

NO. 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.

RESPONDENTS' BRIEF AND APPENDIX

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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).

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STATEMENT OF LEGAL ISSUES

1. In this medical-malpractice action:
 - a. Was it the plaintiffs' burden to establish a prima facie case of causation with expert testimony showing that it is more probable than not that the alleged harm (a recurrence of cancer) resulted from something for which the defendant is responsible (an allegedly negligent delay in diagnosis) than from something for which the defendant is not responsible (the underlying cancer)?
 - b. Was the district court correct in ruling that plaintiffs' proffered expert testimony failed as a matter of law to establish a prima facie case of causation, thus requiring summary judgment?

Apposite authority:

Yates v. Gamble, 198 Minn. 7, 268 N.W. 670 (1936)

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

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

Noske v. Friedberg, 670 N.W.2d 740 (Minn. 2003)

2. Was the district court correct in ruling that plaintiffs' claim of damages for a reduced life expectancy is prohibited under Minnesota law as a claim for "loss of chance"?

Apposite authority:

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

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

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

STATEMENT OF THE CASE

This medical-malpractice action presents questions about a plaintiff's burden of proof on the essential element of causation, and about the type of recoverable damages recognized under Minnesota law. The plaintiffs are Jocelyn Dickhoff (currently five years old) and her parents, Joseph and Kayla Dickhoff. The case arose out of the diagnosis and treatment of a rare and aggressive form of childhood cancer (rhabdomyosarcoma – rab-dō-mī-ə-sār-kō-mə) that developed during Jocelyn's first year of life. The plaintiffs allege that a delayed diagnosis of that cancer was the result of negligence by Dr. Rachel Tollefsrud, Jocelyn's doctor.¹ As of the time the district court dismissed the case, the plaintiffs claimed that the alleged negligence caused a reduced life expectancy, increased future medical expenses, and future general damages.

The plaintiffs' claim for damages had not always been as just described. As a May 10, 2010 trial date neared, plaintiffs conceded that their proof of causation would fail on certain parts of their damages claim, including damages for past medical expenses and damages from the future consequences of the extremely aggressive regimen of radiation and chemotherapy treatments undertaken upon first diagnosis. (T. 4/15/10² at p. 8 (conceding that plaintiffs' proof of causation on past medical expenses could not distinguish the cost of treatment made necessary by the cancer itself – even if diagnosed at the earliest opportunity – from the cost of treatment provided upon actual (allegedly

¹ Dr. Tollefsrud was formerly known as Dr. Rachel Green. For consistency, this brief will refer to her as Dr. Tollefsrud.

² This brief makes reference to three transcripts – April 15, 2010; May 6, 2010; October 25, 2010. For clarity, they will be referred to by their respective dates.

delayed) diagnosis)); T. 4/15/10 at p. 13 (conceding that plaintiffs' proof of causation on future consequences of the cancer treatment (*e.g.*, the potential for developing sterility, cognitive deficit, or other forms of cancer from the aggressive regimen of treatment) could not distinguish the probable consequences of the treatment made necessary by the cancer itself – even if diagnosed at the earliest opportunity – from the probable consequences of the treatment provided upon actual (allegedly delayed) diagnosis)). As a result, the district court ordered those claims for damages dismissed. (T. 4/15/10 at pp. 9-10, 16-17). That outcome is not in dispute on appeal.

Also as the May 2010 trial date approached, plaintiffs submitted proposed jury instructions, including one that modified CIVJIG 91.25 (Items of Personal Damages – Bodily Harm and Mental Harm) by deleting the word “embarrassment” and adding the phrase “deprivation of normal life expectancy.” (See R.A.1-2, 4). The proposed instruction would thus read “future damages for bodily and mental harm may include . . . deprivation of normal life expectancy.” (R.A.4). The defendants objected.

Plaintiffs' expert disclosures revealed that they intended to establish the causation element of their remaining claims for damages (*i.e.*, reduced life expectancy, increased future medical expenses, and future general damages) with proof that the delay resulting from Dr. Tollefsrud's alleged negligence changed the likelihood of a recurrence from 40% to 60%. (See Add. 18-19). Under plaintiffs' evidence, therefore, of the post-delay chance of a recurrence (60%), two-thirds is attributable to the cancer itself (40%) and one-third is attributable to the alleged negligent delay in diagnosis (20%). In other words, any recurrence (which, tragically, has occurred in fact) more probably resulted

from something for which Dr. Tollefsrud is not responsible (the original cancer) than from something for which she is allegedly responsible (a delay in diagnosis).

Jocelyn's cancer recurrence prompted a continuance of the trial. (A.192). With the district court's permission (A.22-23), the defendants then moved for summary judgment because: (1) all of plaintiffs' remaining damage claims were tied to the probability of recurrence, but their proof of causation on that issue failed as a matter of law; and (2) their claim for reduced life expectancy is, in any event, one for "loss of chance," a claim not recognized under Minnesota law. (A.188).

