A11-402

State of Minnesota
In Court of Appeals

Jocelyn Dickhoff by her parents and natural guardians
Joseph Dickhoff and Kayla Dickhoff,

Appellants,

v.

Rachel Green, M.D. and
Family Practice Medical Center of Willmar, P.A.,

Respondents.

BRIEF AND ADDENDUM OF APPELLANTS

Kay Nord Hunt (I.D. No. 138289)
Stephen C. Rathke (I.D. No. 89771)
LOMMEN, ABDO, COLE,
KING & STAGEBERG, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Attorneys for Appellants Jocelyn Dickhoff by her parents and natural guardians Joseph and Kayla Dickhoff

Steven R. Schwegman (I.D. No. 161433)
James S. McAlpine (I.D. No. 0322155)
QUINLIVAN & HUGHES, P.A.
400 South First Street, Suite 600
PO Box 1008
St. Cloud, MN 56302
(320) 251-1414

Attorneys for Respondents Rachel Green, M.D. and Family Practice Medical Center of Willmar, P.A.

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE AND FACTS 2

A. Jocelyn's Mother Informed Jocelyn's Physician Dr. Tollefsrud of the Bump on Jocelyn's Buttocks and Was Told Not to Worry About It 2

B. Dr. Tollefsrud's Medical Charts on Jocelyn Do Not Reflect the Presence of the Bump Until June 14, 2007, Although Dr. Tollefsrud Acknowledges She Was Aware of It at an Earlier Date 4

C. Upon Referral of Jocelyn to Another Physician, Jocelyn's Cancer Was Diagnosed 6

D. Plaintiffs Bring This Lawsuit for Medical Malpractice in August 2009 7

E. Plaintiffs Support Their Medical Malpractice Case With Expert Testimony 8

F. Jocelyn's Medical Condition Has Deteriorated During This Lawsuit 10

G. Respondents Seek Dismissal of Plaintiffs' Claims by Labeling Plaintiffs' Claims to Be "Loss of Chance" and the Trial Court Dismisses Plaintiffs' Lawsuit. 11

ARGUMENT 13

I. THE TRIAL COURT COMMITTED ERROR IN DISMISSING PLAINTIFFS' MEDICAL MALPRACTICE ACTION AGAINST RESPONDENTS 13

A. This Court's Review Is *De Novo* 13

B. The Standard for Establishing a Prima Facie Case of Medical Malpractice Is Well Established 14

C. Plaintiffs Present Traditional Tort Claims of Medical Negligence 16

D. Plaintiffs' Claim Is Not One for Loss of Chance or Negligent Aggravation of a Preexisting Condition 18

1. Minnesota case law supports reinstatement of Plaintiffs' claims 18

2. Loss of a chance is not asserted here 21

E. The Trial Court's Discussion of Statistics is Confused and Contrary to Minnesota Law 25

II. PLAINTIFFS ARE ENTITLED TO PROCEED ON THEIR CLAIM FOR DAMAGES BASED ON JOCELYN'S RECURRENCE OF HER CANCER 26

A. Jocelyn Is Damaged by Recurrence of Cancer 26

B. Trial Court Dismisses Plaintiffs' Claim Based on Loss of Chance 27

C. The Trial Court's Decision Is Against the Facts of Record and Its Ruling Is Based on an Erroneous View of the Law 28

1. Trial court abused its discretion 28

2. Plaintiffs' expert affidavit is legally sufficient 29

CONCLUSION 30

CERTIFICATION OF BRIEF LENGTH 31

TABLE OF AUTHORITIES

Statutes:

Minn. Stat. § 145.682 . . . . . 12, 28, 30

Cases:

Alberts v. Schultz,
975 P.2d 1279 (N.M. 1999), *reh'g denied* 22

Anderson v. State Dep't of Natural Resources,
693 N.W.2d 181 (Minn. 2005) 14

Bauer v. Friedland,
394 N.W.2d 549 (Minn. Ct. App. 1986) 16

Blatz v. Allina Health System,
622 N.W.2d 376 (Minn. Ct. App. 2001) 15

Broehm v Mayo Clinic Rochester,
690 N.W.2d 721 (Minn. 2005) 28

City of North Oaks v. Sarpal,
___ N.W.2d ___, 2011 WL 1775532 (Minn. 2011) 1, 28

Columbia Rio Grande Regional Health Care, L.P. v. Hawley,
188 S.W.3d 838 (Tex. Ct. App. 2006) 25

Cooper v. Hartman,
533 A.2d 1294 (Md. 1987) 21, 22

Cornfeldt v. Tongen,
295 N.W.2d 638 (Minn. 1980) 1, 15, 18

Crosby v. Myhra-Bloom,
2009 WL 911664 (Minn. Ct. App. 2009) 19

Dickey v. Daughety,
917 P.2d 889 (Kan. 1996) 24

Dumas v. Cooney,
1 Cal. Rptr.2d 584 (Cal. Ct. App. 1991), *rev. denied* 19, 21, 22

Fabio v. Bellomo,
489 N.W.2d 241 (Minn. Ct. App. 1992) 20

Fabio v. Bellomo,
504 N.W.2d 758 (Minn. 1993) 20, 23

Flom v. Flom,
291 N.W.2d 914 (Minn. 1980) 15

Funchess v. Cecil Newman Corp.,
632 N.W.2d 666 (Minn. 2001) 15

Gradjelick v. Hance,
646 N.W.2d 225 (Minn. 2002) 16

Hebert v. City of Fifty Lakes,
744 N.W.2d 226 (Minn. 2008) 14

Jensen v. Linner,
260 Minn. 22, 108 N.W.2d 705 (1961) 16

Leubner v. Sterner,
483 N.W.2d 518 (Minn. Ct. App. 1992) 20

Leubner v. Sterner,
493 N.W.2d 119 (Minn. 1992) 15, 20, 29

MacRae v. Group Health Plan, Inc.,
753 N.W.2d 711 (Minn. 2008) 1, 15, 17-19, 29

Mead v. Adrian,
670 N.W.2d 174 (Iowa 2003) 21, 22

Nord v. Herreid,
305 N.W.2d 337 (Minn. 1981) 14

Osborne v. Twin Town Bowl, Inc.,
749 N.W.2d 367 (Minn. 2008) 15

Peterka v. Dennis,
764 N.W.2d 829 (Minn. 2009) 14

Pietrzak v. Eggen,
295 N.W.2d 504 (Minn. 1980) 25, 26

Roberts v. Ohio Permanente Med. Group, Inc.,
668 N.E.2d 480 (Ohio 1996) 22

Sorenson v. St. Paul Ramsey Med. Ctr.,
457 N.W.2d 188 (Minn. 1990) 28

Sumstad v. Wilson,
2009 WL 173506 (Minn. Ct. App. 2009) 23, 25

Wartnick v. Moss & Barnett,
490 N.W.2d 108 (Minn. 1992), *reh'g denied* 1, 16

Other Authorities:

