bubach
FINLEY LAW FIRM, P.C
1700 Hub Tower
699 Walnut Street
Des Moines, IA 50309
Telephone: (515) 288-0145
Fax: (515) 288-2724
jhilmes@finleylaw.com
ebergeland@finleylaw.com
kbubach@finleylaw.com
ATTORNEYS FOR DEFENDANTS/
APPELLEES

CERTIFICATE OF COMPLIANCE

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Dated: December 8, 2017.

/s/ Kellen Bubach
Jack Hilmes
Erik Bergeland
Kellen B. Bubach (AT0010885)
FINLEY LAW FIRM, P.C
1700 Hub Tower
699 Walnut Street
Des Moines, IA 50309
Telephone: (515) 288-0145
Fax: (515) 288-2724
jhilmes@finleylaw.com
ebergeland@finleylaw.com
kbubach@finleylaw.com
ATTORNEYS FOR DEFENDANTS/
APPELLEES

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ROUTING STATEMENT

Pursuant to Iowa Rule of Appellate Procedure 6.1101(3), the Iowa Supreme Court should transfer this appeal to the Iowa Court of Appeals because this appeal is appropriate for summary disposition and presents the application of existing legal principles regarding the need for expert testimony to support each element of a *prima facie* case of medical negligence. The legal principles requiring the need for expert testimony to support the *prima facie* elements of this medical negligence case are well-settled.

Specifically, to create a question of fact to survive summary judgment, Plaintiffs were required to provide expert testimony that it is more likely than not Plaintiffs' damages would have been avoided but for the alleged negligence. Plaintiffs were unable to do so, and the district court properly granted the Defendants' Motion for Summary Judgment.

The question of whether a district court appropriately granted a motion for summary judgment in a complex medical negligence case where the plaintiff did not have expert testimony establishing the *prima facie* element of causation is not a difficult one. Decades of well-established Iowa law in medical negligence cases requiring expert testimony to establish a causal link between the negligence and the harm claimed mandated the district court's decision to grant summary judgment in this case. Because Plaintiffs failed to provide any competent expert

evidence on the foundational causation element of their case, Iowa law required the district court to grant summary judgment. Therefore, this appeal is appropriate for summary disposition by the Iowa Court of Appeals affirming the district court's decision.

STATEMENT OF THE CASE

This case was filed seeking damages arising out of the amputation of Sharon Susie's arm which occurred October 2, 2012. (Petition, ¶26) (App. 0012). Plaintiffs failed to disclose expert testimony sufficient to establish the causation element of their *prima facie* case of medical negligence, and the district court properly granted the Defendants' motion for summary judgment. The amputation was necessary after three days of hospital-administered inpatient intravenous antibiotic therapy was completely ineffective, leaving Ms. Susie with a dead and infected arm. In hindsight, everyone agrees that Ms. Susie had necrotizing fasciitis, a deadly "flesh eating" bacteria, that nearly claimed her life. Plaintiffs allege that the Defendants should have performed a more thorough evaluation in an outpatient clinic visit with Sarah Harty[1], PA-C on September 29, 2012, which allegedly would have led to administration of antibiotics one day earlier. (Petition, p. 8); (App. 0014). Plaintiffs do not argue that the Defendants should have diagnosed necrotizing fasciitis.

[1] Sarah Harty is now Sarah Plueger, but will be referred to herein as Sarah Harty for uniformity in reference.

Because Plaintiffs never disclosed competent expert testimony that any act or omission by Sarah Harty, PA-C, or her employer, Family Health Care of Siouxland, caused Ms. Susie's arm to be amputated, there was no reason to have a trial, and the district court granted summary judgment.

The petition in this action was filed on September 26, 2014, alleging medical negligence. (Docket). On February 4, 2014, an order was entered setting trial for March 8, 2016. (Docket). On July 13, 2015 Plaintiffs' designated their expert witnesses, Dr. John Crew and Jeffrey Nicholson P.A. (Pl. Designation Exp. Wit.) (App. 0019-0023). Defendants designated their expert witnesses, Dr. Terence Gioe, Dr. Ravi Vemuri, and Jill Ferry, RN on October 7, 2015. (Def. Designation Exp. Wit.) (App. 0024-0027). Immediately prior to trial, Plaintiffs informed Defendants that two lay witnesses were planning to testify they observed Ms. Susie's arm in the days immediately following her fall, and as this testimony had never been previously disclosed, the district court continued the trial to allow Defendants to depose these witnesses. (Order for Continuance, March 8, 2016) (App. 0074). Trial was reset for May 9, 2017. (Docket).

Prior to the May 9, 2017 trial, Dr. Crew died, and Plaintiffs moved the court to substitute an expert. (Pl. Mot. for Substitution of Exp. Wit.) (App. 0078-0081). The Court permitted Plaintiffs to substitute experts, and the Plaintiffs retained Dr.

Roger Schechter. (Order of April 27, 2017) (App. 0102-0105). Dr. Schechter was deposed on April 25, 2017. (Order of April 27, 2017) (App. 0102).

The court held a conference with counsel on April 27, 2017 following this deposition. (Order of April 27, 2017) (App. 0102). The Defendants' counsel informed the court that Dr. Schechter's testimony was insufficient to establish the Plaintiffs' *prima facie* element of causation as a matter of law. (Order of April 27, 2017) (App. 0102-0103). The court indicated that the parties believed they would have the transcript by May 1, 2017. (Order of April 27, 2017) (App. 0103). The court offered a continuance, which the parties declined. (Order of April 27, 2017) (App. 0103). The court ordered that any motion for summary judgment must be filed by May 5, 2017. (Order of April 27, 2017) (App. 0103). The Defendants filed a motion for summary judgment on May 4, 2017. (Docket). Plaintiffs filed a resistance on May 6, 2017. (Docket). Defendants filed a reply on May 8, 2017. (Docket). The court held a hearing on May 8, 2017. (Tr. Hearing from May 8, 2017) (App. 0149-0156).

The court granted summary judgment on causation grounds, stating in relevant part:

> It's clear to me even --and I know, Mr. Humphrey, you wanted to make sure I read all your other physician stuff. I did that. I still believe and I find that there is no – that you don't have the necessary expert more likely than not causation evidence to get the claim to a jury. Now, Schechter, every time he was really forced or asked the major question, he said speculation, I don't know what the outcome would have been,

> may have made a difference. I don't care what's in his 1.508 because when you're asked under oath in a deposition, are these your final opinions, he's stuck with those. And he didn't give more likely than not in his deposition. Your plaintiff's treating physicians basically said, listen, the earlier you get antibiotics, the better chance you have. What's the other phrase? Time is tissue. Lamptey said it may well stop it from progressing. Rizk says, well, if you get antibiotics early, they usually work. Let's see. Where's the other one? Earlier the antibiotics, better likely the outcome for the patient. I think all your treaters said that. The problem is -- with that is they did not give an opinion in this case with these facts whether or not it would have made a difference…
>
> The Court is now convinced that in the loss-of-chance action that there is a lack of any reliable expert testimony to establish what percentage of chance was lost without the fact finder engaging in speculation. Therefore, the Court finds that they haven't made a prima facie case and the Court grants the Motion for Summary Judgment as to the loss-of-chance claim as well.

(Tr. Hearing from May 8, 2017, p. 4,6) (App. 0152, 0154).

On May 8, 2017, the court entered brief written order entering summary judgment in favor of the Defendants for the reasons stated on the record at the hearing. (App. 0157). Plaintiffs filed their notice of appeal on June 7, 2017. (App. 0160).

STATEMENT OF THE FACTS

Plaintiff Sharon Susie fell at her home on September 22, 2012, injuring her elbow. (Petition, p. 2) (App. 0008). She presented at the Urgent Care Clinic of Defendant Family Health Care of Siouxland one week later, on September 29, 2012, at approximately 12:30 p.m. (Petition, p. 2) (App. 0008).

Physician's assistant Sarah Harty treated Ms. Susie. (Petition, p. 3) (App. 0009). Sarah Harty performed a physical examination and ordered an x-ray. (Petition, p. 3) (App. 0009). Sarah Harty received the x-ray interpretation that there were no fractures or dislocations, with moderate soft tissue swelling. (Petition, p. 3-4) (App. 0009-0010).

The medical records indicate that Sarah Harty diagnosed Ms. Susie with right proximal forearm pain, elbow pain, and a right elbow contusion. (Pl. Ex. 1, p. 2) (App. 0457). Sarah Harty gave a shot for pain and prescribed pain killers. (Pl. Ex. 1, p. 2) (App. 0457). She instructed Ms. Susie to ice her arm, and instructed her to follow-up with her primary care physician in two days if not better. (Pl. Ex. 1, p. 2) (App. 0457).

Plaintiff Sharon Susie presented to the emergency room at Mercy Medical Center in Sioux City on September 30, 2012, less than 24 hours after seeing Sarah Harty. (Petition, p. 5) (App. 0011). When she arrived at the emergency room on September 30, 2012, Ms. Susie was already suffering from septic shock, necrotizing fasciitis, and kidney failure. (Schechter Depo. p. 93:9-18, 98-99, 104:16-104:21);(App. 0416, 0421-22, 0427); (Lamptey Depo. p. 60-61); (App. 0229-30). In hindsight, Ms. Susie already had necrotizing fasciitis at the time she saw Sarah Harty. (Schechter Depo. p. 71:6–72:23);(App. 0394-95).