The Kandiyohi County District Court, Hon. D.M. Spilseth, ruled that plaintiffs "failed to present admissible expert evidence that the recurrence of cancer was caused by Defendants," and that "a claim for loss of chance of life is prohibited as a matter of law in Minnesota." (Add. 3). This ruling disposed of all remaining claims. Plaintiffs now appeal from the resulting final judgment.

STATEMENT OF THE FACTS

Jocelyn Dickhoff was born in Willmar, Minnesota on June 12, 2006. (A.69). She is now five years old. (Id.). Jocelyn spent her first 16 days in the neonatal intensive care unit at Fairview – University of Minnesota Children’s Hospital suffering from respiratory distress and pulmonary hypertension. (Id.). Her mother, Kayla Dickhoff, is a radiology technician at Paynesville Hospital. (K. Dickhoff dep. at 11, 16; R.A.6, 7). She testified that she first noticed a bump on Jocelyn’s buttocks on the day Jocelyn came home from the hospital. (Id. at 28-29, 31; R.A.8, 9). The bump was round and about a half centimeter in diameter (pea-sized). (Id. at 30, 36; R.A.9, 10). The bump was under the skin and could be moved around. (Id. at 28, 31; R.A.8, 9).

Jocelyn was already scheduled for a two-week well-baby check the next day, June 29. Her doctor was the defendant, Dr. Rachel Tollefsrud, who practices at the Family Practice Medical Center of Willmar. Although not material to the issues on appeal, the facts are disputed as to when and how often Mrs. Dickhoff and Dr. Tollefsrud discussed the bump. According to Mrs. Dickhoff, she discussed the bump with Dr. Tollefsrud at the June 29 visit and at four additional visits over the next nine months. (See plaintiffs’ opening br. at pp.3-4). She testified that Dr. Tollefsrud stated at the June 29 visit that the bump could be a cyst. (K. Dickhoff dep. p. 41; R.A.11). She further testified that the bump had become larger at least by the August 14, 2006 well-baby check. (Id. at 52-53; R.A.12-13). She testified that it had grown to three centimeters in diameter by the March 2007 well-baby check. (Id. at 82; R.A.13.1).

Jocelyn's father, Joe Dickhoff, agreed that Kayla first pointed out the bump to him on June 28, 2006, and that it was about the size of a pea. (J. Dickhoff dep. pp. 16, 17; R.A.15, 16). He also agreed that it was round and moved beneath the skin. (Id. at 20; R.A.16). Mr. Dickhoff attended Jocelyn's well-baby check on June 29, but that was the only contact he had with Dr. Tollefsrud until after the cancer diagnosis in mid-2007. (Id. at 22; R.A.17). He also testified that the Dickhoffs mentioned the bump at the June 29 visit and that Dr. Tollefsrud stated that it could be a cyst. (Id. at 20; R.A.16). He disagrees with his wife, however, with regard to the bump's growth. He testified that the bump changed only a little bit in the first nine to 12 months. (Id. at 30-31; R.A.18). But in the few weeks before Jocelyn's one-year well-baby check – which resulted in a referral and a diagnosis – the bump grew substantially in a very short time. (Id. at 35-37; R.A.19-20). It was then that he and his wife became very concerned about the bump. (Id. at 38; R.A.20).

Dr. Tollefsrud first documented a bump in notes she made of Jocelyn's one-year well-baby check, which occurred on June 14, 2007. (Tollefsrud dep. pp. 33-34; R.A.24). The notes indicate that the child's parent related that Jocelyn "[h]as had small lump on left buttock which had been unchanged, now has gotten larger." (Id. at 34 and Ex. 14; R.A.24, 28). The bump was then four centimeters in diameter and located next to the rectum. (Id. at 35, 81; R.A.24, 27). Although it was not recorded in her medical notes, Dr. Tollefsrud recalls one previous discussion about a bump on Jocelyn's buttocks. (Id. at 29-30; R.A.23). She does not recall the date of the conversation, but she remembers examining Jocelyn and feeling in the mid-buttocks area a bump that was smooth,

movable under the skin, and about the size of a pea. (Id. at 24, 30, 83; R.A.22, 23, 27). The pea-sized bump was in a different location than the four-centimeter lump that Jocelyn had at her one-year well-baby check. (Id. at 36, 75, 81-82; R.A.24, 26, 27). Based upon her training and general practice, Dr. Tollefsrud's usual practice for a small, smooth, and movable bump would be to relate it as a cyst. (Id. at 75-76; R.A.26). Had it been raised repeatedly as a concern, she would have documented it in Jocelyn's records. (Id. at 76; R.A.26).

Dr. Tollefsrud referred Jocelyn for immediate follow-up examination, which occurred at Affiliated Community Medical Center in Willmar later on the morning of June 14, 2007. (Id. at 38; R.A.25). Through a series of additional referrals, Jocelyn was diagnosed with Alveolar Rhabdomyosarcoma, a rare and aggressive childhood cancer. The total number of annual diagnoses in the United States for all types of childhood rhabdomyosarcoma is 350. (Weigel dep. p. 14; R.A.33).