4 Minn. Dist. Judges Ass'n, Minnesota Practice - Jury Instr. Guides,
CIVJIG § 27.10 (5th ed.) 15

4A Minn. Prac. Jury Instr. Guides CIVJIG § 91.85 25

STATEMENT OF THE ISSUES

I. DUE TO RESPONDENTS' FAILURE TO AND RESULTING DELAY IN DIAGNOSING AND TREATING APPELLANT JOCELYN DICKHOFF'S CANCER, HER CANCER WHICH WOULD HAVE BEEN CURABLE WITH TIMELY DIAGNOSIS AND TREATMENT IS NO LONGER CURABLE AND SHE WILL NOT SURVIVE. BASED ON THE FACTS OF RECORD AS APPLIED TO MINNESOTA LAW, ARE APPELLANTS ENTITLED TO PROCEED ON THEIR MEDICAL MALPRACTICE CLAIMS AGAINST RESPONDENTS?

Respondents sought dismissal of Appellants' claims by a motion in limine which was granted by the trial court. (Add. 1; A. 186, 188).

MacRae v. Group Health Plan, Inc., 753 N.W.2d 711 (Minn. 2008).

Cornfeldt v. Tongen, 295 N.W.2d 638 (Minn. 1980).

Wartnick v. Moss & Barnett, 490 N.W.2d 108 (Minn. 1992), *reh'g denied.*

II. BASED ON THE FACTS OF RECORD AS APPLIED TO MINNESOTA LAW, ARE APPELLANTS ENTITLED TO PROCEED ON THEIR CLAIM FOR DAMAGES BASED ON APPELLANT JOCELYN DICKHOFF'S RECURRENCE OF CANCER?

Respondents sought dismissal of Appellants' claim by a motion in limine which was granted by the trial court. (Add. 1; A. 188).

MacRae v. Group Health Plan, Inc., 753 N.W.2d 711 (Minn. 2008).

City of North Oaks v. Sarpal, ___ N.W.2d ___, 2011 WL 1775532 (Minn. 2011).

STATEMENT OF THE CASE AND FACTS

The earlier cancer is discovered and treated, the more likely one will be cured. (Add. 18). Thus, the span of time a patient waits for a diagnosis can mean the difference between life and death. This case presents that situation. (Add. 17-18). Due to Respondent/Defendant Dr. Rachel Tollefsrud's (formerly Dr. Rachel Green) failure to diagnose and/or timely refer Jocelyn Dickhoff to another physician for diagnosis, Jocelyn's otherwise curable cancer is no longer curable. (Add. 17-18, 21-22). The trial court, the Honorable D.M. Spilseth, dismissed this medical malpractice lawsuit, concluding that such a lawsuit is "not recognized by the Supreme Court of Minnesota." (Add. 7). It also dismissed any claim for treatment costs as a result of Jocelyn's August 2010 recurrence of cancer as "a theory of compensable damages [that has] been consistently rejected by the Minnesota Supreme Court." (Add. 8). Appellants/Plaintiffs Jocelyn Dickhoff by her parents and natural guardians Joseph Dickhoff and Kayla Dickhoff (collectively Plaintiffs) challenge the dismissal of their lawsuit. The material facts are as follows.

A. Jocelyn's Mother Informed Jocelyn's Physician Dr. Tollefsrud of the Bump on Jocelyn's Buttocks and Was Told Not to Worry About It.

Jocelyn Dickhoff (Jocelyn) was born on June 12, 2006. (A. 69). After birth, Jocelyn was transferred to the Neonatal Intensive Care Unit of the University of Minnesota Children's Hospital with a primary diagnosis of pulmonary hypertension. (A. 66). Following her discharge two weeks later, Jocelyn was under the care of

Dr. Tollefsrud at Respondent/Defendant Family Practice Medical Center of Willmar, P.A. (Medical Center). (A. 69).[1]

Jocelyn's mother, Appellant/Plaintiff Kayla Dickhoff (Mrs. Dickhoff), noticed a bump on Jocelyn's buttocks for the first time on June 28, 2006. (Kayla Depo., p. 40; A. 28). The next day, Mrs. Dickhoff brought Jocelyn to see Dr. Tollefsrud for a well baby check. Mrs. Dickhoff showed Dr. Tollefsrud the bump. (Id., pp. 40-41; A. 28-29). It was moveable under the skin and not sensitive to Jocelyn. (Id.) It was approximately one centimeter (Id. at 59; A. 33; Add. 16). Dr. Tollefsrud told Mrs. Dickhoff she did not know what it was, but it could be just a cyst. (Id. at 41; A. 29). Dr. Tollefsrud said she would keep an eye on it and the Dickhoffs were told not to worry. (Id.)

Jocelyn's next visit to Dr. Tollefsrud was on July 7, 2006. (Kayla Depo., p. 46; A. 30). Mrs. Dickhoff does not believe she raised the issue of the bump at that examination or on their following visit to Dr. Tollefsrud on July 24, 2006. (Id.)

By Jocelyn's well child visit on August 14, 2006, the bump had become larger. (Kayla Depo., pp. 52-53; A. 31-32). While the bump did not grow very fast, it was bigger than the size of a pea by this visit. (Id., pp. 52-53; A. 31-32). Mrs. Dickhoff again discussed the mass with Dr. Tollefsrud. Dr. Tollefsrud again said she would keep an eye on it. (Kayla Depo., p. 57; A. 33).

---

[1] For ease of reference, Respondent Dr. Rachel Tollefsrud f/k/a Dr. Rachel Green will be referred to as Dr. Tollefsrud. When Dr. Tollefsrud and the Medical Center are jointly referenced, they will be referred to as Respondents.

At the October 12, 2006 four-month check, Mrs. Dickhoff pointed out to Dr. Tollefsrud that she thought the mass had grown since the last visit. (Kayla Depo., pp. 59-60; A. 33). Dr. Tollefsrud again told the Dickhoffs they need not be concerned. (Id.) At the six-month well baby checkup, Mrs. Dickhoff again pointed out the mass to Dr. Tollefsrud and that it had grown. (Kayla Depo., pp. 69-70; A. 35).

The nine-month well baby check was held in March 2007. Mrs. Dickhoff again pointed to the bump and again the fact it was growing. (Kayla Depo., pp. 81-82; A. 36). By this checkup, the mass had deviated, was less moveable and was pushing on the soft tissue of Jocelyn's buttocks. (Kayla Depo., p. 83; A. 36). It was now approximately 3 centimeters in diameter. (Id. at p. 82; A. 36; Add. 16).