Ms. Susie was on continuous antibiotics, mostly intravenously, from the time she arrived at the emergency room until the determination was made on October 2, 2012 that it was necessary to amputate her right arm to save her life. (Lamptey Depo. p. 65-67); (App. 0231). The antibiotics given intravenously for 48 hours prior to amputation, and less than 24 hours after seeing Sarah Harty, had no effect. (Lamptey Depo. p. 65-67); (App. 0231). On the evening of October 2, 2012, Ms. Susie's arm was amputated. (Rizk Depo. p. 19-20) (App. 0269-70). Eight of her toes were eventually amputated as well. (Rizk Depo. p. 35-36) (App. 0285-86).

Amputation was necessary because antibiotics are not effective against necrotizing fasciitis. (Lamptey Depo. p. 57-62, 65-67, 69) ;(App. 0229-32); (Vemuri Depo., p. 45) (App. 0248); (Rizk Depo, p. 42) (App. 0292). Necrotizing fasciitis occurs when bacteria release toxins that destroy the blood vessels and kill muscle tissue, making the delivery of antibiotics impossible. (Lamptey Depo., p. 57-60) (App. 0229); (Rizk Depo. p. 41-42) (App. 0291-92). One-hundred percent of patients with necrotizing fasciitis experience tissue loss, and 35 to 50 percent die. (Schechter Depo. p. 110-11) (App. 0433-0434). Dr. Rizk, one of Ms. Susie's treating surgeons, believes Ms. Susie obtained an excellent result given the disease she had. (Rizk Depo. p. 50); (App. 0300).

Dr. Schechter is Plaintiffs' retained replacement expert following the death of Dr. Crew. (Order of April 27, 2017) (App. 0102-03). Dr. Schechter testified that

he was not a surgeon or an infectious disease specialist. (Schechter Depo., p. 44:19-44:22) (App. 367). Dr. Schechter testified that he was "not here to say [Ms. Susie's] arm was cut off because of Sarah Harty." (Schechter Depo. p. 100:7-100:10); (App. 423). He testified that, in hindsight, Ms. Susie had necrotizing fasciitis on September 29, 2012, when she saw Sarah Harty. (Schechter Depo. p. 71:6–72:23);(App. 0394-95). He testified that it would take 36 hours for antibiotics to be effective. (Schechter Depo., p. 104:11-21) (App. 0427). He agreed that Ms. Susie was already in septic shock, suffering necrotizing fasciitis when she presented at the emergency room less than 24 hours after seeing Sarah Harty. (Schechter Depo. p. 93:9-18, 98-99, 104:16-104:21);(App. 0416, 0421-22, 0427)

Dr. Schechter did not testify that it was more likely than not Ms. Susie's arm would have been saved with antibiotics 24 hours earlier. When asked a leading causation question from Plaintiffs' counsel, Dr. Schechter did not give a but-for causation opinion. (Schechter Depo., p. 121:7-121:22) (App. 0444). Dr. Schechter did not testify that it was possible Ms. Susie's arm would have been saved with antibiotics 24 hours earlier. Dr. Schechter did not give any probabilities as to the likelihood of saving Ms. Susie's arm with antibiotics 24 hours earlier. At best, Dr. Schechter testified that it would speculation to guess what effect antibiotics would have had 24 hours earlier. (Schechter Depo., p. 105:7-105:11, 128:19-23) (App. 0428, 0451).

Dr. Lamptey is an infectious disease physician who treated Ms. Susie after her arrival at the emergency room on September 30, 2012. (Lamptey Depo., p. 60-61); (App. 0229-30). Dr. Lamptey also testified that necrotizing fasciitis was releasing toxins and destroying her muscles for some time before she came to the emergency room on September 30th, because by then the toxins had been in the muscles long enough to kill the muscles, break them down to some degree, and clog the kidneys. (Lamptey Depo., p. 60-61); (App. 0229-30). Dr. Lamptey agrees that Ms. Susie was in septic shock with necrotizing fasciitis at the emergency room on September 30, 2012. (Lamptey Depo., p. 31, 60-61); (App. 0222, 0229-30). Dr. Lamptey agrees that antibiotics are not effective against necrotizing fasciitis. (Lamptey Depo. p. 61-62, 65-67, 69) ;(App. 0230-32). Continuous IV antibiotics beginning on September 30, 2012 were not effective. (Lamptey Depo., p. 65-67); (App. 0231).

Dr. Lamptey also testified that necrotizing fasciitis and cellulitis are separate and distinct, and there is no natural progression from cellulitis to necrotizing fasciitis. (Lamptey Deposition; 64:17-65:19); (App. 0230-31). This is consistent with the CDC Publication Plaintiffs cite that indicates that cellulitis and necrotizing fasciitis are different forms of "invasive disease." (App. 0463).

Dr. Rizk is a general surgeon who participated in the amputation of Ms. Susie's arm. (Rizk Depo. p. 19-20) (App. 0269-70). Dr. Rizk agreed antibiotics are

ineffective against necrotizing fasciitis and surgery is required. (Rizk Depo, p. 42) (App. 0292). Because many people with this disease die, Dr. Rizk, believes this case represents a "great outcome." (Rizk Depo. p. 50) (App. 0300).

Dr. Vemuri is Defendants' retained expert. (Def. Designation Exp. Wit.) (App. 0026). Dr. Vemuri confirmed that Ms. Susie was in septic shock and renal failure upon arriving at the emergency room on September 30, 2012. (Vemuri Depo., p. 23-24) (App. 0242). He testified that Ms. Susie had had an infection in her deeper tissues for some period of time before presenting to the emergency room. Depo., p. 26-27) (App. 0243). Antibiotics are ineffective against necrotizing fasciitis and surgery is required. (Vemuri Depo., p. 45) (App. 0248)

No expert witnesses testified that Ms. Susie had an easily treatable cellulitis on September 29, 2012, one week after her fall. No expert witness testified that antibiotics would have had any effect if given on September 29, 2012.

ARGUMENT

If none of the medical experts in the case, including Plaintiffs' expert, Dr. Schechter, were able to conclude that it is more likely than not that Plaintiff Sharon Susie would not have lost her arm had she been administered antibiotics on September 29, 2012, how could a jury have concluded she would not have lost her arm? Any such conclusion would have been pure speculation. There was no causation question for the jury to decide, and the district court properly granted the

Defendants' Motion for Summary Judgment. Because there was simply no basis other than speculation upon which the jury could have determined the causation questions in this case, this appeal is appropriate for summary affirmation.

I. THE DISTRICT COURT APPROPRIATELY CONSIDERED AND CORRECTLY GRANTED THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON CAUSATION GROUNDS BECAUSE PLAINTIFFS DID NOT HAVE EXPERT TESTIMONY THAT NEGLIGENCE ALLEGED MORE LIKELY THAN NOT CAUSED THE HARM ALLEGED

A. Preservation of Error and Standard of Review

The Defendants agree that error was preserved via Plaintiffs' Resistance to Defendants' Motion for Summary Judgment.

The standard of review of a district court's ruling on a motion for summary judgment is for errors at law. *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 806 N.W.2d 282, 286 (Iowa 2011). The decision to consider a motion for summary judgment after the deadline set by Iowa Rule of Civil Procedure 1.981 is committed to the district court's discretion. *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 281, n. 2 (Iowa 1995) ("We believe the trial court has discretion to consider on its merits a summary judgment motion filed later than the deadline…Therefore, the late filing of DLC's summary judgment motion does not provide a basis for reversal."); *Madden v. City of Eldridge*, 661 N.W.2d 134, 137 (Iowa 2003) ("We affirm the trial court's authority to rule on the untimely motion for summary judgment.").

The purpose of summary judgment is to avoid needless trials and to streamline the litigation process. *See Diamond Prods. Co. v. Skipton Painting & Insulating, Inc.*, 392 N.W.2d 137 (Iowa 1998); *Bauer v. Stern Fin. Co.*, 169 N.W.2d 850 (Iowa 1969). Thus, the Iowa Supreme Court has held that an award of summary judgment is appropriate and will not be disturbed on appeal where a plaintiff is unable to demonstrate every element of the *prima facie* case. The Court has stated:

> Although the appellees have the burden of proving that no material fact is in dispute, this does not relieve the appellants' burden to make a showing sufficient to establish the existence of every element essential to their case. Appellants' burden of proof must be considered in determining whether the appellants have met their burden of resisting appellees' motion for summary judgment.

Shaw v. Soo Line R. Co., 463 N.W.2d 51, 53-54 (Iowa 1990) (citations omitted).

Summary judgment is appropriate where a plaintiff cannot produce evidence upon which liability can be found. *Cox v. Jones*, 470 N.W.2d 23, 26 (Iowa 1991). "In this case, the issue becomes 'whether there was *evidence* upon which liability could be found.'" *Id.* (emphasis in original); *Oswald v. Legrand*, 453 N.W.2d 634, 635 (Iowa 1990); *Donovan v. State*, 445 N.W.2d 763, 766 (Iowa 1989). This Court therefore must determine whether Plaintiffs provided evidence to demonstrate that Defendants' alleged negligence caused harm to Plaintiffs and the nature of that harm. *See Cox*, 470 N.W.2d at 26; *Oswald*, 453 N.W.2d at 640.