Jocelyn's treating physician for her cancer is Dr. Brenda Weigel, the director of the sarcoma program at the University of Minnesota Cancer Center. (Id. at 5, 7; R.A.30-31). Dr. Weigel explained that rhabdomyosarcoma is a cancer of the muscle. (Id. at 13; R.A.32). A rhabdomyosarcoma tumor typically develops in the body's deeper tissue. (Id. at 66; R.A.41). Tumors are thought to be firm and fixed. (Id. at 67; R.A.41).

The perianal area, as a site for rhabdomyosarcoma, is rare and considered to be unfavorable. (Id. at 17; 59; R.A.33, 39). Children under age one generally have a worse prognosis. (Id. at 19; R.A.34). All children diagnosed with rhabdomyosarcoma, regardless of age or stage, receive surgery, intense chemotherapy, and radiation. (Id. at

pp. 18, 24, 38, 54-55, 61-62, 69-70, 72; R.A.34, 35, 36, 38, 39-40, 41-42). All patients receiving these therapies have a high risk of infertility, as well as an increased risk of second malignancies (*i.e.*, different cancers) and adverse learning and developmental consequences. (*Id.* at 51-53; R.A.37). As a result of the fact that all rhabdomyosarcoma patients receive very aggressive chemotherapy and radiation treatment, plaintiffs conceded their inability to meet the burden of proof on causation as to their claim of damages for past medical expenses and for the future consequences of treatments undertaken upon first diagnosis. (T. 4/15/10 at pp. 8, 13; T. 5/6/10 at pp. 25, 41).³ Therefore, past damages traceable to a time period before Jocelyn's April 2010 recurrence are no longer part of the case and are not in dispute on appeal. (T. 4/15/10 at pp. 9-10, 16-17). The only claim for medical expenses that is in dispute relates to the care Jocelyn has received following the April 2010 recurrence. (T. 5/6/10 at pp. 25, 27, 30).

Dr. Edwin Forman is plaintiffs' causation expert. (See plaintiffs' opening br. at p. 8). In his opinion, Jocelyn's condition at the time of her actual diagnosis gave her a 40% chance for an event-free (*i.e.*, no recurrence) five-year survival and a 60% chance of a recurrence, the latter being coextensive with the likelihood of dying from the disease. (Add. 17-19, 21). Had a diagnosis occurred when the parents first noticed the bump, Dr.

³ The supreme court's decision in *Fabio v. Bellomo*, 504 N.W.2d 758, 762 (Minn. 1993) required this outcome: "Fabio admitted that chemotherapy would have been necessary even if Dr. Bellomo had diagnosed her cancer in 1986. Her complaint, therefore, fails to establish that Dr. Bellomo's alleged malpractice was a direct cause of her need to undergo chemotherapy, and we hold that summary judgment for Dr. Bellomo was correct on this issue."

Forman's opinion is that Jocelyn would have had a greater chance of survival (60%) and a lesser chance of a recurrence (40%). (Add. 17-19). Based upon those conclusions, Dr. Forman opined that it is more likely than not that Jocelyn would have survived her cancer – in his words, been “curable” – had she received earlier treatment (60%), but that because of the delay in diagnosis it is now more likely than not that she will die of her cancer (also 60%). (Add. 21). Under Dr. Forman's testimony, therefore, of the post-delay chance of a recurrence and resulting death (60%), two-thirds is attributable to the cancer itself (40%) and one-third is attributable to the alleged negligent delay in diagnosis (20%).

Based solely upon Dr. Forman's testimony, the plaintiffs proposed to prove causation of damages for (1) medical expenses and any attendant general damages attributable to the April 2010 recurrence (T. 5/6/10 at pp. 30, 41-42 (stating that “our proof will be that but for the negligence she would not have had this recurrence and would not require this chemotherapy”)); and (2) a reduced life expectancy. (See R.A.1-2, 4) (proposing to instruct the jury that “[f]uture damages for bodily and mental harm may include . . . [d]eprivation of normal life expectancy”). With leave of the district court (A. 22-23), the defendants moved for summary judgment. (T. 10/25/10 at pp. 21, 39) (stating that the motion before the court is one for summary judgment). The district court ruled that plaintiffs “failed to present admissible expert evidence that the recurrence of cancer was caused by Defendants,” and that “a claim for loss of chance of life is prohibited as a matter of law in Minnesota.” (Add. 3).

ARGUMENT

I. Standard of Review

On appeal from an order for summary judgment, this court conducts a de novo review and examines “whether there are any genuine issues of material fact, whether either party is entitled to judgment as a matter of law, and whether the lower court erred in its application of the law.” *Housing & Redev. Auth. v. Lambrecht*, 663 N.W.2d 541, 547 (Minn. 2003). To establish a genuine issue of material fact, “[m]ere speculation, without some concrete evidence, is not enough to avoid summary judgment.” *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993). The “nonmoving party cannot defeat a summary judgment motion with unverified and conclusory allegations or by postulating evidence that might be developed at trial.” *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002).