B. Dr. Tollefsrud's Medical Charts on Jocelyn Do Not Reflect the Presence of the Bump Until June 14, 2007, Although Dr. Tollefsrud Acknowledges She Was Aware of It at an Earlier Date.

At no time, as set forth above, did Dr. Tollefsrud express any concern about the bump, order any tests, consult with any other physicians or note the bump in Jocelyn's medical records. (A. 69-82 Add. 12-14). According to Dr. Tollefsrud's charting, the bump is not identified in Jocelyn's medical records until her 12-month well baby check. (Tollefsrud Depo., p. 24; A. 58).

On Jocelyn's June 14, 2007 12-month well child visit, the bump was charted for the first time. (Add. 14). Jocelyn's medical chart contains the following notation: "Lump on buttock. Has had small lump of left buttock which had been unchanged, now

has gotten larger.[2] Also with redness in left perianal area. No diarrhea sometimes seems to be tender when wiping, other times doesn't bother her." The chart also states: "Rectal: comments: left perianal erythema, mass palpitated, approximately 4 cm. diameter extending to buttock. Non-tender." (Id.)

Although not charted, Dr. Tollefsrud has admitted she was aware of the mass prior to Jocelyn's 12-month well baby check and she discussed it with the Dickhoffs at an earlier appointment. Dr. Tollefsrud, however, does not know exactly when that discussion occurred. (Id. at pp. 24, 28-30; A. 58-60). Dr. Tollefsrud testified:

> Q. Okay. What do you recall about that one conversation or discussion or notice?
>
> A. I recall there being a mention of a bump on Jocelyn's buttocks area and, um, mom being concerned or asking me about what that might be.
>
> . . .

(Tollefsrud Depo., pp. 29-30; A. 60).

Dr. Tollefsrud offers by way of explanation that she sees 20 to 24 patients in a typical day and only occasionally takes notes when she conducts a patient's physical examination. (Id. at p. 17-18; A. 57). Generally it is not until the end of the day or occasionally the next day before she makes entries into the patient's chart concerning the visit. (Id. at pp. 17-18; A. 57).

---

[2] Mrs. Dickhoff testified that that is an inaccurate history because the mass did grow well before the one-year well baby checkup. (Kayla Depo., pp. 53-54; A. 32).

C. Upon Referral of Jocelyn to Another Physician, Jocelyn's Cancer Was Diagnosed.

On June 14, 2007, Dr. Tollefsrud referred Jocelyn to Dr. Marie Schroeder of Affiliated Community Medical Center. (Add. 14). Dr. Schroeder charted: "Mother states that Jocelyn has had a lump in that area ever since birth. . . . There are two 1 cm. raised redden areas in the 6 and 7 o'clock position around the rectum. In addition, laterally in the right buttock is a more firm area." (Add. 5-6).

Jocelyn was referred to Dr. Robert Acton, a pediatric surgeon at the University of Minnesota Hospitals. (Add. 14; A. 83; A. 96). An MRI of Jocelyn was done at Rice Memorial Hospital. The July 13, 2007 radiology final report states the following MRI findings regarding Jocelyn's mass:

> There is a large soft tissue mass measuring approximately 5.2 x 4.6 cm in the largest dimension in the inferior aspect of the sacrum, located predominately in the soft tissues and posterior to the perineal area. After contrast administration there is a heterogeneous enhancement of this mass, with areas of increased signal and mild enhancement and areas of no enhancement within. There is also small satellite ring and solid enhancing lesions. There is also a second abnormal enhancing mass measuring 3.2 x 1.5 in the left groin. It is uncertain if there is a connection between these two masses. The sacrum mass is extending also to the right side pelvis compressing the bladder from and lateral aspect of the wall. There is no bone involvement. This mass do not present with significant fat content in T1. The groin mass measures also 4.5 cm in the craniocaudal dimensions. In the face of this mass in the pelvis and left groin, diagnostic consideration would include tumor as nerve sheath tumor and neuroma . . . . Additional MRI of the entire spin and chest/abdomen cavity would be of further help in determining if there is additional lesions at the nerve origins . . . .

(Add. 15).

In August 2007, Dr. Brenda Weigel of the University of Minnesota Department of Pediatrics and an oncologist made the diagnosis of Stage IV alveolar rhabdomyosarcoma (RMS), a cancer of the connective tissues. This diagnosis includes a determination of metastasis. (Add. 15; A. 96-97). After diagnosis, Jocelyn received a 6 month regimen of chemotherapy. On December 5, 2007, physicians surgically removed "all gross disease. Residual viable tumor was seen in the surgical resection which required additional radiation and chemotherapy." (Add. 18; A. 97).

In a May 12, 2008 letter, Dr. Weigel states: "[b]ased on the CT scan showing two masses, Jocelyn was staged at Stage IV. The staging at Sloan Kettering was Stage III." (Add. 16). The generally accepted survival rate for Jocelyn according to Dr. Weigel is 30% for an event-free three-year survival. (Add. 17). In that letter, Dr. Weigel addresses the probable long-term consequences for Jocelyn if she should survive her disease. Dr. Weigel states: "[T]here is almost 100% chance of infertility and a real increased lifetime risk of second malignancies of multiple types." (Add. 17).

D. Plaintiffs Bring This Lawsuit for Medical Malpractice in August 2009.

This lawsuit was brought in August 2009 asserting that Respondents were negligent in failing to diagnose or refer Jocelyn's symptoms for appropriate testing. (A. 10). Due to the negligence of Dr. Tollefsrud and her clinic, Jocelyn's cancer was not timely and appropriately diagnosed and treated. The Dickhoffs asserted that had Respondents correctly diagnosed Jocelyn's symptoms earlier, her cancer would have been curable. (A. 10). As a direct result of Respondents' negligence, Jocelyn has suffered

injuries to her body which are permanent and/or fatal and Plaintiffs have incurred and will incur in the future medical and other related expenses. (Id.)

E. Plaintiffs Support Their Medical Malpractice Case With Expert Testimony.

In support of their medical malpractice lawsuit, Plaintiffs have presented the expert testimony of two experts. Dr. Edwin Forman is board certified in pediatrics hematology/oncology and a senior faculty member at Mount Sinai School of Medicine. (Add. 12, 20, 23). Dr. James Gelbmann is board certified by the American Academy of Family Practice and a family practice physician at the Brainerd Medical Center. (A. 1). At trial, Dr. Gelbmann will only offer an expert opinion on the standard of care and Respondents' deviation from it. The focus on appeal is on Dr. Forman's causation opinion.