An inference to create a triable issue in response to a motion for summary judgment cannot be based on conjecture or speculation. *Castro v. State*, 795 N.W.2d 789, 795 (Iowa 2011). "In considering a motion for summary judgment, ... [a]ll reasonable inferences arising from the undisputed facts should be made in favor of the nonmovant, but **an inference based on speculation and conjecture is not reasonable."** *Id.* (Citing *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1482 (11th Cir.1985)); *see also Henchey v. Dielschneider* WL 227642, 3 -4 (Iowa Ct. App. 2011). **"Speculation is not sufficient to generate a genuine issue of fact."** *Hlubek v. Pelecky*, 701 N.W.2d 93, 96 (Iowa 2005).

In response to a motion for summary judgment, if the nonmoving party fails to assert specific facts to support the existence of a genuine issue for trial, the court may grant the motion for summary judgment. *Thorton v. Hubill, Inc.*, 571 N.W.2d 30, 32 (Iowa Ct. App. 1997); *Rains v. Grieve*, 2011 WL 5396270, at *3 (Iowa Ct. App. 2011) (concluding no genuine issue of material fact existed on investor's damages claim where it was alleged that investor could have avoided a decline in the value of his accounts if he had been allowed to remove the balance and invest it as such a claim was nothing more than a mere conclusory statement or speculation).

B. The District Court Did Not Abuse Its Discretion in Considering the Motion for Summary Judgment

Plaintiffs first argue the district court abused its discretion in considering Defendants' Motion for Summary Judgment that was filed five days prior to trial. (Pl. Br. p. 45). Defendants' Motion for Summary Judgment was not untimely. Iowa Rule of Civil Procedure 1.981 addresses the procedure for motions for summary judgment and provides: "The motion shall be filed not less than 60 days prior to the date the case is set for trial, unless otherwise ordered by the court." In this case, the Court's April 27, 2017 order set a deadline of May 5, 2017 for summary judgment motions. (App. 0103).

On April 27, 2017, the district court issued an order following a conference with counsel for all parties. (App. 0102-103). The court noted that the parties had informed the court on March 15, 2017 that the Plaintiffs' expert, Dr. Crew, had died. (App. 0102). At that time, the Court indicated that the Plaintiffs should begin searching for a replacement expert. (App. 0102). Plaintiffs retained Dr. Roger Schechter. (App. 0102). The deposition of the replacement expert, Dr. Schechter, was taken on April 25, 2017. (App. 0102). Following Dr. Schechter's deposition Defendants' counsel informed the district court that there was not sufficient causation evidence to submit this case to the jury. (App. 0102-03). The court noted that the parties anticipated having the transcript by May 1, 2017, and the court ordered that any motions for summary judgment be filed by May 5, 2017. (App.

0103). Defendants filed their motion for summary judgment on May 4, 2017. (App. 0106). Defendants' motion was not untimely, and the district court properly considered the motion.

To the extent Plaintiffs argue that the district court abused its discretion in issuing an order allowing a motion for summary judgment to be filed by May 5, 2017, the district court did not abuse its discretion under the circumstances of this case. Plaintiffs' expert died and Plaintiffs' replacement expert could not be deposed until April 25, 2017. (App. 0102). As discussed in further detail below, when Dr. Schechter was deposed he expressly stated he was there to talk about standard of care, and he was not there to say Ms. Susie lost her arm because of Defendants' alleged negligence. (Schechter Depo., p. 100:7-100:10); (App. 0423). As the Plaintiffs did not have expert testimony sufficient to establish the *prima facie* element of causation, there was no reason to proceed to trial. Additionally, the district court offered a continuance, which the parties, including Plaintiffs, declined. (App. 0102-03).

Under all of these circumstances, the district court did not abuse its discretion in considering the motion for summary judgment, timely filed under the district court's order of April 27, 2017. *See Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 281, n. 2 (Iowa 1995) ("We believe the trial court has discretion to consider on its merits a summary judgment motion filed later than the

deadline…Therefore, the late filing of DLC's summary judgment motion does not provide a basis for reversal.").

C. The District Court Properly Granted the Motion for Summary Judgment on Causation Grounds

a. Expert Testimony Is Required to Establish the Prima Facie Element of Causation

To establish a *prima facie* case of medical negligence, a plaintiff must offer evidence that establishes the applicable standard of care, a violation of the standard of care, and a causal relationship between the violation and the harm allegedly experienced by the plaintiff. *Lobberecht v. Chendrasekhar,* 744 N.W.2d 104, 108 (Iowa 2008). In any tort action based on allegations of negligence, a plaintiff can only recover damages for those injuries caused by defendant's negligence. *Doe v. Cent. Iowa Health Sys.,* 766 N.W.2d 787, 792 (Iowa 2009). **"The proof must establish causal connection beyond the point of conjecture."** *Ramberg v. Morgan,* 209 Iowa 474, 482, 218 N.W. 492, 498 (1928). "It must show more than a possibility." *Id.* Rather, "[t]he evidence must show plaintiff's theory of causation is reasonably probable—not merely possible, and more probable than any other hypothesis based on such evidence." *Doe,* 766 N.W.2d at 792 (citation omitted); *see also Chenoweth v. Flynn,* 251 Iowa 11, 16, 99 N.W. 310, 313 (1959) ("Mere possibility does not ordinarily generate a jury question, it leaves the jury to speculate upon a speculation.").

When the causal connection between the alleged tortfeasor's actions and the plaintiff's alleged injury is not within the knowledge and experience of an ordinary layperson, the plaintiff needs expert testimony to create a jury question on causation. *Doe*, 766 N.W.2d at 793 (citing *Bradshaw v. Iowa Methodist Hosp.*, 251 Iowa 375, 382-83, 101 N.W.2d 167, 171 (1960)). The Iowa Supreme Court discussed the need for expert testimony to prove the effect of medications in the analogous case of *Ranes v. Adams Laboratories, Inc.*, 778 N.W.2d 677, 688-689 (Iowa 2010). In *Ranes*, Plaintiff claimed ingestion of prescription medication allegedly containing the drug phenylpropanolamine caused Plaintiff brain injury. *Id.* at 682-683. The Iowa Supreme Court affirmed the decisions of the district court to exclude Plaintiff's sole causation expert and in turn, to grant of summary judgment based on insufficient evidence to generate a factual question for the jury on the issue of causation without expert testimony. *Id.* at 697-698.

Similar concepts are embodied throughout Iowa case law. Iowa's appellate courts have long recognized that expert testimony is needed for technical questions of diagnoses and causation which lie beyond the understanding of a layperson. *See Doe*, 766 N.W.2d at 793 (concluding in the absence of expert testimony to determine which aspects of plaintiff's emotional distress were related to the unauthorized disclosures of his records, and which were related to preexisting factors, substantial evidence did not exist to submit the issue of causation to the

jury); *Yates v. Iowa West Racing Ass'n*, 721 N.W.2d 762, 774-75 (Iowa 2006) (discussing that medical testimony regarding cause and effect is not within the knowledge and experience of ordinary laypersons); *Bradshaw v. Iowa Methodist Hosp.*, 251 Iowa 375, 382-83, (Iowa 1960) (holding that in patient's action for personal injury allegedly resulting from a fall in defendant hospital, medical testimony that it was possible that plaintiff's subsequent physical condition was caused by the fall was insufficient, standing alone, to take the issue of causation to the jury).

The question of whether earlier administration of antibiotics to Sharon Susie would have saved her arm invokes scientific and medical concepts beyond the knowledge of the lay jury. Consequently, to generate a factual issue on the question of causation and damages, Plaintiffs must present expert testimony sufficient to establish the injury was caused by Defendants' negligence. *See Doe*, 766 N.W.2d at 793; *Bazel v. Mabee*, 576 N.W.2d 385, 388 (Iowa Ct. App. 1998); *Daley v. Hoagbin*, 2000 WL 1298722, 2 (Iowa Ct. App. 2000). Plaintiffs have disclosed no competent evidence to establish the required foundational element of their case that Defendants' alleged negligence caused Plaintiff Sharon Susie to lose her arm (or caused any other quantifiable harm). As such, Plaintiffs' case fails as a matter of law, and the district court properly granted the motion for summary judgment.

b. Plaintiffs Failed to Present Required Expert Testimony on Causation

The harm Plaintiffs claim as a result of the allegedly negligent delay in diagnosis is the amputation of Ms. Susie's right arm. (Pl. Br. p. 10) (Petition, p. 8-10); (App. 0014-16). Plaintiffs allege Ms. Susie should have been administered antibiotics on September 29, 2012. Instead, Ms. Susie was given antibiotics continuously for more than 48 hours, mostly intravenously, when she presented at the emergency room the next day. (Lamptey Depo. p. 65-67); (App. 0231).

Thus, the ultimate causation question for the jury in this case would have been:

> **Would giving antibiotics one day earlier, on September 29, 2012 have avoided the amputation of Ms. Susie's right arm?**

Therefore, the question for this Court on appeal is: Did Plaintiffs have sufficient expert testimony establishing that it was more likely than not that administration of antibiotics on September 29, 2012 would have avoided amputation of Ms. Susie's right arm?

The answer in this case is "no". No witnesses for either side were going to tell the jury that Ms. Susie's right arm could have been saved had antibiotics been administered on September 29, 2012. There is no expert testimony that would establish that administration of antibiotics on September 29, 2012 would have

spared Ms. Susie's arm. There is no testimony as to what benefit, if any, Ms. Susie could have received from antibiotics on September 29, 2012.