Summary judgment is properly granted when the nonmoving party fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). “Summary judgment is appropriate when the record shows a complete lack of proof on any essential element of the plaintiff’s claim.” *Housing & Redev. Auth.*, 663 N.W.2d at 547 (emphasis added). “In *Celotex [Corp. v. Catrett]*, 477 U.S. 317 (1986), the Court held that when the nonmoving party bears the burden of proof on an element essential to the nonmoving party’s case, the nonmoving party must make a showing sufficient to establish that essential element.” *DLH, Inc.*, 566 N.W.2d at 71 (citing *Celotex* 477 U.S. at 322-23). Therefore, summary judgment is mandatory for the

defendant “when the record reflects a complete lack of proof on an essential element of the plaintiff’s claim.” *DLH, Inc.*, 566 N.W.2d at 71 (quotation omitted); see *Iacona v. Schrupp*, 521 N.W.2d 70, 72 (Minn. App. 1994) (mandating summary judgment against a party who ““fails to make a showing sufficient to establish the existence of an element essential to that party’s case.””) (quoting *Celotex*, 477 U.S. at 322).

II. Plaintiffs failed as a matter of law to establish a prima facie case of causation.

Causation is an essential element of every medical-malpractice claim. See, e.g., *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 717 (Minn. 2008). For nearly eight decades, the Minnesota Supreme Court has consistently applied the rule – a rule it has described as applicable “especially in malpractice cases” – that “[t]he burden is on plaintiff to show that it is more probable that the harm resulted from some negligence for which defendant is responsible than in consequence of something for which he was not responsible.” *Yates v. Gamble*, 198 Minn. 7, 14, 268 N.W. 670, 674 (1936). See also, *Silver v. Redleaf*, 292 Minn. 463, 465, 194 N.W.2d 271, 273 (1972) (same); *Smith v. Knowles*, 281 N.W.2d 653, 656 (Minn. 1979) (same); *Walton v. Jones*, 286 N.W.2d 710, 714 (Minn. 1979) (same); *Cornfeldt v. Tongen*, 295 N.W.2d 638, 640 (Minn. 1980) (same).

A factual component necessary to apply that burden, as identified in the above quotation, is “the harm” for which recovery is sought. Or, as the supreme court has so aptly put it, “causation cannot be discussed intelligently without reference to the injury claimed to be caused.” *Leubner v. Sterner*, 493 N.W.2d 119, 121 (Minn. 1992). In this case, the plaintiffs claim that the alleged negligence caused a reduced life expectancy, as

well as future medical expenses and future general damages, all stemming from the April 2010 recurrence. (See plaintiffs' opening br. at pp. 18, 29-30; R.A.1-2, 4). The question presented, then, is whether plaintiffs provided prima facie proof that these alleged harms – setting aside for the moment the fact that reduced life expectancy is not a recoverable damage under Minnesota law – resulted from something for which Dr. Tollefsrud is responsible (an allegedly negligent delay in diagnosis) than in consequence of something for which she is not responsible (the aggressive underlying cancer). As demonstrated below, they did not. And as the supreme court has explicitly stated, “[f]ailure to present such proof . . . mandates either summary judgment or a directed verdict for the defendant.” *Leubner*, 493 N.W.2d at 121.

To meet the standard of proof, the test for causation demands admissible evidence distinguishing between harm for which the defendant is allegedly responsible and harm for which the defendant is not responsible. This is so “especially in malpractice cases” because many times the physician could not have caused the initial injury, as is true for Jocelyn’s cancer in this case. *Yates*, 198 Minn. at 14, 268 N.W. at 674. The supreme court in *Leubner* made this point expressly: “This is a failure-to-diagnose case; there is no claim the disease itself, the cancer, was caused by the physician, but rather that the physician’s delay resulted in harm that could have been avoided.” 493 N.W.2d at 122. Therefore, the proof necessary to support causation in cases where the defendant causes the *initial* injury differs from the proof necessary when, as here, he or she did not. Again, the supreme court has made this point expressly:

[W]hen we allowed damages for potential ill effects *from initial injuries caused by the defendants*, the future effects flowed directly from the *initial* injuries, the *initial* injuries were the *sole* cause of the future effects, and the probabilities of their occurrence were proven with reasonable medical certainty. In this case, however, [the plaintiff's] initial "injury," her cancer, did not result from a misdiagnosis by Dr. Bellomo, and a misdiagnosis by Dr. Bellomo *could not have been the sole cause* of any future ill effects.

Fabio v. Bellomo, 504 N.W.2d 758, 763 (Minn. 1993) (emphasis added).

The *Fabio* court's analysis readily shows why plaintiffs' reliance on initial-injury cases is misplaced. (See plaintiffs' opening br. at p. 25 (citing *Pietrzak v. Eggen*, 295 N.W.2d 504 (Minn. 1980)). *Pietrzak* had nothing to do with a doctor's alleged negligence. Instead, it involved a knee injury – *i.e.*, an initial injury (the *only* injury) – caused by the defendant's negligence in operating a car. *Id.* at 506 (stating that plaintiff's degenerative knee-joint disease was "a result of the trauma of the automobile accident"). But as the supreme court stated in *Fabio*, when the defendant's negligence causes the *initial* injury, then "the initial injuries [are] the *sole* cause of the future effects." 504 N.W.2d at 763 (emphasis added). Therefore, because the evidence in *Pietrzak* also supported a finding that "such [future] damage is more likely to occur than not to occur" (295 N.W.2d at 507), the law permitted future damages, because, in the words of the *Fabio* court, "the probabilities of their occurrence were proven with reasonable medical certainty." 504 N.W.2d at 763.