Both Dr. Gelbmann and Dr. Forman, after reciting Jocelyn's medical history, state that it is their professional opinion that Dr. Tollefsrud was negligent in her care of Jocelyn and that this negligence is a departure and deviation from the standard of care. (Add. 16; A. 1). Both doctors state that the presence of the bump on Jocelyn's buttocks demanded, and the standard of care required, documentation in her medical records, constant and consistent monitoring, and diagnostic testing in order to determine the etiology of this abnormality. (Id.) And if a family practice physician cannot make the diagnosis, the standard of care requires referral to another physician for appropriate testing." (Id.)

Dr. Forman explains that RMS often presents as a painless mass without symptoms, which is what occurred here. (Add. 18). Often it is fixed to underlying tissue – which was not the case here, "suggesting that the tumor had not even spread locally." (Id.) When RMS "begins to invade, and partially when it crosses tissue planes the prognosis is much worse." (Id.) The key determinants of prognosis are size (worse progress and more intensive therapy if greater than 5 centimeters), clinical stage (worse prognosis for Stages III and IV) and invasion of regional lymph nodes. (Id.)

According to Dr. Forman, based upon the changes which occurred in the mass prior to the correct diagnosis and given the extent of metastasis upon diagnosis, "the alveolar rhabdomyosarcoma [the cancer] was not metastatic when its symptom was first observed by Jocelyn's mother when Jocelyn was a neonate." (Add. 17). If the diagnosis had occurred at or shortly after the bump was noticed when Jocelyn was a neonate, more likely than not her cancer would have been curable. (Id.) Given the fact that Jocelyn's disease at the time of diagnosis was at Stage III/IV, it is "more likely than not, she will not survive her disease." (Add. 17-18; Add. 21). At Stage III Jocelyn has a 40% chance of survival; Stage IV has a less than 5% survival rate. (Add. 18). Dr. Forman further explains that Jocelyn's survival would "have been much higher than 60 percent" with timely diagnosis. (Add. 19).

The best way to cure RMS is "total surgical removal when the diagnosis was made." But here, that was not possible because of the delayed diagnosis, but such

removal "clearly would have been possible in the first few months of [Jocelyn's] life." (Add. 18).

F. Jocelyn's Medical Condition Has Deteriorated During This Lawsuit.

Trial was scheduled to begin on May 6, 2010. (A. 191). On April 8, 2010 Dr. Forman submitted a second affidavit in response to the testimony of Respondents' experts. (Add. 20). Dr. Forman reiterated that based on the delay in diagnosis "more likely than not, [Jocelyn] will die in childhood of her disease." (Add. 21-22). He notes that he found nothing in the Respondents' experts' opinions "or in the testimony of Dr. Weigel which takes issue with the present unfavorable prognosis." (Add. 21). Dr. Forman repeats his opinion that Jocelyn's cancer "more likely than not, would have been curable if diagnosed and treated before nine months of age." He states that he also found nothing in Respondents' experts' opinions "or in the testimony of Dr. Weigel which takes issue with the favorable prognosis if diagnosis and treatment had occurred in that time frame." (Add. 21-22).

While this case has been pending, the medical condition of Jocelyn evolved and her condition has deteriorated. Her prognosis is grim. (Add. 6, 23; A. 20). On April 23, 2010, Jocelyn's cancer recurrence was verified. Chemotherapy again began on April 27, 2010. (Add. 23). On April 26, 2010, and as part of a multitude of motions in limine, Respondents by motion in limine sought to "preclude Plaintiffs' claim of damage for loss of chance of life or decreased life expectancy." (A. 186). The trial court continued the trial scheduled for May 10, 2010, in part because "the medical condition of the child

(Plaintiff Jocelyn Dickhoff) is evolving and recently her condition has deteriorated significantly. The child's prognosis is grim." (A. 20).

G. Respondents Seek Dismissal of Plaintiffs' Claims by Labeling Plaintiffs' Claims to Be "Loss of Chance" and the Trial Court Dismisses Plaintiffs' Lawsuit.

In May 2010, trial was rescheduled for January 3, 2011. (A. 195). It was subsequently rescheduled for May 10, 2011. (A. 25). On June 29, 2010, Respondents brought a renewed motion in limine again seeking an "Order dismissing Plaintiff Jocelyn Dickhoff's claim for loss of chance of life" but now adding a request for dismissal of "Plaintiff's claim for medical expenses based on the recurrence of cancer." (A. 188). Respondents cite to no Rule of Civil Procedure with their motion seeking dismissal of Plaintiffs' claims for purported "loss of chance of life." (Id.)

Respondents, by their motion to dismiss claim for loss of chance of life, did not challenge Dr. Forman's qualifications nor his expert medical opinion and acknowledge it is Dr. Forman's opinion that, based on the delay in Jocelyn's diagnosis due to Respondents' negligence, Jocelyn's cancer went from curable to not curable. (Defendants' Memorandum of Law in Support of Motion to Dismiss Plaintiff Jocelyn Dickhoff's Claim for Loss of Chance of Life and Plaintiff's Claim for Medical Expenses Based on the Recurrence of Cancer, p. 4, dated June 29, 2010; T. 10/25/10, p. 7). Nonetheless, Respondents assert on these facts, Jocelyn's medical malpractice claim is "prohibited as a matter of law in Minnesota" because Respondents label Plaintiffs' claims to be "loss of chance." (Id. at p. 18).

In addition, Respondents moved to dismiss Jocelyn's claims for future medical care and palliative care related to her 2010 recurrence of cancer. (Id. at pp. 18-20). This motion, according to their Memorandum, was based on Minn. Stat. § 145.682. (Id.)

In response, Plaintiffs viewed Respondents' motion for dismissal of "loss of chance" as one for summary judgment. (See Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, dated August 6, 2010). They explained that Respondents' analysis is misguided and that Plaintiffs' claims for damages as a result of Respondents' medical negligence are fully recognized under Minnesota law and are well supported traditional negligence tort claims – not so-called "loss of chance" claims. (Id., pp. 1-6). Plaintiffs assert that Respondents' motion sets up and attacks essentially a red herring. Plaintiffs' medical malpractice was not based on, and there was no need to rely on, any lost chance doctrine for Plaintiffs to recover tort damages due to Respondents' negligence.

Plaintiffs presented and asserted that Dr. Forman's third affidavit is legally sufficient with regard to the delay in diagnosis causing additional medical procedures and costs caused by the RMS recurrence. (Id., p. 6; Add. 23). Based on the recurrence of Jocelyn's cancer, Dr. Forman reviewed Jocelyn's medical records regarding the recurrence and particularly those of her treating oncologist Dr. Weigel. Because of the recurrence, Dr. Weigel scheduled a regimen of additional treatment and care therapy. (Add. 23). Based on his review, Dr. Forman further opined on August 6, 2010 that if Jocelyn's cancer had been timely diagnosed and treated, she would not have suffered the

2010 recurrence, requiring the subsequent medical care and potential additional care in the future. (Add. 23).