When asked if he was going to testify that Sharon Susie's arm was cut off because of Sarah Harty, Dr. Schechter answered: "I'm not here to say her arm was cut off because of Sarah Harty." (Schechter Depo. p. 100:7-100:10); (App. 0423). This Court's analysis need go no further than this admission. However, when directly asked again by Plaintiffs' counsel if it was more likely than not that Ms. Susie's arm would have been saved by antibiotics on September 29, 2012, Dr. Schechter again declined to render the causation opinion necessary to support Plaintiffs' case. (Schechter Depo. p. 121:7-121:22);(App. 0444).

Additionally, Dr. Schechter conceded that it would take 36 hours for the antibiotics to be effective, and he further conceded that Ms. Susie already had necrotizing fasciitis on September 29, 2012 when she saw Sarah Harty. (Schechter Depo. p. 71:6 – 72:23, 104:16-104:21); (App. ,0394-95, 0427); (See also, Lamptey Depo. p. 60-61) (agreeing that necrotizing fasciitis was present for some time prior to Ms. Susie's arrival at the emergency room on September 30, 2012); (App. 0229-30); (Vemuri Depo., p. 26-27) (App. 0243). It is also undisputed that when Ms. Susie had returned to the emergency room 24 hours after she was seen by Sarah Harty, Ms. Susie was already in septic shock, suffering from necrotizing fasciitis against which antibiotics alone are not effective, and was going to require surgery

to treat the necrotizing fasciitis. (Schechter Depo. p. 93:9-18, 98-99, 104:16-104:21);(App. 0416, 0421-22, 0427); (Lamptey Depo. p. 60-61); (App. 0229-30).

Ultimately, Dr. Schechter repeatedly conceded that it would be "speculation" to guess what effect antibiotics would have had. (Schechter Depo. p. 105:7-105:11, 127:10-128:23); (App. 0428, 0450). There is no factual dispute. The jury would have had nothing other than speculation upon which to conclude that Ms. Susie's arm could have been saved by administration of antibiotics on September 29, 2012, and the district court correctly granted the motion for summary judgment.

i. Dr. Schechter's Testimony Fails to Establish the Causation Element of Plaintiffs' Prima Facie Case

Dr. Schechter's deposition testimony establishes he was not going to testify that Defendants' alleged negligence caused Ms. Susie's damages. On numerous occasions, Dr. Schechter, Plaintiffs' sole expert physician, indicates that he is not focused on the causation questions in the case:

> **19** Q. Next question: Do you hold yourself out as an
> **20** expert in the treatment of necrotizing fasciitis?
> **21 A. No, I'm not a surgeon, nor am I an infectious**
> **22 disease specialist.**[2]

(Schechter Depo., p. 44:19-44:22) (App. 0367).

> …. **I'm here actually to talk**

[2] In light of this testimony, Defendants were prepared to attack Dr. Schechter's qualifications and scientific basis to even render a causation opinion in this case. However, because Dr. Schechter repeatedly refused to render a causation opinion, there was no causation opinion from which to attack Dr. Schechter's qualifications.

about whether or not I think the standard of care of episodic care was met.
Q. Or are you here to say that Sharon Susie's arm was cut off because of Sarah Harty?
A. I'm not here to say her arm was cut off because of Sarah Harty. I'm here to say that she became ill and septic because she wasn't given a thorough enough evaluation and followup.
Q. Isn't the bottom line, you don't know what would have happened to Sharon Susie had she had CBC testing, had she returned to the clinic in 20 hours or less than 24 hours, had a comprehensive physical exam been documented? You don't know that the outcome would not have been exactly the same. True?
A. I don't know, but the faster you get to care when you're sick, the better off you are.

(Schechter Depo., p. 100:4-100:20) (App. 0423).

Dr. Schechter testified on several occasions that he could not say how long it would take for antibiotics to take effect but agreed with Plaintiffs' previous expert, Dr. Crew, that it would take 36 hours. He further conceded that it would be "speculation" as what effect antibiotics would have had on Ms. Susie's outcome.

Q. You agree that if I give you antibiotics this minute, particularly in a group A strep necrotizing soft tissue scenario, it's going to take a while for the antibiotics to do the desired job?
A. And again, this is speculative because a while is not only a matter of opinion but it's also a matter of how much tissue damage had occurred.
Q. Well, I'll just take Dr. Crew because you have been represented by counsel to have opinions the same as Dr. Crew. And you said at the very top of our conversation here words of the effect that you embrace his opinions.
At Page 48 he says it would take 36 hours for

17 the antibiotics to be effective in this case. You saw
18 that?
19 A. I'll defer to his --
20 Q. You agree; correct?
21 A. Yeah.

(Schechter Depo., p. 104:4-104:21) (App. 0427).

Q. He said in that same page range: "It is
8 speculation on whether the antibiotics would," quote,
9 "'turndown,'" close quote, "the infection had they been
10 given by Sarah Harty." Do you agree?
11 A. Speculation, yes.

(Schechter Depo., p. 105:7-105:11) (App. 0428)

19 Q. What I'm getting to, we are speculating on the
20 effect of antibiotics had they been given to Sharon
21 Susie on the afternoon of the 29th of September 2012;
22 correct?
23 A. Yes.

(Schechter Depo., p. 128:19-23) (App. 0451).

The above testimony makes clear that Dr. Schechter unequivocally conceded that he can only speculate as to the effects that antibiotics would have had if they had been administered on September 29, 2012. Plaintiffs concede as much in their brief. (Pl. Br. p. 19-20) ("Dr. Robert Schechter was simply being honest when he testified that for him to opine as to the effectiveness of treatment with antibiotics had Sharon Susie received those antibiotics at the urgent care clinic on September 29, 2012 would be somewhat speculative."). Dr. Schechter's

speculation continued in response to the case-critical leading question posed by counsel for Plaintiffs:

> Do you agree with that -- that the earlier you
> **8** get the antibiotics on board and the more you allow the
> **9** body to mobilize in someone's immune system in response
> **10** to this developing infection that you may well more
> **11** likely than not have saved her arm?
> **12 MR. HILMES:** Mark, I'm going to raise an
> **13** objection. Form and foundation, and it's mixed
> **14** hypotheticals and mixed principles of law.
> **15** But to the extent you can answer, you are
> **16** supposed to answer.
> **17 THE WITNESS:** To -- I would say it's a
> **18** significant possibility ranging as high as probability
> **19** that early intervention with antibiotics could have
> **20** either at least reduced the progression of the
> **21** infection or slowed its progression and potentially
> **22** have averted as much tissue loss as she experienced.

(Schechter Depo., p. 121:7-121:22) (App. 0444).

Thus, when asked the ultimate but-for causation question, would earlier antibiotic administration more likely than not have saved Ms. Susie's arm **in a leading fashion by Plaintiffs' counsel,** Plaintiffs' expert still would not say "yes" or "I think so" or "I believe so" or "I cannot say for sure but I think most likely her arm would have been saved" or even "Her arm might have been saved". Instead, he gave the convoluted opinion that there is a possibility to a probability "that early (how early?) intervention with antibiotics **could** have **either** at least reduced the progression of the infection (what does the jury do with "reduced the progression"?) **or** slowed its progression (what does the jury do with "slowed its

progression"?) and **potentially** have averted as much tissue loss (what tissue loss? how much? would her arm have been saved?) as she experienced." This testimony provides no guidance to the jury on the question Plaintiffs' counsel asked and the question that will be before the jury, which is "would her arm more likely than not have been saved?".

Combined with Dr. Schechter's other testimony that it would be speculation as to what effect antibiotics on September 29, 2012 would have had, if any, and combined with his testimony that he was "not here to say her arm was cut off because of Sarah Harty" the opinions from Dr. Schechter provide no guidance for the jury to determine if or how Ms. Susie's outcome would have been different with antibiotics one day earlier. This is particularly true where Dr. Schechter also conceded that such antibiotics would take 36 hours to be effective, conceded that Ms. Susie had necrotizing fasciitis on September 29, 2012, and where it is undisputed that 24 hours later Ms. Susie was in septic shock, suffering from necrotizing fasciitis against which antibiotics are not effective.

In sum, none of Dr. Schechter's testimony rises above the level of speculation and conjecture. Dr. Schechter was unwilling or unable to tell the jury what difference Sarah Harty could have made for Ms. Susie. His testimony actually supports the opposite conclusion, that antibiotics on September 29, 2012 would not have made any difference at all in the outcome. Certainly, no witness has explained

that (or how) her arm would have been saved or that any other damage would have been avoided. No witness has even said that it was possible that her arm could have been saved. Plaintiffs failed to disclose any competent causation opinions against Defendants.

Given the well-established rules regarding requirements for expert testimony on causation and rules of disclosure in medical negligence cases, permitting a jury to consider entering a verdict in favor of a plaintiff when there was a structural omission in the evidence would have been reversible error, and instead the district court correctly granted the motion for summary judgment.

Finally, Dr. Schechter's report does include the opinion that it is more likely than not treatment with antibiotics on September 29, 2012 would have saved Ms. Susie's arm and toes. (App. 0086-87). Dr. Schechter's report is inadmissible hearsay. Iowa R. Evid. 5.801-5.802. Dr. Schechter's report was not signed under penalty of perjury. (App. 0087). The report was not drafted by Dr. Schechter as it repeatedly refers to him in the third-person. (App. 0082-87).