The same is not true when the defendant cannot have caused the initial injury, as in a failure-to-diagnose-cancer case. This is so, as the *Fabio* court stated, because in such circumstances a misdiagnosis cannot be the *sole* cause of future ill effects. *Id.* at 763. Therefore, unlike an initial-injury case, the plaintiffs' proof of causation in failure-to-

diagnose cases must specifically address not only the harm resulting from the negligence for which the defendant is allegedly responsible, but also the harm for which he or she is not responsible. And the evidence must be that the harm – in this case a recurrence and its consequences – is more probably the result of the alleged negligence than of the original cancer itself. “The guiding principle behind this rule is that a jury should not be permitted to speculate as to possible causes of a plaintiff’s injury or whether different medical treatment could have resulted in a more favorable prognosis for the plaintiff.” *Leubner*, 493 N.W.2d at 121 (citing *Smith v. Knowles*, *supra*, and *Cornfeldt v. Tongen*, *supra*).

The plaintiffs’ evidence fails these requirements. In the opinion of Dr. Edwin Forman, the plaintiffs’ causation expert, Jocelyn’s condition at the time of her actual diagnosis gave her a 40% chance for an event-free (*i.e.*, no recurrence) five-year survival and a 60% chance of a recurrence, the latter being coextensive with the likelihood of dying from the disease. (Add. 17-19, 21). Had a diagnosis occurred when the parents first noticed the bump, Dr. Forman’s opinion is that Jocelyn would have had a greater chance of survival (60%) and a lesser chance of a recurrence (40%). (Add. 17-19). The undisputed medical developments have shown that in fact Jocelyn has tragically fallen into Dr. Forman’s post-delay group having a 60% chance of a recurrence. But Dr. Forman’s own opinion states that it is more probable that the recurrence was caused by something for which Dr. Tollefsrud cannot be responsible (the 40% chance of a recurrence that Jocelyn always had, regardless of when her cancer was diagnosed) than by something for which she could be responsible (the 20% increased chance of a

recurrence caused by an allegedly negligent delay in diagnosis).⁴ As a matter of law, therefore, plaintiffs' proof of causation failed, requiring summary judgment. *Leubner*, 493 N.W.2d at 121.

The plaintiffs argue, however, that their burden of proof is limited to producing evidence that the alleged negligent delay caused the chance of survival to move from the favorable side of probable (more than 50%) to the unfavorable side of probable (less than 50%), without regard to the role of the original underlying cancer. (Plaintiffs' opening br. at p. 18 ("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")). Under this reasoning, evidence supporting a change in likelihood of survival from 51% (timely diagnosis) to 49% (delayed diagnosis) would be sufficient to support a finding of

⁴ Plaintiffs' brief emphasizes that Dr. Forman's third affidavit states that "[i]t 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." (Plaintiffs' opening br. at pp. 13, 16, 27 (citing Add. 23)). But this bare assertion could never, by itself, meet a plaintiff's summary judgment burden of proof. As the supreme court has stated, "[c]ausation is not established by such facile declarations" as "[t]he departures from accepted levels of care, as above identified, were a direct cause of [plaintiff's] death." *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 429 and n.4 (Minn. 2002). In addition to such conclusions, the expert must explain how and why the facts led him or her to reach that opinion. *Id.* at n.4. *See also, Maudsley v. Pederson*, 676 N.W.2d 8, 14 (Minn. App. 2004) (holding expert affidavit deficient because it failed to provide "specific details explaining how and why [the physician's] 15- to 17-hour delay in treatment caused [plaintiff's] blindness"). Dr. Forman's third affidavit, as quoted above, simply offers no opinion of how or why. Therefore, it could not alone provide a basis for defeating the defendants' motion for summary judgment.

Just as importantly, Dr. Forman's third affidavit "reaffirm[s] the facts and opinions recited in those [first two] Affidavits." (Add. 23). Therefore, Dr. Forman's opinion at all times remains insufficient to avoid summary judgment, because on its face it states facts establishing that it is more probable that Jocelyn's recurrence was caused by her underlying cancer than by Dr. Tollefsrud's alleged negligence.

causation, even though it is overwhelmingly probable in that circumstance that the cause of any post-delay recurrence would be the cancer itself (49/51 or 96.1%). But the supreme court has expressly stated that proof of causation is deficient as a matter of law even if it is “*equally* probable that other outside factors were causes of the recurrence.” *Leubner*, 493 N.W.2d at 122 (emphasis added). In the above example, the 96.1% probability far exceeds equal probability. The same is true in this case, where the probability that the cancer itself caused Jocelyn’s recurrence is 67%.⁵ A plaintiff’s burden of proof is not limited to merely establishing a change in survival from somewhere above 50% to somewhere below. A plaintiff must also produce evidence of the role of the cancer itself, and that role must make the cancer less likely the cause of the recurrence than the alleged negligent delay. *Yates*, 198 Minn. at 14, 268 N.W. at 674. Because the plaintiffs’ proof in this case establishes the converse, the causation element failed as a matter of law, requiring summary judgment. *Leubner*, 493 N.W.2d at 121.

