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

DEFENDANTS-APPELLEES' APPLICATION FOR FURTHER REVIEW FROM COURT OF APPEALS DECISION FILED ON NOVEMBER 7, 2018

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QUESTIONS PRESENTED FOR REVIEW

I. **DID THE DISTRICT COURT CORRECTLY GRANT THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON CAUSATION GROUNDS, WHERE PLAINTIFFS DID NOT HAVE EXPERT TESTIMONY THAT THE OUTCOME MORE LIKELY THAN NOT WOULD HAVE BEEN DIFFERENT WITH EARLIER DIAGNOSIS AND TREATMENT?**

II. **DID THE DISTRICT COURT CORRECTLY GRANT THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' LOSS OF CHANCE THEORY WHERE PLAINTIFFS HAD NO EXPERT TESTIMONY ON WHAT THE LOSS OF CHANCE WAS, IF ANY?**

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STATEMENT SUPPORTING FURTHER REVIEW

The Court of Appeals decision conflicts with numerous Iowa Supreme Court and Court of Appeals decisions regarding the standards of proof of causation, the sufficiency of expert testimony on causation in a medical negligence case, and the general prohibition on speculation sustaining a question of fact for the jury. The Court of Appeals' decision conflicts with voluminous precedent on these important matters, warranting further review.

Plaintiffs' theory is Defendants were negligent in failing to properly evaluate Plaintiff Sharon Susie which may have led to administration of antibiotics one day earlier, on September 29, 2012, which may have saved Ms. Susie's arm. Plaintiffs have no expert testimony supporting the central causation question for the jury at trial:

> **Is it more likely than not that Plaintiff Sharon Susie's arm would have been saved by administration of antibiotics on September 29, 2012?**

Only an expert could answer this question. No expert would answer this question in the affirmative. Therefore, no genuine issue of material fact existed for the jury. The District Court correctly granted Defendants' Motion for Summary Judgment.[1]

[1] The District Court order is attached as Exhibit B and the record referenced therein is attached as Exhibit C.

As Judge McDonald noted in his dissent, the Court of Appeals' decision (attached as Exhibit A) reversing the District Court conflicts with the recently filed opinion of *Waddell v University of Iowa Community Service, Inc.* No. 17-0716, 2018 WL 4638311 (Iowa Ct. App. Sept 26, 2018). (Exhibit A, p. 21). Here, the majority and Plaintiffs rely on several generalized statements from physicians to the effect that "earlier treatment is better." (Exhibit A, p. 6-7, 12). The *Waddell* court held these types of generalized statements are insufficient to create a genuine issue of material fact. *Id*. at *5. Thus, the Court of Appeals' decision conflicts with *Waddell.*

The Court of Appeals' decision also conflicts with numerous Court of Appeals and Iowa Supreme Court cases holding expert testimony is required to prove causation in a medical malpractice case. *See, e.g., Cox v. Jones*, 470 N.W.2d 23, 25 (Iowa 1991) ("Professional liability cases, especially medical malpractice actions, require expert testimony of a technical nature concerning standards of care and causation."); *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 718 (Iowa 2001) (holding, expert testimony is nearly always required to establish each element of a prima facie of medical malpractice claim, including causation); *Dickens v. Associated Anesthesiologists, P.C.*, 758 N.W.2d 839 (Iowa Ct. App. 2008) ("In medical malpractice actions, expert testimony of a technical nature is required to show standards of care and

causation."); *Doe v. Cent. Iowa Health Sys.*, 766 N.W.2d 787, 792-793 (Iowa 2009) ("The evidence must show the plaintiff's theory of causation is reasonably probable—not merely possible, and more probable than any other hypothesis based on such evidence…When the causal connection between the tortfeasor's actions and the plaintiff's injury is not within the knowledge and experience of an ordinary layperson, the plaintiff needs expert testimony to create a jury question on causation."); *Bazel v. Mabee*, 576 N.W.2d 385, 388 (Iowa Ct. App. 1998); *Daley v. Hoagbin*, 2000 WL 1298722, 2 (Iowa Ct. App. 2000); *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 medical testimony that it was possible that plaintiff's subsequent physical condition was caused by the fall was insufficient); *Ranes v. Adams Laboratories, Inc.*, 778 N.W.2d 677, 688-689 (Iowa 2010) (expert testimony required to prove the effect of medications).