Most importantly, Dr. Schechter's deposition testimony makes clear that he was not going to provide the causation opinion contained in his report at trial[3]. As

[3] This is another reason the district court properly considered the motion for summary judgment, despite being filed five days before trial. Based on Dr. Schechter's report, Defendants could not file a motion for summary judgment. Defendants' Motion for Summary Judgment was not ripe until after Dr. Schechter's deposition, when it became abundantly clear Dr. Schechter did not actually hold the causation opinion Plaintiffs' counsel authored for him for his report.

discussed above, and directly contrary to his report, Dr. Schechter confirmed during his deposition that: (1) he was not there to say Ms. Susie's arm was cut off because of Sarah Harty; (2) antibiotics would not be effective for 36 hours; (3) Ms. Susie had necrotizing fasciitis on September 29, 2012 when she saw Sarah Harty; (4) he would be speculating as to the effect of antibiotics on September 29, 2012; (5) Ms. Susie was suffering from septic shock and necrotizing fasciitis within 24 hours of seeing Sarah Harty; and (6) he would not give the causation opinion contained in his report even in response to leading questions from Plaintiffs' counsel. (Schechter Depo., p. 71:6-72:23; 93:9-18; 98-99; 100:4-100:20; 104:4-104:21; 105:7-105:11; 121:7-121:22; 128:19-23) (App. 0394-95, 0416, 0421-23, 0427-28, 0444, 0451).

Had Dr. Schechter actually expressed the causation opinion in his report at his deposition, Defendants' counsel was prepared to attack the medical and scientific foundation for that opinion, as well as Dr. Schechter's qualifications for rendering it. However, because Dr. Schechter repeatedly declined to express the causation opinion in his report (and in fact testified contrary to that opinion), despite multiple opportunities to do so, Defendants' counsel did not have the opportunity to cross-examine Dr. Schechter as to the basis for the opinion and his qualifications for rendering it.

Dr. Schechter's report does not create a fact issue because it is inadmissible hearsay and because Dr. Schechter's deposition testimony makes clear that he does not hold the causation opinion contained in his report.

ii. Antibiotics Would Not Have Effective for 36 hours

Dr. Schechter testified that he agreed that antibiotics would not be effective for 36 hours. (Schechter Depo., p. 104:11-21) (App. 0427). Ms. Susie returned to the hospital in approximately 24 hours suffering from septic shock and necrotizing fasciitis. (Schechter Depo. p. 93:9-18, 98-99, 104:16-104:21);(App. 0416, 0421-22, 0427); (Lamptey Depo. p. 60-61); (App. 0229-30). Thus, even if Ms. Susie had been prescribed antibiotics by Sarah Harty, Ms. Susie would have progressed to a septic, life threating condition the next day as a result of necrotizing fasciitis against which antibiotics would not have been effective. Additionally, as previously noted, Dr. Schechter agreed on multiple occasions that it would be speculation to testify as to what effect antibiotics would have had, if any. (Schechter Depo., p. 105:7-105:11, 128:19-23) (App. 0428, 0451).

iii. Sharon Susie Did Not Have an Easily Treatable Cellulitis on September 29, 2012.

Plaintiffs' **entire** theory of the case depends on Ms. Susie having only an easily treatable cellulitis on September 29, 2012. (Pl. Br. p. 53-54). Not only will no witnesses testify that to effect, Dr. Schechter directly contradicts this theory. Dr. Schechter conceded that, in hindsight, Ms. Susie had necrotizing fasciitis on

September 29, 2012. (Schechter Depo. p. 71:6–72:23);(App. 0394-95). In other words, Plaintiffs' own expert conceded that the factual basis for Plaintiffs' entire theory of the case was not accurate. On this admission alone, Plaintiffs' case fails as to causation because it is undisputed that antibiotics are ineffective against necrotizing fasciitis and surgery is required. (Lamptey Depo. p. 61-62, 65-67, 69) ;(App. 0230-32); (Vemuri Depo., p. 45) (App. 0248); (Rizk Depo, p. 42) (App. 0292). Indeed, 48 hours of IV antibiotics administered one day later did not defeat this infection. (Lamptey Depo. p. 65-67); (App. 0231).

In addition to Dr. Schechter's admission that Ms. Susie had necrotizing fasciitis on September 29, 2012, there are no witnesses that will testify to the contrary. Dr. Lamptey agreed that Ms. Susie had necrotizing fasciitis **before** arriving at the emergency room on September 30, 2012. (Lamptey Depo. p. 60-61); (App. 0229-30). Dr. Vemuri further confirmed that there "was something brewing in her deeper tissues for some period of time before she got to the emergency room at mercy hospital 24 hours after seeing Sarah Harty. (Vemuri Depo., p. 26-27) (App. 0243).

Dr. Lamptey further testified that necrotizing fasciitis and cellulitis are separate and distinct, and there is no natural progression from cellulitis to necrotizing fasciitis. (Lamptey Deposition; 64:17-65:19); (App. 0230-31). The Center for Disease Control confirms that necrotizing fasciitis and cellulitis are not

the same, but rather cellulitis and necrotizing fasciitis are different forms of "invasive disease." (Plaintiffs' CDC Publication) (App. 0463).

In sum, there is no expert evidence that Ms. Susie had an easily treatable cellulitis on September 29, 2012, and the expert evidence that does exist establishes exactly the opposite, that Ms. Susie had necrotizing fasciitis on September 29, 2012 when she saw Sarah Harty. At minimum, her condition had progressed to necrotizing fasciitis, and not simply cellulitis, prior to when antibiotics from Sarah Harty even potentially could have been effective. Again, Plaintiffs' entire causation case depends on Ms. Susie having an easily treatable cellulitis on September 29th. Because Ms. Susie had necrotizing fasciitis on September 29th according to Plaintiffs' expert, Dr. Schechter, the evidence in the record establishes that antibiotics on September 29th would not have made any difference. Because antibiotics on September 29th would not have made a difference, Plaintiffs' case fails as to causation as a matter of law.

iv. Dr. Vemuri's Testimony Does Not Support Plaintiffs' Causation Case

As discussed in the previous section, Plaintiffs' expert agreed that Sharon Susie had necrotizing fasciitis on September 29, 2012. Dr. Vemuri, Defendants' expert, testified that when necrotizing fasciitis is present, antibiotics do not help without surgical debridement. (Vemuri Depo., p. 45) (App. 0248). Therefore, had

broad spectrum antibiotics been prescribed on September 29, 2012, they would not have prevented this outcome.

Additionally, Dr. Vemuri confirmed that Ms. Susie was in septic shock with renal failure upon arrival to the emergency room approximately 24 hours after she was seen by Sarah Harty. (Vemuri Depo., p. 23-24) (App. 0242). As any antibiotics would not have been effective until 36 hours after administration according to Dr. Schechter, if they would have begun to work at all given that Ms. Susie had necrotizing fasciitis on September 29, 2012, antibiotics would not have stopped the progression of the infection to a septic condition.

Ultimately, Dr. Vemuri's report concluded, consistent with his deposition testimony, that nothing which could have been initiated by Sarah Harty would have changed the outcome in this case. Any reliance on Dr. Vemuri's testimony to support Plaintiffs' claim is misplaced.

c. Response to Specific Arguments Plaintiffs Raise

i. Dr. Schechter was given the opportunity to elaborate

In Plaintiffs' statement of facts, Plaintiffs assert that Dr. Schechter was never given the opportunity to elaborate on his opinions. (Pl. Br. p. 19-21). Contrary to this assertion, Dr. Schechter was asked directly if he was prepared to testify that Sharon Susie's arm was cut off because of Sarah Harty. If held that opinion, he had the opportunity to elaborate about why he held that opinion. Instead, Dr. Schechter

stated "I am not here to say her arm was cut off because of Sarah Harty." (Schechter Depo. p. 100:7-100:10) ;(App. 0423). It is impossible to reconcile this testimony with an assertion that Dr. Schechter believed or was willing to testify it was more likely than not that Ms. Susie's arm would have been saved with administration of antibiotics by Sarah Harty. Indeed, if Dr. Schechter had expressed the opinion that antibiotics on September 29 would have saved Ms. Susie's arm, Defendants would have asked Dr. Schechter to elaborate on his opinion.

Dr. Schechter was given another opportunity when asked by Plaintiffs' counsel whether earlier antibiotics "may well more likely than not have saved her arm?". Plaintiffs' counsel's question included a leading preface regarding the general effect of earlier antibiotics, stating: "Do you agree with that -- that the earlier you get the antibiotics on board and the more you allow the body to mobilize in someone's immune system in response to this developing infection that you may well more likely than not have saved her arm?" (Schechter Depo., p. 121:7-121:22) (App. 0444).

Even in response to this leading question from Plaintiffs' counsel Dr. Schechter would not give the opinion that Ms. Susie's arm likely would have been saved with antibiotics on September 29, 2012. (Schechter Depo., p. 121:7-121:22) (App. 0444). In fact, Dr. Schechter never testified that it was even a possibility that Ms. Susie's arm would have been saved.