Plaintiffs ground their argument in language from *MacRae*, a statute-of-limitations case. 753 N.W.2d at 716 (stating that “the only issue before us is whether [the]

⁵ Plaintiffs rely on the unpublished case of *Crosby v. Myhra-Bloom*, No. A08-1128, 2009 WL 911664 (Minn. App. Apr. 7, 2009) as support for their argument that evidence of crossing the 50% threshold is sufficient by itself to meet a plaintiffs burden of proof on causation. (Plaintiffs’ opening br. at p. 19). But *Crosby* merely illustrates the point being made here. There, the patient’s cancer progressed from a 67% survival rate with a timely diagnosis to a 1-2% survival rate after delayed diagnosis. *Id.* at *3. Thus, plaintiff’s expert evidence showed not only that the patient crossed from the favorable side of probable survival to the unfavorable side, but also that of the 98% probability of a post-delay recurrence, 66.3% could be attributable to the defendant’s alleged negligence. *Id.* In *Crosby*, therefore, it was far more probable that the adverse outcome was the result of the defendant’s alleged negligence than of the underlying cancer itself. The latter evidence is missing here; indeed, the converse is undisputed.

undisputed facts establish that [the plaintiff's] claim is barred by the applicable statute of limitations"). Plaintiffs argue that *MacRae* establishes a burden of proof on causation unencumbered by any need to account for the harm for which the defendant is not responsible. (Plaintiffs' opening br. at pp. 17-19, 29) (citing *MacRae* and arguing that a plaintiff need only offer proof that the alleged negligent delay caused the chance of survival to move from the favorable side of probable (more than 50%) to the unfavorable side of probable (less than 50%)).⁶ But statute-of-limitations cases are fundamentally different from cases involving a plaintiff's burden to produce sufficient evidence to avoid summary judgment on an essential element of the claim. When read within the context in which *MacRae* arose, the language plaintiffs rely on does not support their argument.

First, the statute of limitations is an affirmative defense, while causation is an element of the claim for relief. For the former, "the party asserting the defense has the burden of establishing each of the elements." *Id.* at 716 (citing *State Farm Fire & Cas. Co. v. Aquila Inc.*, 718 N.W.2d 879, 885 (Minn. 2006)). For the latter, of course, the burden is on the plaintiff.

Second, the nature of the parties' respective burdens is different. For a statute-of-limitations defense, the defendant must establish when the cause of action accrued. Accrual requires that some compensable damage has occurred. *MacRae*, 753 N.W.2d at 719-20. But this "some-damage" standard for a defendant's burden to establish accrual is far different than a plaintiffs' burden to establish causation and thereby avoid summary

⁶ The relevant language from *MacRae* is as follows: "We 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.

judgment. For accrual, “the limitations period begins to run when the plaintiff can *allege* each of the essential elements of a claim.” *Id.* at 717 (citing *Molloy v. Meier*, 679 N.W.2d 711, 721 (Minn. 2004)) (emphasis added). And the allegations need only be sufficient to “survive a motion to dismiss for failure to state a claim upon which relief can be granted.” *Noske v. Friedberg*, 670 N.W.2d 740, 742 (Minn. 2003) (quoting *Hermann v. McMenemy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999)). Further, “[t]he showing a plaintiff must make in order to survive a motion to dismiss under [Rule 12] is *minimal*.” *Noske*, 670 N.W.2d at 742 (emphasis added). To meet this minimal standard, it need only be “*possible* on any evidence which *might* be produced, consistent with the pleader’s *theory*, to grant the relief demanded” in the complaint. *Id.* at 743 (emphasis added) (quoting *N. States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963)). Moreover, in the context of a Rule 12 motion, a court must “accept[] the facts alleged in the complaint as true and construe[] all reasonable inferences in favor of the nonmoving party.” *Nelson v. Productive Alts., Inc.*, 696 N.W.2d 841, 846 (Minn. App. 2005) (citations omitted), *affirmed*, 715 N.W.2d 452 (Minn. June 15, 2006).

By contrast, the summary judgment burden requires a plaintiff to come forward with specific admissible evidence showing that there is a genuine issue for trial. Minn. R. Civ. P. 56.05; *see Nicollet Restoration v. St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995) (stating that nonmoving party must present “specific admissible facts” to avoid summary judgment). The opposite of the standard governing a Rule 12 motion, the non-moving party under Rule 56 “may not rest upon the mere averments or denials of [their]

pleading.” Minn. R. Civ. P. 56.05. For the causation element in a medical-malpractice case, that means expert testimony establishing as a matter of *admissible* fact that it is more probable that the alleged injury was caused by something for which the defendant is allegedly liable than by something for which he or she is not responsible. *Yates*, 198 Minn. at 14, 268 N.W. at 674.