During his deposition, Plaintiffs' expert expressly stated: "I'm not here to say [Plaintiff's] arm was cut off because of [Defendant] Sarah Harty". (App. 0423). This admission should have been dispositive of the appeal. When Plaintiffs' counsel attempted to rehabilitate this testimony and asked a

leading causation question detailing Plaintiffs' counsel's causation theory, Plaintiffs' expert still declined to express a sufficient causation opinion. (App. 0444). Instead, the entirety of Plaintiffs' expert testimony establishes he did not have a but-for causation opinion and any opinions he did have about the effect of earlier antibiotics would be speculation. (App. 423-451).

Thus, the Court of Appeals decision also conflicts with the legion Court of Appeals and Iowa Supreme Court cases that hold speculation cannot generate a genuine issue of material fact. *See, e.g., Asher v. OB-Gyn Specialists, P.C.*, 846 N.W.2d 492, 501 (Iowa 2014) ("causation [in a medical malpractice case] cannot be established through guesswork or speculation"); *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 718 (Iowa 2001) (same); *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."); *Braunschweig v. Bormann*, 699 N.W.2d 684 (Iowa Ct. App. 2005) (inferences based on conjecture and speculation are not legitimate); *Lewis v. State ex rel. Miller*, 646 N.W.2d 121, 124 (Iowa Ct. App. 2002) (same); *Hlubek v. Pelecky*, 701 N.W.2d 93, 96 (Iowa 2005) ("Speculation is not sufficient to generate a genuine issue of fact."); *Henchey v. Dielschneider*, WL 227642, 3-4 (Iowa Ct. App. 2011)

(same); *Cemen Tech, Inc. v. Three D Indus., L.L.C.*, 753 N.W.2d 1, 5 (Iowa 2008) (same); *DeLathower v. Crimi*, No. 00-1661, 2002 WL 21921, at *4 (Iowa Ct. App. Jan. 9, 2002) (same); *Smith v. City of Waverly*, 759 N.W.2d 812 (Iowa Ct. App. 2008) (same); *Walls v. Jacob N. Printing Co.*, 618 N.W.2d 282, 286 (Iowa 2000) (**vacating court of appeals decision and affirming district court where the record could not support liability without "rank speculation"**); *Olson v. Durant Cmty. Sch. Dist.*, No. 17-1235, 2018 WL 3302033, at *4 (Iowa Ct. App. July 5, 2018) (holding that "bare assertions and speculation do not show a genuine issue of material facts").

In addition to his failure to express a but-for causation opinion, Plaintiff's expert testified **five** times that any opinion he would have as to what effect earlier antibiotic intervention would have had on Ms. Susie was speculation:

> 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.**

(App. 0428)

> **4** Q. You agree that if I give you antibiotics this
> **5** minute, particularly in a group A strep necrotizing
> **6** soft tissue scenario, it's going to take a while for
> **7** the antibiotics to do the desired job?
> **8 A. And again, this is speculative because a while**
> **9 is not only a matter of opinion but it's also a matter**

10 of how much tissue damage had occurred.

(App. 0427)

23:Q:Well, if she had a firestorm brewing when
24: she walked into the urgent care clinic, as Dr. Crew said,
25: Dr. Crew telling us that she has the beginnings of
1: necrotizing soft tissue disease then and there, do you
2: think -- do you really think Sara Harty can stop that?...
13: A:**And it's <u>speculative</u>, but**
14: clearly time is of the essence when you're getting
15: progressively more ill.

(App. 0423-24)

13 Q. Isn't the bottom line, you don't know what
14 would have happened to Sharon Susie had she had CBC
15 testing, had she returned to the clinic in 20 hours or
16 less than 24 hours, had a comprehensive physical exam
17 been documented? You don't know that the outcome would
18 not have been exactly the same. True?
19 A. <u>I don't know</u>, but the faster you get to care
20 when you're sick, the better off you are.

(App. 0423)

19 Q. What I'm getting to, we are **<u>speculating</u>** 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 <u>A. Yes.</u>

(App. 0451)

If this testimony (in conjunction with testimony that "I'm not here to say her arm was cut off because of Sarah Harty") is insufficient to establish no genuine issue of material fact exists as a result of the opposing expert's

inability to give a non-speculative causation opinion, then district courts, Defendants, and defense counsel need guidance from this Court as to whether it is even possible to obtain summary judgment for lack of a non-speculative causation opinion, and, if so, how many admissions that an expert is speculating are necessary to establish there is no genuine issue of material fact for trial. The above testimony would have forced the jury to speculate the issue of causation. The above testimony establishes any causation opinions Dr. Schechter would have rendered at trial would have been speculation. No expert witness provided an opinion that Ms. Susie's arm would have or could have been saved with antibiotics on September 29, 2012.