The question for the jury was going to be, "would administration of antibiotics on September 29th, 2012 more likely than not have saved Ms. Susie's arm?" Dr. Schechter was asked that question by both Plaintiffs' counsel and Defendants' counsel. Dr. Schechter had ample opportunity to give the causation opinion Plaintiffs needed and declined to do so. Because no witness was going to testify Ms. Susie's arm could have been saved with antibiotics, there was no reason to have a trial, and the district court properly granted summary judgment on causation grounds.

ii. The district court did not ignore causation testimony from the other witnesses

Plaintiffs' substantive argument on the sufficiency of the causation testimony begins on the bottom of page 49 with an assertion that the trial court ignored the causation testimony from other medical experts in this case. (Pl. Br. p. 49-50). This assertion is incorrect, as the trial court expressly stated during the hearing on the motion for summary judgment that it spent hours reviewing all the relevant material, and specifically stated: "It's clear to me even --and I know, Mr. Humphrey, you wanted to make sure I read all your other physician stuff. I did that. I still believe and I find that there is no – that you don't have the necessary expert more likely than not causation evidence to get the claim to a jury." (Tr. Hearing on Motion for Summary Judgment, p. 3-4) (App. 0151-52). Thus, the district court expressly stated that it spent hours reading the information from the

other physicians and still determined Plaintiffs did not have sufficient evidence of causation to get the claim to the jury.

iii. The Entire Record Does Not Support Plaintiffs' Theory

Plaintiffs next argue that whether the "record supports the argument that a submissible case on causation has been generated does not come from a single witness. It comes from the entire record presented to the jury…" (Pl. Br. p. 51). While that assertion may be generally true, an examination of the entire record reveals, as the district court concluded, that no expert witnesses provided any testimony that earlier administration of antibiotics would more likely than not have saved Ms. Susie's arm. None of the treating witnesses so testified. The treating physicians were not going to be called live at trial with their deposition testimony presented to the jury. Therefore, the treating physicians would not have offered any causation opinions at trial. Defendants' expert, Dr. Vemuri, also did not give the causation opinion Plaintiffs' need, and the summary of testimony provided in his report was that antibiotics on September 29, 2012, would not have made any difference.

Most importantly, if Plaintiffs' expert witness, who had the entirety of the record available to him, was not willing to testify that administration of antibiotics on September 29, 2012 more likely than not would have saved Ms. Susie's arm, on what basis could a jury make that conclusion? Even when considering the entire

record, all of the evidence in the record supports the fact that antibiotics would not have made any difference and that it is speculation to assert otherwise. The fact that antibiotics typically work against cellulitis is irrelevant. When viewing the record in total, no submissible causation case existed.

iv. Plaintiffs Have Insufficient Cause in Fact Testimony

Plaintiffs next argue that semantics alone does not defeat the probative value of an expert opinion and relies on *Hansen v. Central Iowa Hospital Corporation*, 686 N.W.2d 476 (Iowa 2004). (Pl. Br., p. 51-52). On this issue, *Hansen* stands for the proposition that specific language, such as "reasonable degree of medical certainty" is not required to establish an expert's opinion. *Id.* at 484-85. Defendants agree that no magic language is required to establish an expert's opinion, but this entire argument is a red herring. Defendants are not arguing that Dr. Schechter's opinion on causation is insufficient because he did not use the words reasonable degree of medical certainty. Defendants are also not arguing that Dr. Schechter was required to express his opinion as a certainty about what would have happened. Instead, as discussed throughout this brief, Dr. Schechter's opinion is insufficient on causation simply because he did not give any opinion as to what damages the alleged delay in diagnosis more likely than not caused, and in fact, specifically refrained from doing so. In other words, Dr. Schechter's testimony is not

insufficient on causation because he failed to use magic words, it is insufficient on causation because he did not give a causation opinion.

Plaintiffs then cite *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) for the proposition that the new causation standards espoused therein required the causation issue to be submitted to the jury. (Pl. Br., p. 52). However, *Thompson* does not change the fact that the Plaintiffs' causation element in this case must be established via expert testimony. Instead, *Thompson* adopts the causation analysis from the Restatement (Third) of Torts, modifying the causation test from a substantial factor test to a but-for causation test followed by a requirement that the claimed harm be within the scope-of-liability. *Id*. at 834-36. The fundamental flaw in Plaintiffs' case is that there is insufficient expert testimony to establish **but-for causation**; there is no expert evidence that but-for Sarah Harty's alleged negligence, the outcome more likely than not would have been different.

The uniform "Cause - Defined" instruction (ICJI 700.3) guides the jury as follows:

> The conduct of a party is a cause of damage when the damage would not have happened except for the conduct.

Stated in terms of the instruction, Plaintiffs' brief on appeal and Plaintiffs' resistance to the motion for summary judgment do not identify which witness or witnesses will answer the question:

"What damage would not have happened except for the failure to give antibiotics on September 29, 2012?"

Despite Plaintiffs' assertion that "Certainly, it is undisputed that the record contains sufficient cause in fact testimony", Plaintiffs do not provide any actual place in the record where sufficient cause in fact testimony exists. (Pl. Br. p. 53). Plaintiffs simply cite the entirety of the physicians' deposition testimony, without actually citing to any specific testimony that supports the assertion that there is sufficient cause in fact testimony. (Pl. Br. p. 53). Plaintiffs do not cite any testimony or evidence that would allow a jury to conclude that Ms. Susie's arm would likely have been saved with antibiotics on September 29, 2012, or even that any other harm would have been avoided, and no such testimony exists.

As noted, Plaintiffs begin the argument on page 53 by requesting this Court "See complete deposition testimony of Dr. Lamptey, Dr. Vemuri, Dr. Rizk and Dr. Schechter." (Pl. Br. p. 53). What follows is two pages of Plaintiffs' counsel's theory of the case, without a single cite to any portion of the actual factual record for support. (Pl. Br. p. 53-54).

Plaintiffs begin with the assertion that Ms. Susie had cellulitis on September 29, 2012. (Pl. Br. p. 53-54). Plaintiffs then go on to argue that antibiotics would have been effective to treat the cellulitis. (Pl. Br. p. 53-54). Thus, as previously noted, the erroneous assertion that on September 29th, 2012 Ms. Susie had easily treatable cellulitis underlies Plaintiffs' entire causation argument on pages 53 and

54 of their brief. (Pl. Br. p. 53-54). No expert has testified that Ms. Susie had an easily treatable cellulitis on September 29th, 2012. More importantly, and dispositive of this argument, **Plaintiffs' expert concedes Ms. Susie had necrotizing fasciitis on September 29, 2012:**

> Q. I got that.
> 12 And with all the information we have, Dr. Crew [Plaintiffs' first expert]
> 13 was able to say with a little bit of lookback, 'cause
> 14 of what he knows happened, when she crossed the
> 15 threshold less than 24 hours later at Mercy Hospital,
> 16 that there was a brewing necrotizing **fasciitis then and**
> **17 there in the presence of Sarah Harty. You understand**
> **18 that's what he was telling us?**
> 19 A**. Right.**
> **20 Q. And you embrace that knowing what we know now**
> **21 looking back; correct?**
> **22 A. <u>Yes</u>,** but I'm not as concerned about giving it a
> 23 name as I am preventing the patient's deterioration.

(Schechter Depo. p. 72:11-72:23) ;(App. 0395).

Because both Plaintiffs' original expert, Dr. Crew, and replacement expert, Dr. Schechter, conceded that Sharon Susie had necrotizing fasciitis at the time she saw Sarah Harty, all of Plaintiffs' arguments that Ms. Susie had an easily treatable cellulitis are inaccurate and irrelevant.

In any event, no witnesses dispute that Ms. Susie had necrotizing fasciitis 24 hours after seeing Sarah Harty. As Dr. Schechter conceded that antibiotics would have taken 36 hours to be effective if they were to be effective at all, even if Ms. Susie only had cellulitis on September 29, 2012, a conclusion which no

expert will support, the cellulitis would have progressed to necrotizing fasciitis regardless of whether antibiotics were administered on September 29, 2012. There is simply no evidence, or citation to the record, that antibiotics on September 29th "would have led to a full recovery because the treatment would have predated the release of the toxins which make the treatment of deep tissue infections problematic" as alleged in Plaintiffs' brief. (Pl. Br., p. 54). There is no expert opinion that antibiotics on September 29th would have led to a full recovery.

Indeed, the speculative causation theory laid out on pages 53 and 54 of Plaintiffs' brief begs the question: "Why is no doctor saying any of this?" There is no competent proof in the record to establish that Sarah Harty cost Ms. Susie her arm. The reason for that is that Ms. Susie had a horrible disease, necrotizing fasciitis, when she saw Sarah Harty on September 29, 2012, and she is lucky to be alive. Because many people with this disease die, Dr. Rizk, Plaintiffs' surgeon, believes this case represents a "great outcome." (Rizk Depo, p. 50) (App. 0300). Broad spectrum antibiotics for 24 hours would not have changed the outcome. The medical witnesses, including Dr. Schechter, know that it would be a pure guess to say otherwise.

d. Summary of the Failure of Plaintiffs' Case as to Causation

There is no expert testimony in the record from which a jury could conclude it is more likely than not that earlier antibiotics would have altered this outcome in

any way. No expert will testify that antibiotics on September 29, 2012 would have saved Ms. Susie's arm. There is no evidence that this was an easily treatable cellulitis. Dr. Schechter conceded necrotizing fasciitis was present on September 29, 2012. Dr. Vemuri and Dr. Lamptey agree that necrotizing fasciitis was present for some time prior to Ms. Susie arriving at the emergency room on September 30, 2012. Dr. Vemuri, Dr. Rizk, and Dr. Lamptey all testified that antibiotics alone are not effective against necrotizing fasciitis. Dr. Schechter conceded on multiple occasions that he would speculating as to the effectiveness of antibiotics on September 29th. Dr. Schechter also conceded that antibiotics, if they were to be effective, would not be effective for 36 hours, and it is undisputed that approximately 24 hours later upon presentation to the emergency room Ms. Susie was in septic shock and had necrotizing fasciitis.