Returning to the *MacRae* case, the plaintiff there argued “that no compensable damage can occur in a cancer misdiagnosis case until it is more likely than not that the patient will not survive the disease.” 753 N.W.2d at 722. Therefore, argued plaintiff, even if the plaintiff immediately incurred additional medical expenses, or immediately suffered increased pain and suffering from treatment necessitated by the delay, a cause of action still could not accrue until the chance of dying from the disease crossed the 50% threshold. *Id.* The supreme court rejected this argument: “We therefore decline [the plaintiff’s] invitation to hold that no compensable damage can occur in a cancer misdiagnosis case until it is more likely than not that the patient will not survive the disease.” *Id.* at 722-23. It was only in reaching that outcome that the court stated, “[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 his disease.” *Id.* at 722.

The court’s isolated statement in *MacRae* has no application in this case. First, the statement was unnecessary to the court’s holding, because the undisputed evidence showed that Mr. MacRae’s cancer had not reached the 50% threshold more than four years before suit was commenced. *Id.* at 715. In other words, because the defendant did not argue that reaching the 50% threshold marked accrual and rendered the cause of

action time-barred, a ruling on that point was not necessary to the court's decision to reverse the judgment dismissing the action as time-barred. And the *MacRae* court itself expressly ruled that statements about accrual that are unnecessary to a holding have no precedential value: "But *Molloy* did not involve a cancer misdiagnosis, and our statement that a cause of action accrues immediately upon such a misdiagnosis was not necessary to our holding in that case. That statement therefore is not binding precedent." 753 N.W.2d at 719 (emphasis added) (citing *Vandenheuvel v. Wagner*, 690 N.W.2d 753, 755-56 (Minn. 2005)). Thus, the statement upon which the plaintiffs rely has no value as precedent, and it therefore cannot be construed as impliedly supplanting the eight decades of consistently applied case law requiring a plaintiff to offer specific admissible facts showing that it is more probable that the harm was caused by something for which the defendant is allegedly liable than by something for which he or she cannot be responsible.

Moreover, when construed in the context of accrual, the statement in *MacRae* does not support plaintiffs' argument in any event. In the context of accrual, a plaintiff need only be able to *allege* a compensable damage sufficient to avoid a motion to dismiss under Rule 12 for failure to state a claim upon which relief may be granted. *MacRae*, 753 N.W.2d at 717; *Noske*, 670 N.W.2d at 742. To meet this minimal standard, it need only be "*possible* on any evidence which *might* be produced, consistent with the pleader's *theory*, to grant the relief demanded" in the complaint. *Noske*, 670 N.W.2d at 743 (emphasis added) (citation omitted). Thus, if a complaint alleges that the plaintiff has crossed the 50% threshold for likelihood of death from cancer, it is possible, on

evidence the plaintiff might produce, that he or she could prove it is more probable that the likelihood of death is the fault of the defendant doctor than the progression of the original cancer.

In short, there is nothing legally inconsistent with saying that a cause of action can accrue when the patient crosses the 50% threshold. But the requirements for accrual cannot be coextensive with the requirements for avoiding summary judgment, because that would be the same as saying that avoiding a dismissal under Rule 12 automatically avoids summary judgment under Rule 56. At bottom, therefore, the statement in *MacRae* cannot be construed as supplanting a plaintiff's burden of proof to establish causation. Nothing about that statement supports the conclusion that the supreme court intended to overrule the requirement that causation must include proof that accounts not only for the defendant's fault in causing the outcome, but also the outside factors like the underlying cancer itself. And, as the supreme court has expressly stated, even when it is "equally probable that other outside factors were causes of the recurrence," the plaintiff's proof of causation fails as a matter of law. *Leubner*, 493 N.W.2d at 122 (emphasis added). In this case, the undisputed facts show that the probability that outside factors caused the recurrence is 67%, far greater than equal probability. As the *Leubner* court stated, "[t]o present this kind of proof to a jury would result in the very speculation that this court ruled impermissible in *Smith [v. Knowles]* and *Cornfeldt [v. Tongen]*." *Id.* Here, as in *Leubner*, plaintiffs' proof of causation failed as a matter of law. In ruling that plaintiffs "failed to present admissible expert evidence that the recurrence of cancer was caused by Defendants," the district court correctly applied Minnesota law to the undisputed facts.

(Add. 3). Because the plaintiffs' entire remaining claim of damages depended on proof that the allegedly negligent delay more probably than the underlying cancer caused the recurrence, their failure of proof on causation disposed of all remaining claims.⁷ The district court's decision and the resulting judgment should therefore be affirmed.

III. In addition to the failure of proof on causation, plaintiffs' claim for reduced life expectancy is a legally unrecognized claim for "loss of chance."