Judge McDonald in his dissent and Judge Ackerman in granting the summary judgment motion correctly analyzed the causation issue. No expert witness provided a but-for causation opinion or any causation opinion at all about what would have happened with earlier antibiotics or what the likelihood would have been, if any, that Ms. Susie's arm or toes could have been saved. No expert would have testified that there was even a possibility Ms. Susie's arm could have been saved. As Judge McDonald noted, while no magic words are required[2], there still must be an expert opinion on causation

[2] *Hansen v. Cent. Iowa Hosp. Corp.*, 686 N.W.2d 476, 485 (Iowa 2004) (while buzzwords like "reasonable degree of medical certainty" are not required to

to the effect that it is more likely than not the outcome would have been different but for the alleged negligence. (Ex. A, p. 17). **No such opinion exists in this case**. The Court of Appeals' opinion conflicts with voluminous case law on the important matters raised herein, warranting further review by this Court.

BRIEF

I. THE DISTRICT COURT CORRECTLY HELD THERE WAS INSUFFICIENT EVIDENCE OF BUT-FOR CAUSATION

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 a 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,

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create a jury question on causation, there still must be expert testimony indicating probability of a causal connection").

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)). No party disputes that the question of whether earlier administration of antibiotics to Sharon Susie would have saved her arm requires expert testimony. 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).

b. The Court of Appeals Erred in Finding There Was Sufficient Expert Evidence to Create a Fact Issue on Causation

The harm Plaintiffs claim because of the allegedly negligent delay in diagnosis is the amputation of Ms. Susie's right arm. (Petition, p. 8-10); (App. 0014-16). 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?**

Neither the Court of Appeals nor Plaintiffs have identified what expert witness was going to provide an affirmative answer to this question. No witnesses for either side were going to tell the jury 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 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.

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). In addition to his repeated admissions that any causation opinions would be speculation, Dr. Schechter testified: "I'm not here to say her arm was cut off because of Sarah Harty."

(Schechter Depo. p. 100:7-100:10); (App. 0423). 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 declined to render the causation opinion necessary to support Plaintiffs' case. (App. 0444).

Additionally, Dr. Schechter conceded it would take 36 hours for the antibiotics to be effective, and **he further conceded 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). This admission is critical because antibiotics alone are not effective to treat necrotizing fasciitis, but also requires surgery. (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).

The jury would have had nothing other than speculation upon which to conclude Ms. Susie's arm could have been saved by administration of antibiotics on September 29, 2012. Nonetheless, the Court of Appeals held Dr. Schechter's testimony, Dr. Schechter's report, and the testimony of other

physicians generated a question of fact for the jury. None of this evidence created a genuine issue of material fact.

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 Defendants' alleged negligence caused Susie's damages. On numerous occasions, Dr. Schechter, Plaintiffs' sole expert physician, indicates he is not focused on the causation questions:

> **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.**[3]

(App. 0367).

> …. **I'm here actually to talk**
> **5 about whether or not I think the standard of care of**
> **6 episodic care was met.**
> **7** Q. Or are you here to say that Sharon Susie's arm
> **8** was cut off because of Sarah Harty?
> **9 A. I'm not here to say her arm was cut off because**
> **10 of Sarah Harty. I'm here to say that she became ill and**
> **11 septic because she wasn't given a thorough enough**
> **12 evaluation and followup.**
> **13** Q. Isn't the bottom line, you don't know what
> **14** would have happened to Sharon Susie had she had CBC

[3] 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.

15 testing, had she returned to the clinic in 20 hours or
16 less than 24 hours, had a comprehensive physical exam
17 been documented? You don't know that the outcome would
18 not have been exactly the same. True?
19 A. I don't know, but the faster you get to care
20 when you're sick, the better off you are.

(App. 0423).