When Plaintiffs' expert testifies that he would be speculating as to the effect of antibiotics on September 29th, and testifies that he was not going to testify that Sarah Harty cost Ms. Susie her arm, which is the damage claimed in this case, there is no question of fact on causation for a jury to decide. Because there is no expert opinion from which a jury could conclude administration of antibiotics on September 29th would more likely than not have saved Ms. Susie's arm, the district court properly granted the Defendants' Motion for Summary Judgment on causation grounds.

II. THE DISTRICT COURT CORRECTLY GRANTED THE DEFENDANTS' MOTION ON PLAINTIFFS' LOSS OF CHANCE THEORY BECAUSE PLAINTIFFS HAD NO EXPERT TESTIMONY ON WHAT THE LOSS OF CHANCE WAS, IF ANY

A. Preservation of Error and Standard of Review

The Defendants agree that error was preserved via Plaintiffs' Resistance to Defendants' Motion for Summary Judgment. The standard of review of a district court's ruling on a motion for summary judgment is for errors at law. *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 806 N.W.2d 282, 286 (Iowa 2011).

B. Plaintiffs' Failed to Present Required Expert Testimony on Loss of Chance

The district court correctly held that, on the loss-of-chance claim, "there is a lack of any reliable expert testimony to establish what percentage of chance was lost without the fact finder engaging in speculation." (App. 0154). General expressions such as "Sooner is better" and "time is tissue" are not lost chance theories, and provide no guidance to a jury in determining what loss of chance was caused by the Defendants' alleged negligence. In the cases cited by Plaintiffs, the juries were provided percentages and specific proof was offered for a jury to determine what chance had been lost of, for example, survival of cancer due to a delay in diagnosis. *See DeBurkarte v. Louvar*, 393 N.W.2d 131, 135 (Iowa 1986) (fifty to eighty percent chance of survival with an earlier diagnosis); *Wendland v. Sparks*, 574 N.W.2d 327, 329-330 (Iowa 1998) (ten percent chance of revival had

resuscitation efforts been undertaken); *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966) (not a loss of chance case, and the plaintiff's experts "testified categorically that if operated on promptly, [decedent] would have survived").

Here, no such record has been presented. The jury, based on all of the testimony in the record, and specifically Dr. Schechter's testimony, has no basis from which to conclude there was any loss of chance. If there was in fact a chance of saving Ms. Susie's arm with antibiotics on September 29, 2012, a conclusion for which there is no evidence, the jury nonetheless will have no testimony from which they could determine what that chance was. No witness has been willing to testify that it was even **possible** that Ms. Susie's arm would have been saved. A careful review of Plaintiffs' brief reveals that there is not one cite to any testimony where any medical professional states that there was any chance antibiotics would have saved her arm. Any finding of percentage of loss of chance would be based on pure speculation. Speculation is insufficient to support a submissible case to the jury. *Hlubek v. Pelecky*, 701 N.W.2d 93, 96 (Iowa 2005) ("Speculation is not sufficient to generate a genuine issue of fact."); *Castro v. State*, 795 N.W.2d 789, 795 (Iowa 2011) ("In considering a motion for summary judgment, ... [a]ll reasonable inferences arising from the undisputed facts should be made in favor of the nonmovant, but an inference based on speculation and conjecture is not reasonable.").

The jury instructions regarding loss of chance in Iowa instruct the jury that the loss of chance "is measured by the difference between the chance of [keeping the arm] if treatment had been given at the earlier time, and the chance of [keeping the arm]" after the delay in treatment. Plaintiff may not recover for harm caused by the pre-existing condition to which defendant's negligence did not contribute. Iowa Civ. Jury Inst. 200.39.

No witness has opined what the chance of keeping the arm was, if any, if antibiotic treatment had been given at the earlier time. The jury would have to pull a percentage out of the ether to find in favor of the Plaintiffs on this theory. The jury cannot determine what the chance of keeping the arm was had antibiotics been administered on September 29, 2012 without expert testimony. No expert testimony in the record provides any guidance on that question. Thus, Plaintiffs loss of chance claim fails because there is no expert testimony in the record from which a jury could determine what the loss of chance was. To the contrary, the admissions from Dr. Schechter, combined with the other expert testimony in the record, discussed in detail in the preceding sections, establish that antibiotics 24 hours earlier would not have made any difference at all.

Citing the loss of chance theory does not cure the critical deficiencies in the Plaintiffs' causation case discussed above, and the district court correctly granted summary judgment.

The district court's grant of summary judgment is also supportable because Plaintiffs did not timely disclose any loss of chance evidence. A loss of chance theory has never been plead in this case. There have been no disclosures as to what chance was lost, or as to what damage the chance has been lost. No expert report discussed loss of chance. At the time of the summary judgment hearing, it was simply too late to inject loss of chance theories into the case where no evidence has previously been disclosed to identify what chance was lost of avoiding what particular harm due to the alleged negligence.

C. Response to Specific Arguments from Plaintiffs' Brief

As was the case with Plaintiffs' standard causation argument, the most telling portion of Plaintiffs' loss-of-chance argument is the emboldened print on Page 57-58, where counsel engages in a detailed explanation of his causation and loss-of-chance theory, not one element of which is supported by a citation to the record in a matter that relates to Ms. Susie's specific situation on September 29, 2012. This recitation is purely a lawyer's argument, threaded together by a patchwork of speculation, guesswork, and possibilities. There are no witnesses who will support any part of this theory which involves the complex interactions of bacteria, host, toxin, and medical treatment modalities. Once again, the argument and speculation contained on pages 57-58 of Plaintiffs' Brief begs the question: "Why is no doctor saying any of this?"

Each phrase of the relevant causation theory from Page 57-58 of Plaintiffs' Brief will be addressed in the subparagraphs to follow (a – h) to illustrate that no witness or collection of witnesses will offer evidence that would permit the jury to identify the damage that was caused by a failure to provide antibiotics on September 29, 2012. Conversely, and perhaps more importantly, Plaintiffs' own expert witness contradicts nearly every portion of Plaintiffs' causation argument.

a. **"No one is able to know whether the cellulitis infection had become necrotizing as of September 29th…"** (Pl. Br. p. 57).

   i. Plaintiffs' experts directly contradict this assertion. Both Plaintiffs' original expert, Dr. Crew, and Plaintiffs' replacement expert agreed that, with the benefit of hindsight, Sharon Susie had necrotizing fasciitis on September 29, 2012. (Schechter Depo. p. 71:6–72:23); (App. 0394-95).

   ii. Dr. Lamptey supports Dr. Schechter's conclusion, confirming that necrotizing fasciitis was releasing toxins and destroying her muscles for some time **before** she came to the emergency room on September 30th because by then the toxins had been in the muscles long enough to kill the

muscles, break them down to some degree, and clog the kidneys. (Lamptey Depo., p. 60-61); (App. 0229-30).

iii. Dr. Vemuri supports Dr. Schechter's conclusion, confirming that "there was something brewing in her deeper tissues for some period of time" before she got to the emergency room at mercy hospital 24 hours after seeing Sarah Harty. (Vemuri Depo., p. 26-27) (App. 0243).

b. **[W]hat is clear is that there was indeed a cellulitis infection to the skin and likely the subcutaneous tissue at the time of the Urgent Care Clinic Visit.** (Pl. Br. p. 57).

i. No one has testified that, more likely than not, Ms. Susie had an easily treatable cellulitis, as opposed to necrotizing fasciitis, in the urgent care clinic on September 29, 2012.

ii. Necrotizing fasciitis and cellulitis are not the same. Plaintiffs' CDC Publication (App. 0463) indicates that cellulitis and necrotizing fasciitis are **different forms** of "invasive disease."

iii. Dr. Daniel Lamptey will explain that necrotizing fasciitis and cellulitis are separate and distinct, and there is no

natural progression from cellulitis to necrotizing fasciitis. (Lamptey Deposition; 64:17-65:19); (App. 0230-31).

iv. Again, Plaintiffs' expert, Dr. Schechter, agreed that, in hindsight, Ms. Susie had necrotizing fasciitis, not cellulitis, when she presented to the urgent care clinic on September 29, 2012. (Schechter Depo., 71:6 – 72:23); (App. 0394-95).

c. **The initiation of antibiotics on that date would have made a difference.** (Pl. Br. p. 57).

i. Dr. Schechter has not testified consistent with this statement. He can merely speculate, and when testifying under oath declines to offer a scientific opinion as to what difference antibiotics would have made. (Schechter Depo., p. 105:7-105:11, 128:19-23) (App. 0428, 0451).[4]

ii. Dr. Schechter further testified that antibiotics would not have been effective for 36 hours. (Schechter Depo., p. 104:11-21) (App. 0427). Certainly, within 24 hours after seeing Sarah Harty, Ms. Susie was in septic shock with necrotizing fasciitis. (Schechter Depo. p. 93:9-18, 98-99,

[4] Dr. Schechter's report is inadmissible hearsay, and will not be part of Plaintiff's proof to the jury. Iowa R. Evid. 5.801.