The trial court dismissed Plaintiffs' lawsuit. (Add. 1, 10). The trial court, in so dismissing, states: "Plaintiffs assert that as a result of [Respondents'] alleged negligence, Jocelyn's chance of an event-free three year survival decreased from 60% to no better than 40%. This is, in essence, a claim for loss of chance of life . . . ." (Add. 7). The trial court continues: "[c]laims for 'loss of chance' due to reduced life expectancy and increased risk of recurrence as a theory of compensable damages have been consistently rejected by the Minnesota Supreme Court." (Add. 8).[3]

ARGUMENT

I. THE TRIAL COURT COMMITTED ERROR IN DISMISSING PLAINTIFFS' MEDICAL MALPRACTICE ACTION AGAINST RESPONDENTS.

A. This Court's Review Is *De Novo*.

In labeling Plaintiffs' lawsuit as one for "loss of chance of life" and thereby seeking dismissal of Plaintiffs' lawsuit as a matter of law on that ground, Respondents cited to no Minnesota Rule of Civil Procedure as authority for their motion. (A. 188). Plaintiffs viewed Respondents' motion to be one for summary judgment because matters outside the pleadings were presented to the trial court for consideration. The trial court

---

[3] The trial court does not further explain why it concludes this case is a "loss of chance" case. As set out at pages 21-25 of this brief, "loss of chance" is a departure from traditional tort law and its definition varies from jurisdiction to jurisdiction. Some conceptualize it as an exception to legal cause or damages or both. As will be explained, Plaintiffs' claims, however, are traditional tort negligence claims.

did not state what standard it was applying in dismissing Plaintiffs' claims. (Add. 7). The trial court does state its determination is as a matter of law. (Id.)

On appeal from a summary judgment, this court reviews *de novo* whether a genuine issue of material fact exists and whether the trial court erred in applying the law. Peterka v. Dennis, 764 N.W.2d 829, 832 (Minn. 2009). Summary judgment is only appropriate when the evidence "shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Anderson v. State Dep't of Natural Resources, 693 N.W.2d 181, 186 (Minn. 2005). On a motion for summary judgment, evidence is not weighed and factual disputes are not resolved. Nord v. Herreid, 305 N.W.2d 337, 339 (Minn. 1981). The inquiry is only whether all the facts, when viewed in the light most favorable to the nonmoving party, compel one and only one conclusion. Id. The party moving for summary judgment carries this burden. Id.

This court also reviews *de novo* the district court's decision to grant a motion to dismiss for failure to state a claim upon which relief may be granted. Hebert v. City of Fifty Lakes, 744 N.W.2d 226, 229 (Minn. 2008).

B. The Standard for Establishing a Prima Facie Case of Medical Malpractice Is Well Established.

To establish a prima facie case of medical malpractice, a plaintiff must offer evidence that is sufficient to prove (1) the standard of care recognized by the medical community as being applicable to the case, (2) the defendant's departure from that standard of care, and (3) that the defendant's departure from the applicable standard of

care was a direct cause of the patient's injuries. MacRae v. Group Health Plan, Inc., 753 N.W.2d 711, 717 (Minn. 2008).[4] Only if the record reflects a complete lack of proof on any of the essential elements of the malpractice claim is summary judgment appropriate. Funchess v. Cecil Newman Corp., 632 N.W.2d 666, 672 (Minn. 2001).

To prove causation, plaintiff must prove, typically with expert evidence, that "it is more probable than not" that the patient's injury was a result of the defendant's negligence. Cornfeldt v. Tongen, 295 N.W.2d 638, 640 (Minn. 1980). A medical expert's opinion concerning causation must be "based on an adequate factual foundation," which may include "legitimate inferences" with "probative value in determining disputed fact questions." Blatz v. Allina Health System, 622 N.W.2d 376, 387 (Minn. Ct. App. 2001).

Causation is one element of a medical malpractice case. For causation, plaintiff must show the negligence made it probable, or more likely than not, that the injury occurred or will occur. Leubner v. Sterner, 493 N.W.2d 119, 121-22 (Minn. 1992); Cornfeldt, 295 N.W.2d at 640; see also Flom v. Flom, 291 N.W.2d 914, 917 (Minn. 1980).

The issue of causation is particularly unripe for summary judgment. Osborne v. Twin Town Bowl, Inc., 749 N.W.2d 367, 373 (Minn. 2008) ("whether proximate cause

---

[4] A "direct cause" is a cause that had a substantial part in bringing about "the harm." 4 Minn. Dist. Judges Ass'n, Minnesota Practice - Jury Instr. Guides, CIVJIG § 27.10 (5th ed.). Minnesota law uses the terms "direct cause," "proximate cause" and "substantial factor" interchangeably. Id. cmt.

exists in a particular case is a question of fact for the jury to decide"). The determination of proximate cause is normally a question of fact for the jury. Wartnick v. Moss & Barnett, 490 N.W.2d 108, 115 (Minn. 1992), *reh'g denied.* Indeed, it is only where "the record reflects a complete lack of proof" such that all reasonable minds can come to only one conclusion, that the issue of causation can become a question of law. Gradjelick v. Hance, 646 N.W.2d 225, 230 (Minn. 2002). As stated by this Court in Bauer v. Friedland, 394 N.W.2d 549, 554 (Minn. Ct. App. 1986), citing Jensen v. Linner, 260 Minn. 22, 108 N.W.2d 705, 712 (1961), "a person is not required to prove her theory of negligence by testimony so clear as to exclude every other possible theory."

C. Plaintiffs Present Traditional Tort Claims of Medical Negligence.

Plaintiffs present a traditional tort negligence claim – not a so-called "loss of chance" claim. Plaintiffs seek recovery for harm that Respondents more probably than not caused or will cause due to their negligence. Plaintiffs have supported their claims with ample evidence and expert support. Dismissal of this case was improper.

Plaintiffs established by expert medical opinion that it is more probable than not that Jocelyn would have survived – been cured of cancer – had she been diagnosed and treated earlier and that in her expert's opinion her survival from cancer is presently not probable. (Add. 12, 20 & 23). Jocelyn's expert's opinion is explicit that the alteration in probability of her survival was a direct result of the delay attributable to Respondents' negligence. (Id.)

From June 29, 2006 until June 14, 2007, Dr. Tollefsrud was the only doctor who saw Jocelyn. At the two-week well baby visit, Jocelyn's mother saw the bump, pointed it out to Dr. Tollefsrud and discussed the bump with her. At the time, the bump was approximately 1 centimeter in diameter, without color, movable under the skin and not sensitive to the child. (Add. 16). In subsequent well baby checks, the bump was again pointed out to Dr. Tollefsrud. By March 2007 (the nine-month well baby visit), the bump had increased in size to about 3 centimeters in diameter and was less movable. (Id.) At no time did Dr. Tollefsrud express any concern about the bump, order any tests, consult with any other physicians, or even note the bump in the medical records. (Id.)