Dr. Schechter testified he could not say how long it would take for antibiotics to take effect but agreed with Plaintiffs' previous expert it would take 36 hours. He conceded it would be "speculation" as to the effect of antibiotics on Ms. Susie's outcome:

Q. Well, I'll just take Dr. Crew because you have
12 been represented by counsel to have opinions the same
13 as Dr. Crew. And you said at the very top of our
14 conversation here words of the effect that you embrace
15 his opinions.
16 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.

(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.

(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.

(App. 0451).

Dr. Schechter conceded that he can only speculate as to the effects of antibiotics on September 29, 2012. 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?...
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.

(App. 0444).

When asked the ultimate but-for causation question in a leading fashion by Plaintiffs' counsel, Plaintiffs' expert still would not give a causation opinion. 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." The question Plaintiffs' counsel asked and the question that will be before the jury: "would her arm more likely than not have been saved?" no guidance to the jury on that question is provided by Dr. Schechter's response.

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 Susie had necrotizing fasciitis on September 29, 2012, and where it is undisputed that 24 hours later Ms. Susie was suffering from necrotizing fasciitis against which antibiotics are not effective.

None of Dr. Schechter's testimony rises above the level of speculation and conjecture. Regardless, Dr. Schechter was unwilling or unable to tell the jury what difference Sarah Harty could have made for Susie. 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 it was possible her arm could have been saved. Dr. Schechter's deposition testimony confirms he was not going to offer any opinion that Ms. Susie's arm could have been saved by administration of antibiotics one day earlier.

ii. Dr. Schechter's 1.508 Report Does Not Create a Genuine Issue of Material Fact

As the Court of Appeals' decision noted, 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. (Ex. A, p. 11-12). However, as Judge McDonald noted, Dr. Schechter's report is not competent evidence on summary judgment because the unsworn expert report is a disclosure of expected testimony. (Ex. A, p. 17-19).

More importantly, as Judge McDonald further explained, **Dr. Schechter's deposition testimony makes clear that he was not going to provide the causation opinion contained in his report at trial and any causation opinions he could offer would be speculation**. (Ex. A, p. 17-19). Instead, 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. (App. 0394-95, 0416, 0421-23, 0427-28, 0444, 0451).

Dr. Schechter's report is also 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). Judge McDonald correctly noted that even an affidavit affirming Dr. Schechter's report would not be sufficient because it would violate the contradictory affidavit rule. (Ex. A, p. 18-19).

The majority opinion holds Defendants impliedly conceded that Dr. Schechter could testify to the opinions in his report because Defendants' summary judgment briefing argued that no new opinions may be offered beyond those in expert reports. The reference to Rule 1.508 reports in Defendants' briefing was in the context of establishing that no new, non-disclosed opinions from other experts, such as treaters, could save the causation case from summary judgment. As explained herein and in Defendants' briefing, the issue with Dr. Schechter is not that he failed to disclose a causation opinion in his report, the issue is that he refused to provide

those same opinions when asked under oath, confirmed under oath any causation opinions he has would be speculation, and the Rule 1.508 summary itself is not competent evidence on summary judgment[4].

Dr. Schechter's report is inadmissible hearsay. Dr. Schechter's deposition testimony makes clear that he does not hold the causation opinion contained in his report. Dr. Schechter repeatedly confirmed any causation opinions would be speculative. Dr. Schechter's report does not create a fact issue.

c. The Testimony from Other Physicians Does Not Create a Genuine Issue of Material Fact on Causation

The final basis upon which the Court of Appeals relied in finding Plaintiffs had sufficient causation evidence to generate a fact issue was testimony from other physicians. The Court of Appeals characterizes Dr. Lamptey, Dr. Rizk, and Dr. Vemuri's testimonies as supporting the proposition that "the type of bacteria infecting Sharon [Susie] could be treated with antibiotics, **if caught early enough.**" (Ex. A, p. 12) (emphasis added). The last clause of this statement from the Court of Appeals highlights the

[4] Iowa Rule of Civil Procedure 1.981(3) provides, in part: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact…". The rule does not contemplate unsworn expert report as competent evidence to resist summary judgment. *See also* Exhibit A, p. 17-19.

problem with reliance on these other physicians to create a fact issue. No expert witness was going to opine that September 29, 2012 was "early enough" to prevent the harm. The only record testimony was that it would be speculation as the effect of antibiotics had they been given on September 29, 2012. The admissions from Dr. Schechter that it would take 36 hours for antibiotics to be effective and that Susie already had necrotizing fasciitis on September 29, 2012, only support the conclusion that antibiotics on September 29, 2012 would have made no difference. As Judge McDonald notes, general "earlier is better" testimony is insufficient to create a genuine issue of material fact, and the majority's holding conflicts with prior case law on this issue.