104:16-104:21) ;(App. 0416, 0421-22, 0427); (Lamptey Depo. p. 60-61); (App. 0229-30). Dr. Schechter's testimony supports the conclusion that antibiotics on September 29, 2012, would have made **no** difference.

iii. Additionally, Plaintiffs' counsel has conceded that his expert "was simply being honest when testified that for him to opine as to the effectiveness of treatment with antibiotics…on September 29, 2012 would be somewhat speculative". (Pl. Br. 19-20).

iv. No treating physician offered testimony, nor is any testimony cited in Plaintiffs' Brief, that would allow a jury to determine that antibiotics would have changed the outcome.

v. The treating physicians have testified that antibiotics are ineffective against necrotizing fasciitis and have testified that more than 48 hours of continuous IV antibiotic therapy in the hospital failed to improve Ms. Susie's infection. (Lamptey Depo. p. 61-62, 65-67, 69) ;(App. 0230-32); (Vemuri Depo., p. 45) (App. 0248); (Rizk Depo, p. 42) (App. 0292).

d. **Sharon may have needed some degree of debridement which would have resulted in tissue loss but she likely would have not lost her arm and toes…**(Pl. Br. p. 57).

i. No witness has ever quantified what, if any, tissue loss could have been avoided in Sharon Susie's case. No treating physician or expert witness has ever opined that Ms. Susie might not have lost her arm and toes.

ii. "Time is tissue" and "earlier is better" do not begin to approach the level of specificity that Plaintiffs would have argued to the jury in this case. Neither general concept provides the jury with tools to determine what the delay in antibiotic administration likely cost Ms. Susie in terms of bodily debridement, if any. This is particularly true where Ms. Susie did not have a simple cellulitis.

iii. When asked directly, Dr. Schechter declined to express this opinion: "Q: Or are you here to say that Sharon Susie's arm was cut off because of Sarah Harty? A: **I'm not here to say her arm was cut off because of Sarah Harty.**" (Schechter Depo. p. 100:7-100:10); (App. 0423).

iv. For a jury to determine that Ms. Susie would have experienced "some" tissue loss but something less than the loss of her arm and toes would be an exercise in guess and speculation. Medically trained experts were unable to reach any conclusion in this regard. Jurors are not permitted to speculate as to technical issues of medical causation. **"when a jury is left to speculate on whether the defendant's conduct in fact caused the plaintiff's damages, the evidence is insufficient to support a finding of proximate cause."** *Daley v. Hoagbin*, 2000 WL 1298722, 2-3 (Iowa Ct. App. 2000)

e. **….because the administration of the antibiotics would have begun to kill the microorganism (the Group A Strep Bacteria).** (Pl. Br. p. 57).

i. No one has said that antibiotics would have "begun to kill the microorganism" if administered sometime after 1:00pm on September 29, 2012 and before she arrived at the hospital shortly after noon on September 30, 2012 in shock and organ failure.

ii. Dr. Schechter testified that it was "speculative" to determine when antibiotics would begin to work. (Schechter Depo., p. 104:4-104:10); (App. 0427).

iii. Dr. Schechter agreed "it would take 36 hours for the antibiotics to be effective in this case." (Schechter Depo., p. 104:16-104:21); (App. 0427).

f. **The systemic elimination of the bacteria would have in turn minimized the release of toxins which resulted from the interaction between the bacteria and Sharon's tissue.** (Pl. Br. p. 57-58).

i. No witness will testify that "systemic elimination of the bacteria" causing necrotizing fasciitis would have occurred. No one has testified as to when the infection became systemic. However, Dr. Schechter conceded necrotizing fasciitis was present on September 29, 2012. (Schechter Depo. p. 71:6–72:23) ;(App. 0394-95). Dr. Crew had previously agreed. (Schechter Depo. p. 71:6–72:23) ;(App. 0394-95). Dr. Vemuri agrees. (Vemuri Depo., p. 26-27) (App. 0243). Dr. Lamptey agrees. (Lamptey Depo. p. 61-62) ;(App. 0230).

ii. All medical witnesses have uniformly testified that necrotizing fasciitis cannot be treated with antibiotics alone. (Lamptey Depo. p. 61-62, 65-67, 69) ;(App. 0230-32); (Vemuri Depo., p. 45) (App. 0248); (Rizk Depo, p. 42) (App. 0292). Surgical removal of dead tissue and infection sites is required. At least 35-50 percent of people with this rare type of infection die. (Schechter Depo., p. 110-11) (App. 0433-34).

g. **As a result, Sharon's own immunity system would have kicked into gear to as to (sic) minimize the ravaging effects of the necrotizing process so as to preserve her arm.** (Pl. Br. p. 58).

i. The lack of support for subparts c, d, e, and f above, applies here also.

ii. Additionally, Dr. Schechter agreed as follows: "Q:… it is speculation on whether the antibiotics would, quote, turndown, close quote, the infection had they been given by Sarah Harty. Do you agree? A: Speculation, yes." (Schechter Depo., p. 105) (App. 0428).

h. **Further, the loss of her eight toes on both feet resulted from the fact that her body was diverting oxygenated blood from**

her extremities to her vital organs, especially her kidneys where were in failure at the time she presented to Mercy. Had the antibiotics been started some 24 hours earlier, she likely would not have progressed to severe septic shock thereby minimizing the need for blood shunting and the need for vasopressors to bring her blood pressure back. (Pl. Br. p. 58).

i. See subpart c, d, e, and f above. No witness has supported the theory that antibiotics would have prevented shock and organ failure that began within 24 hours of the patient leaving the urgent care clinic. Dr. Schechter agrees that it would have taken 36 hours (at least 12 hours after Ms. Susie presented in shock and organ failure) for antibiotics to take effect. (Schechter Depo., p. 104:16-104:21) (App. 0427).

The detailed causation and loss-of-chance theory presented in Plaintiffs' Brief is not supported by the evidence. To use counsel's phrase, the "honest" Plaintiffs' experts are unwilling to support the theory. The treating physician witnesses had already testified under oath via video in the form that would have been presented to the jury and did not address the critical causation questions in any fashion. Plaintiffs' experts are limited by their own concessions that they do not have opinions beyond speculation as to what would happen if Sharon Susie had

received antibiotics 24 hours earlier, and in fact, these opinions support the conclusion that there would have been no change in outcome. There is no competent testimony or evidence upon which the jury could answer the causation or loss-of-chance questions that would have been presented at the close of trial.

Plaintiffs' unsupported argument continues on page 61 with the statement that "there is absolute certainty in the opinion of Dr. Schechter and Jeffrey Nicholson, P.A. that the failure to institute antibiotics has resulted in tissue damage to Sharon Susie." (Pl. Br. p. 61). Plaintiffs' failure to cite any portion of the record where these witnesses express "absolute certainty" that the failure to give antibiotics on September 29, 2012 caused tissue loss is again telling. No witness was going to tell the jury that the failure to give antibiotics caused tissue loss. Additionally, the relevant question is, "what chance of keeping her arm did Ms. Susie lose as a result of a one day delay in antibiotic administration?" **No witness was going to tell the jury the answer to that question**, and therefore there was no reason to waste time with a trial on a loss-of-chance theory.

Plaintiffs go on to assert, without citation, that the "cause in fact requirement will clearly be met". (Pl. Br. p. 61-62). It is unclear to what Plaintiffs are referring. To meet the cause in fact requirement Plaintiffs must show that Sharon Susie's arm would not have been lost but-for the alleged negligence. Or, as it pertains to loss of chance, Plaintiffs must show what chance of saving Ms. Susie's arm, if any, was

lost as a result of the alleged negligence in failing to give antibiotics on September 29, 2012. Plaintiffs failed to do so and provided no expert support for their assertion that the "cause in fact requirement will clearly be met."

Finally, presenting "proof" on a critical element of a case via argument of counsel is unacceptable and highlights the reason that parties are prevented from proving their cause through speculation and guess. Because no witness has offered the detailed[5] loss of chance theory set forth by Plaintiffs' counsel in their brief, counsel for Defendants have not been afforded the opportunity to cross examine any witness on these theories to identify the medical scientific basis for the theories. Typically, parties are afforded the chance to test the veracity and reliability of scientific medical opinion. Here that opportunity has not presented itself because no witnesses have testified that they will adopt the theory advanced in Plaintiffs' brief.

In sum, no expert witnesses provided any testimony that Ms. Susie lost any chance to preserve her arm, nor did they provide any testimony about what that chance was. As discussed in detail throughout, the expert testimony in this case establishes that antibiotics on September 29, 2012 would not have made any difference in Ms. Susie's outcome. Because there was insufficient evidence on the

[5]Even when detailing this unsupported theory, Plaintiffs' counsel does not offer what the loss of chance was in this case.

prima facie causation element of Plaintiffs' case, whether under standard causation or loss of chance, the district court properly granted the Defendants' Motion for Summary Judgment.

CONCLUSION

The District Court correctly granted summary judgment on all of Plaintiffs' claims. At best, Plaintiffs' expert can speculate on the effect of antibiotics on September 29, 2012. Speculation is insufficient to generate a jury question on the causation issues in this case. The testimony Plaintiffs' expert actually provided supports the conclusion that failing to give antibiotics on September 29, 2012 had no effect on the outcome. The district court properly granted Defendants' Motion for Summary Judgment and should be affirmed.

REQUEST FOR NON-ORAL SUBMISSION

The Defendants respectfully request this appeal be submitted without oral argument.

Respectfully submitted,

/s/ Kellen Bubach
Jack Hilmes
Erik Bergeland
Kellen Bubach
THE FINLEY LAW FIRM, P.C.
699 Walnut Street, 1700 Hub Tower
Des Moines, IA 50309
Tel No.: (515) 288-0145
Fax No.: (515) 288-2724
jhilmes@finleylaw.com

ebergeland@finleylaw.com
kbubach@finleylaw.com
ATTORNEYS FOR DEFENDANTS/
APPELLEES