It was not until June 14, 2007, at Jocelyn's 12-month well child visit, that Dr. Tollefsrud even notes the existence of the bump and only then refers Jocelyn to pediatrics for further evaluation. By the time Jocelyn was treated at the University of Minnesota, her diagnosis was Stage IV metastatic alveolar rhabdomyosarcoma. (Add. 16).

By failing to diagnose Jocelyn's cancer until sometime after her first birthday, Respondents allowed the cancer to grow to an advanced stage and it is no longer curable. (Add. 17-18).

Contrary to the trial court's understanding of Minnesota law, under Minnesota law, Plaintiffs have a cause of action against Respondents for failure to diagnose Jocelyn's cancer and to recover for all the harm associated with the cancer's unchecked progress. As the Minnesota Supreme Court recognized in MacRae, 753 N.W.2d at 722-23, a patient

suffers compensable damage when his or her cancer turns fatal due to the delay in cancer diagnosis.

With the delay in diagnosis, Jocelyn's probability of survival dropped from more likely than not to survive to more likely than not to not survive. As Dr. Forman explained, Jocelyn's cancer was not metastatic when the symptoms were first observed by Jocelyn's mother when Jocelyn was a neonate. However, due to the delay in diagnosis and treatment, which did not occur until Jocelyn reached 12 months of age, Jocelyn's disease is at Stage III/IV and more likely than not she will not survive the disease. (Add. 18, 21).

D. Plaintiffs' Claim Is Not One for Loss of Chance or Negligent Aggravation of a Preexisting Condition.

1. Minnesota case law supports reinstatement of Plaintiffs' claims.

Respondents argue that Plaintiffs cannot recover anything due to Respondents' negligence as they label Plaintiffs' claims as being for "a loss of chance." Plaintiffs' claims are not for loss of chance. Just as Plaintiffs are able to recover for harm the negligence likely caused in the past, Plaintiffs are able to recover for harms the negligence will likely cause in the future. See Cornfeldt, 295 N.W.2d at 640. In this case, Jocelyn now suffers from her advanced cancer. She has suffered a recurrence of cancer and will die of her disease.

This harm is compensable under Minnesota law. In MacRae, the Minnesota Supreme Court considered when a patient suffers compensable damage for failure to

timely diagnose cancer. 753 N.W.2d at 721-22. After reviewing longstanding precedent, the Minnesota Supreme Court held that as a matter of law, "a patient suffers compensable damage from a negligent misdiagnosis of cancer when it becomes more likely than not he will not survive the disease." Id. at 722.

Plaintiffs have presented sufficient expert and factual support to meet this standard. Dr. Forman opines that due to the delay in diagnosis, Jocelyn went from curable with timely diagnosis to it being "more likely than not" she will not survive her cancer. Crosby v. Myhra-Bloom, 2009 WL 911664 at *5-6 (Minn. Ct. App. 2009) (A. 205) (noting that a cancer survival rate serves as proof that a patient "more likely than not" will not survive the cancer). Jocelyn is only in this position because Respondents failed to timely diagnose her cancer. With a timely diagnosis, Jocelyn's cancer would have been curable. Thus, it can be said that Respondents' failure to timely treat Jocelyn made it "more likely than not" that she will not survive her disease. This is all Minnesota law requires. See MacRae, 753 N.W.2d at 722.

The evidence supports that it is more likely than not that Jocelyn's advanced cancer was a result of the delay in diagnosis rather than the disease itself. As will be explained, under these circumstances there was no need to rely on any "lost chance" or negligent aggravation doctrine. Under the traditional rules of causation as set out above, Plaintiffs presented sufficient evidence to create a triable issue of fact. Dumas v. Cooney, 1 Cal. Rptr.2d 584, 589 (Cal. Ct. App. 1991), *rev. denied* ("In this type of case where the testimony establishes a probability of a better result (usually the patient's survival) absent

a doctor's negligence, a finding for the plaintiff is consistent with existing principles of proximate cause.").

Even the cases on which the trial court relies support this understanding, but are factually distinct from the facts of this case. (Add. 7). In Leubner v. Sterner, 493 N.W.2d 119 (Minn. 1992), the Minnesota Supreme Court upheld the dismissal of plaintiff's claim of increased risk of metastasis where there was "no proof it is more probable than not that plaintiff will not survive her cancer." Id. at 122.[5] In Fabio v. Bellomo, 504 N.W.2d 758, 763 (Minn. 1993), the Supreme Court declined to recognize a plaintiff's claim for risk of cancer recurrence where the risk was 30% because the claim was distinct from a viable traditional tort action where plaintiffs needed to prove harm by reasonable medical certainty.[6] In Fabio, even with the delayed diagnosis it was more likely than not Fabio would survive her cancer. Id. Both Fabio and Leubner apply the traditional tort standard of more probable than not, which is exactly the standard Plaintiffs apply and have presented evidence meeting that standard.

---

[5] This court in Leubner v. Sterner, 483 N.W.2d 518, 521 (Minn. Ct. App. 1992), similarly recognized there was no medical testimony that death will more probably than not result from Dr. Jensen's alleged negligence.

[6] In Fabio v. Bellomo, 489 N.W.2d 241, 245 (Minn. Ct. App. 1992), this court explained that Fabio's expert Dr. Caldwell believed Fabio even with the delayed diagnosis still had a better than 50% chance of survival.

2. Loss of a chance is not asserted here.

The trial court was simply wrong in concluding that Plaintiffs' claim on this record is one of "loss of chance." The loss of chance doctrine was developed to address the perceived injustice of traditional tort law by recognizing a cause of action in any case in which the defendant's negligent conduct simply decreased the patient's chance of recovery from a preexisting condition. Mead v. Adrian, 670 N.W.2d 174, 186 (Iowa 2003) (Cady, J. concurring) ("loss of a chance is a separate theory of recovery from traditional negligence claim"); Dumas, 1 Cal. Rptr.2d at 590 (lost chance has been viewed as a relaxed standard of causation and effectively is a new tort).

In those jurisdictions that have adopted loss of chance, there has been a dispute as to the precise nature and extent of departure of this doctrine from traditional tort law.[7] Whatever variations may exist in the different jurisdictions with the "loss of chance" doctrine, one thing is clear: a claim for loss of chance is a separate theory of recovery from traditional negligence or a wrongful death claim.