II. THE DISTRICT COURT CORRECTLY HELD THERE WAS INSUFFICIENT EVIDENCE OF LOSS OF CHANCE

The Court of Appeals also overruled the district court's determination on the loss of chance issue, stating: "The Susies presented expert testimony to show Sharon's chance of a cure from necrotizing fasciitis was reduced due to defendants' actions. Additionally, Dr. Lamptey, Dr. Rizk, and Dr. Vemuri stated that the early administration of antibiotics could have slowed or stopped the progression of the bacterial infection in Sharon's arm." (Ex. A, p. 13-14). The Court of Appeals does not cite to the record to support these statements. No expert testified Ms. Susie had any chance **for a cure** from necrotizing

fasciitis on September 29, 2012.[5] None of the treating physicians opined that antibiotics on September 29, 2012 could have slowed or stopped the progression of infection in this case.

If there was in fact a chance of saving Ms. Susie's arm with antibiotics on September 29, 2012, a conclusion unsupported by evidence, the jury nonetheless would have no testimony from which they could determine what the chance was. No witness has been willing to testify that it was even **possible** that Ms. Susie's arm would have been saved with antibiotics on September 29, 2012. 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).

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. Iowa Civ. Jury Inst.

[5] Dr. Schechter gave the convoluted response, addressed in detail on page 17 above, that there was a possibility that early (how early?) intervention could have "**potentially averted some tissue loss**." He did not opine there was any chance **for a cure**. Of course, he also testified his opinions regarding the effects of antibiotics were speculation.

200.39. But **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 Plaintiffs on this theory.[6] 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 provides any guidance on that question. Instead, the admissions from Dr. Schechter, combined with the other

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[6] *Mead v. Adrian*, 670 N.W.2d 174 n. 5 (Iowa 2003), relied upon by the Court of Appeals, states:

> Dr. Adrian argued to the district court that in order to sustain a recovery for lost chance of survival there must be expert testimony concerning the probability of survival expressed as a percentage. We believe that when the claim is submitted as an alternative to ordinary wrongful-death damages it is unrealistic to require a claimant who is arguing that it is more probable than not that death resulted from the defendant's negligence to also present evidence that the probability of survival was in fact some lesser percentage. The jury must determine the amount of proportionate reduction based on all of the evidence in the case.

Defendant submits it is not clear what evidence supports a loss of chance case if a claimant is "not required to also present evidence that the probability of survival was in fact some lesser percentage." Regardless, a loss of chance claim necessarily requires the jury to determine the percentage lost, consistent with the jury instructions on loss of chance and Justice Cady's concurrence in *Mead*. Neither the evidence supporting the loss of chance claim nor the jury's determination as to what percentage chance was lost in *Mead* are set forth in the opinion so it is impossible to analyze the issue in detail. However, it is unclear how in a complex medical negligence case the jury could determine the percent of chance was lost without an expert opinion as to what percentage of chance was lost, providing at least a range of percentages, or providing some other basis from which the jury could determine the loss of chance question **without the jury speculating** as to what the loss of chance was.

expert testimony in the record, establish that antibiotics 24 hours earlier would not have made any difference.

Plaintiffs also did not timely disclose any loss of chance evidence. There were 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.

No expert witnesses provided any testimony Ms. Susie lost any chance to preserve her arm, nor did they provide any testimony about what that chance was. As Judge McDonald concluded: "there is no non-speculative opinion or other evidence in the record from which a jury could infer that if the defendants had done something different on the day Susie presented at the urgent care clinic, the harm could have been avoided." (Ex. A, p. 24).

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 causation. 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 Court of Appeals' determinations that sufficient expert evidence on causation exists to generate a fact question and that speculation is sufficient to generate a fact question conflicts with

voluminous precedent on these important matters, and Defendants respectfully request this Court grant this application for further review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This application complies with the type-volume limitation of Iowa R. App. P. 6.1103(4) because this application has been prepared in a proportionally spaced typeface using Microsoft Office Word in font size 14, Times New Roman, and contains 5,546 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

Dated: November 27, 2018.

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