Some courts and commentators conceptualize the doctrine as an exception to the basic rule of legal cause or damages or both. See Cooper v. Hartman, 533 A.2d 1294, 1297 (Md. 1987). For example, in Ohio, under its interpretation of that doctrine a patient whose chance of survival was less than 50% prior to the act of medical negligence can

---

[7] Although not entirely clear from the trial court's opinion, it appears the trial court conceptualized loss of chance as a theory of compensable damages. (Add. 7). However, later, when discussing recurrence, the trial court switches to a causation analysis. (Add. 8).

recover damages where the medical negligence has caused the chances of recovery to decrease even further. The degree to which survival has decreased is then used as the percentage to calculate the damages to be awarded. Roberts v. Ohio Permanente Med. Group, Inc., 668 N.E.2d 480 (Ohio 1996).

In a loss of chance claim, plaintiff does not seek recovery for traditional harms, such as physical injury or death, but the lost chance of avoiding the harm. Dumas, 1 Cal. Rptr.2d at 590; Alberts v. Schultz, 975 P.2d 1279, 1282-83 (N.M. 1999), *reh'g denied* ("it is the chance in and of itself . . . that becomes the item of value for which the patient seeks compensation."); Mead, 670 N.W.2d at 186. The loss of chance doctrine operates to allow a plaintiff to recover in situations where the doctor's negligence likely would only result in a possibility of causing harm. Alberts, 975 P.2d at 1283.

Courts employing this causation approach to the loss of chance doctrine award compensation to lost chance plaintiffs on the grounds that the lost chance factual scenario necessitates a relaxation of the traditional requirement of proximate causation.

An alternative approach to the doctrine, the damages approach, conceives of the loss of chance doctrine differently, and in doing so avoids the need to carve out an exception from the traditional causation standard. According to the damage approach, the loss of chance cause of action does not depend on a relaxation of the causation standard, but on a clarification of the injury for which the plaintiff seeks compensation. Cooper, 533 A.2d at 1297.

Loss of a chance has been applied in some jurisdictions where a patient survives but has suffered a reduced chance for a better result. The patient is suffering from cancer. With prompt diagnosis and proper treatment, the patient's chance of survival would be 90%. However, due to the physician's negligence, when the cancer is finally diagnosed and treated, the patient's chances of survival have been reduced to 70%. However, under either scenario, the patient is still more likely than not to survive. States that have recognized loss of chance will allow an award of damages to be made for the 20% reduction in the chance of survival. Under Minnesota law, however, that patient would have no cause of action because at all times it was more likely than not the patient would survive. Fabio, 489 N.W.2d at 245 (Dr. Caldwell believed Fabio still had better than 50% chance of survival even with delayed diagnosis).

Likewise, a person suffering from a preexisting condition such as cancer with less than a 50% chance of recovery before misdiagnosis would have no cause of action under Minnesota law against a doctor who negligently failed to diagnose the condition, even if the delay brought about by the misdiagnosis caused the person to lose a chance of recovering from the condition. So, for example, a person with a 35% chance of surviving from her cancer with timely diagnosis would, according to traditional tort doctrine under Minnesota law, have no cause of action against a doctor whose failure to diagnose the cancer caused the person's chance of survival to fall to 20% or even zero. Under these facts, it was always more probable than not that the patient would not survive, and therefore, no cause of action exists. Sumstad v. Wilson, 2009 WL 173506 at *2 (Minn.

Ct. App. 2009) (A. 197) (even without delay, appellant still had a 70-80% chance of adverse outcome; therefore appellant does not meet causation requirements). The same is not true in those jurisdictions which recognize loss of chance. See, e.g., Dickey v. Daughety, 917 P.2d 889, 892 (Kan. 1996) (had plaintiff been given proper medical care he had 30% chance of survival; jury found he had 0% chance with care he received).

On the other hand, under traditional tort law, which is present Minnesota law, a person who would survive her cancer with timely diagnosis and treatment has a cause of action against a doctor whose negligent misdiagnosis or failure to treat results in the probability she will not survive. In such a case, the doctor's negligence is more likely than the preexisting condition to have caused the plaintiff's inability to survive. That is Jocelyn's situation. Accordingly, it is not necessary in this case to explore whether the lost chance doctrine relaxes the traditional principles of causation or involves a redefinition of recoverable damages because Plaintiffs' claims are not premised on lost chance.

Plaintiffs are only pursuing a traditional medical negligence tort claim. In the Complaint, Plaintiffs assert that the negligence (caused and) will continue to cause permanent and devastating injuries. The expert affidavits do not speak to some "loss of chance." Dr. Forman spells out that Jocelyn will succumb to her cancer due to the misdiagnosis. There is nothing in Plaintiffs' submission that establishes that Plaintiffs are only contending that with timely treatment Jocelyn would have simply had a better chance of survival. This is the gravamen of a loss of chance claim. Plaintiffs plainly do not seek

this. They seek to prove that with timely treatment Jocelyn "more likely than not" would not suffer death.

E. The Trial Court's Discussion of Statistics is Confused and Contrary to Minnesota Law.

The trial court, by its citation to statistics, confused two distinct concepts: (1) the use of statistics to prove a traditional tort claim, and (2) the presentation of a non-traditional claim for "loss of chance." (Add. 7). Using statistics to support a personal injury claim (or any other claim) does not invalidate that claim as one for loss of chance. No court has so ruled. Courts, in fact, regularly instruct juries on survival statistics so that the jury may come to a reasoned evaluation of future damages. 4A Minn. Prac. Jury Instr. Guides CIVJIG § 91.85. It is regular practice for courts to hear plaintiffs and defendants use survival statistics in the same fashion that plaintiffs do here, namely to show whether the plaintiff will likely survive the cancer or not. See, e.g., Columbia Rio Grande Regional Health Care, L.P. v. Hawley, 188 S.W.3d 838, 843-44 (Tex. Ct. App. 2006) (affirming plaintiff's verdict where expert opined that patient would have a Stage C colorectal cancer diagnosis with a 60% chance of five-year survival with a timely diagnosis and a Stage D diagnosis with 0-30% chance with the delayed diagnosis). Sumstad, 2009 WL 173506 at *2 (A. 197).

Pietrzak v. Eggen, 295 N.W.2d 504 (Minn. 1980), is instructive. In Pietrzak, the plaintiff introduced expert testimony that "over half" of individuals with knee injuries identical to those of the plaintiff would have to undergo future reconstructive surgery. Id.

at 507. The defendants claimed that the plaintiff could not recover for this future harm. The Minnesota Supreme Court rejected the defendants' argument. The Supreme Court ruled the plaintiff had met the standard under Minnesota law because the plaintiff had shown that such damage is "more likely to occur than not to occur." Id.

Here Dr. Forman states explicitly that Jocelyn's cancer more likely than not would have been curable if diagnosed and treated before nine months of age. (Add. 21). The survival statistics support his testimony, but do not turn this case into a "loss of chance" case, as the trial court incorrectly concludes. Plaintiffs' claims meet the more likely than not standard of traditional tort law and are entitled to proceed.

II. PLAINTIFFS ARE ENTITLED TO PROCEED ON THEIR CLAIM FOR DAMAGES BASED ON JOCELYN'S RECURRENCE OF HER CANCER.

A. Jocelyn Is Damaged by Recurrence of Cancer.

Dr. Forman, in his first two affidavits, opines that if Respondents had diagnosed Jocelyn's bump and treated her before she was nine months old more likely than not Jocelyn's cancer would have been curable. Because of the delayed diagnosis and treatment, Jocelyn will more likely than not not survive. (Add. 12, 20).

Unfortunately, while this case has been pending, Jocelyn has had a recurrence of her cancer. (A. 20). Dr. Forman then reviewed Jocelyn's medical records regarding the recurrence and particularly those of her treating oncologist. (Add. 23). In Dr. Forman's third affidavit, he reaffirms the "facts and opinions recited" in his first and second affidavits. (Add. 23). In his third affidavit, Dr. Forman addresses only Jocelyn's cancer

recurrence. Dr. Forman opines in this affidavit that if Jocelyn's cancer had been timely diagnosed and treated, it is unlikely that she would have suffered the 2010 recurrence and required the subsequent medical care and potential additional care in the future. (Add. 23). Dr. Forman continues:

> In other words, it is the [Respondents'] failure to timely diagnose and treat Jocelyn Dickhoff's [RMS] that changed the likelihood of recurrence and the need for additional care from unlikely to probable.

(Id.)

Dr. Forman states it is impossible to put precise statistics on the circumstances with or without timely care but it is "without question, however, based on my expertise, that it was the failure to provide timely care and treatment in this case that is to blame for the recurrence and recent need for medical care." (Id.).

B. Trial Court Dismisses Plaintiffs' Claim Based on Loss of Chance.

The trial court also dismisses Plaintiffs' claim in this regard, but its reasoning is confusing. It appears that the trial court viewed such damages as not compensable as part and parcel of loss of chance. The trial court states "[c]laims for 'loss of chance' due to reduced life expectancy and increased risk of recurrence as a theory of compensable damages have been consistently rejected by the Minnesota Supreme Court." (Add. 8).[8] The trial court also states that under Minnesota law "expert testimony establishing an

---

[8] At the October 25, 2010 hearing, Plaintiffs' counsel and the trial court both saw Respondents' argument for dismissal of recurrence damages as a continuation of their loss of chance argument. (T. 10/25/10, pp. 25-26).

outline of the chain of causation showing that it is more probable than not that the Defendants' alleged negligence is the cause of plaintiffs' damages, as opposed to the chance of recurrence already present absent the defendants' alleged negligence" is required and "[t]his opinion does not satisfy the standard." (Add. 8).

Clearly, Dr. Forman's affidavits read together, set forth "an outline of the chain of causation that allegedly resulted in damage to [the Plaintiffs]." Sorenson v. St. Paul Ramsey Med. Ctr., 457 N.W.2d 188, 193 (Minn. 1990). By the trial court's statements, it would appear that the trial court's dismissal of Plaintiffs' claim for damages based on recurrence of cancer is likewise premised on its erroneous understanding of the evidence before it and the erroneous understanding of Minnesota law as applied to the facts presented.

C. The Trial Court's Decision Is Against the Facts of Record and Its Ruling Is Based on an Erroneous View of the Law.

1. Trial court abused its discretion.

It is true that the district court's decision in this regard refers to Minn. Stat. § 145.682. (Add. 7). A district court's dismissal of a complaint for failure to comply with § 145.682 is reviewed for abuse of discretion. Broehm v Mayo Clinic Rochester, 690 N.W.2d 721, 725 (Minn. 2005). But the trial court's analysis (to the extent it exists) appears to be premised on its misunderstanding of Minnesota law as applied to the facts before it. In either event, the trial court committed error. City of North Oaks v. Sarpal, ___ N.W.2d ___, 2011 WL 1775532 at *5 (Minn. 2011) (district court abuses its

discretion when its decision is against the facts of record or its ruling is based on an erroneous view of the law).

2. Plaintiffs' expert affidavit is legally sufficient.

Plaintiffs' expert thoroughly explains the distinction between Jocelyn's condition in the first nine months of her life as opposed to her condition in June and July 2007, when Respondents finally took action. Dr. Forman quantifies the impact of Respondents' negligence on her ability to survive. Dr. Forman states explicitly "it is the [Respondents'] failure to timely diagnose and treat Jocelyn Dickhoff's [RMS] that changed the likelihood of recurrence and need for additional care from unlikely to probable." (Add. 23). It was this testimony that was missing in Leubner, 493 N.W.2d at 122 where the Supreme Court stated:

> Significantly, [Dr. Newman's] opinion does not say it is more probable than not that Ms. Leubner's recurrence of cancer resulted from Dr. Jensen's alleged negligence.

Id.

Here, Plaintiffs present that expert testimony explicitly. (Add. 23). As the Minnesota Supreme Court stated in MacRae, "[w]e agree that a patient suffers compensable damage from a negligent misdiagnosis of cancer when it becomes more likely than not that he will not survive the disease." 753 N.W.2d at 722. The Supreme Court recognized that "the progression of the disease may require the patient to undergo a different course of treatment or to incur additional medical expenses." Id. This is compensable damage. Id. Since the evidence shows Jocelyn suffered more physical

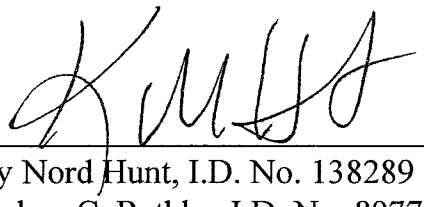
discomfort and/or incurred higher economic costs as a result of the delayed diagnosis, the evidence is sufficient to satisfy the causation element of a malpractice claim with respect to these alleged losses. Dr. Forman' affidavit is legally sufficient under Minn. Stat. § 145.682 and the trial court committed error in dismissing Plaintiffs' claims.

CONCLUSION

Appellants respectfully request that the trial court be reversed and their medical malpractice lawsuit be ordered reinstated.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: June 1, 2011

BY 

Kay Nord Hunt, I.D. No. 138289
Stephen C. Rathke, I.D. No. 89771
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Attorneys for Appellants

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 7,604 words. This brief was prepared using Word Perfect 12.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: June 1, 2011

BY_____

Kay Nord Hunt, I.D. No. 138289
Stephen C. Rathke, I.D. No. 89771
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Attorneys for Appellants