Plaintiffs effusively deny that they seek a recovery for "loss of chance," stating repeatedly that the argument and ruling to the contrary below were merely a labeling exercise. (*E.g.*, plaintiffs' opening br. at pp. 11, 13, 18). But the law and the undisputed facts belie the denial. Based upon Dr. Forman's opinions, the plaintiffs undisputedly sought to recover for a reduced life expectancy. Their jury instruction – modifying CIVJIG 91.25 (Items of Personal Damages – Bodily Harm and Mental Harm) by deleting the word "embarrassment" and adding the phrase "deprivation of normal life expectancy" – proposes that "future damages for bodily and mental harm may include . . . deprivation of normal life expectancy." (R.A.1-2, 4).

⁷ The plaintiffs conceded at oral argument that the consequences of an adverse ruling would be to foreclose their remaining claims for damages. (T. 10/25/10 at pp. 25-26). This includes the claim for medical expenses incurred as a result of the recurrence. (*Id.*). Plaintiffs point out on appeal that such increased expenses are legally recoverable (plaintiffs' opening br. at pp. 29-30), and defendants don't dispute that. But a failure to prove that the defendant's negligence *caused* those expenses to be incurred forecloses such a recovery. For the medical expenses at issue, therefore, the failure of proof on causation forecloses a recovery. For the damages plaintiffs seek in the nature of a "loss of chance," however, both the failure of proof on causation and the legally unrecognized nature of the damage itself foreclose a recovery. The latter is the subject of Argument III below.

Tragically, however, Jocelyn never had a “normal” life expectancy. She has childhood cancer. To repeat what the supreme court said when it first rejected loss of chance nearly 20 years ago, “there is no claim the disease itself, the cancer, was caused by the physician” *Leubner*, 493 N.W.2d at 122. Thus, Jocelyn’s “normal” life expectancy can only be understood through the prism of the cancer that afflicted her almost from birth. And according to plaintiffs’ own expert, Dr. Forman, Jocelyn’s “normal” life expectancy never gave her more than a 60% chance of a long-term survival. Under no circumstances can it be said that Dr. Tollefsrud’s alleged negligence “deprived” Jocelyn of any life expectancy in this regard. The cancer alone undisputedly resulted in that outlook.

Therefore, the only reduction from a “normal” life expectancy for which Dr. Tollefsrud could even theoretically be liable is the 20% reduction in Jocelyn’s life expectancy that Dr. Forman attributes to the delay in diagnosis. By definition, a claim for a reduced life expectancy in this circumstance is a prohibited claim for “loss of chance.”

The supreme court in *Fabio* expressly so stated:

Fabio’s second theory of recovery is for “loss of chance.” She argues that her increased chance of a recurrence of cancer and her decreased chance of living another 20 years are compensable injuries. We have never recognized loss of chance in the context of a medical malpractice action, and we decline to recognize it in this case.

Fabio, 504 N.W.2d at 762. Here, just as in *Fabio*, plaintiffs claim as compensable injuries a 20% increase in Jocelyn’s chances of a cancer recurrence and a 20% decreased

chance of a long-term survival.⁸ They cannot be claiming anything else because that is the only deprivation of normal life expectancy their expert attributes to Dr. Tollefsrud's alleged negligence. The lost "chance of living another 20 years" in *Fabio* is indistinguishable from the lost chance of a "normal" life expectancy claimed as a damage in this case. Both are prohibited claims for loss of chance.

The supreme court reiterated that conclusion in *MacRae*, recounting that in *Fabio* "[w]e rejected 'loss of chance' *due to reduced life expectancy and increased risk of recurrence* as a theory of compensable damages." 753 N.W.2d at 722 (emphasis added). The reduced life expectancy described as "loss of chance" in *MacRae* is the reduced life expectancy described in the plaintiffs' proposed jury instruction. The district court was directly on target when it ordered that "[p]laintiffs' claim for loss of chance of life, shortened life expectancy or deprivation of normal life expectancy are dismissed." (Add. 3). The court's ruling is a correct application of Minnesota law and should be affirmed.

⁸ The development that Jocelyn has in fact experienced a recurrence has no effect on the legal analysis, because that fact only demonstrates which of Dr. Forman's groups she falls in – *i.e.*, the group with the 60% chance of a recurrence (40% attributable to the original cancer and 20% attributable to the delay). As the *Leubner* court put it, "[a]rguably, the injury claimed to be caused is a decreased percentage chance of surviving, *whether or not the patient, in fact, has survived.*" 493 N.W.2d at 121 (emphasis added). Here, the prohibited decreased chance of surviving is precisely what the plaintiffs' "deprivation of normal life expectancy" seeks to recover for.

CONCLUSION

In a medical-malpractice case involving an alleged negligent delay in diagnosing cancer, the plaintiffs' burden of proof on the essential element of causation is not limited to merely establishing a change in the chances of survival from somewhere above 50% to somewhere below. A plaintiff must also produce evidence of the role of the cancer itself, and that role must make the cancer less likely the cause of the recurrence than the alleged negligent delay. Because the plaintiffs' proof in this case establishes the converse, the causation element failed as a matter of law, requiring summary judgment.

Apart from causation, plaintiffs' claim for "deprivation of normal life expectancy" is prohibited under Minnesota law as a claim for loss of chance.

For these reasons, the district court was correct in ordering summary judgment. The order and resulting judgment must therefore be affirmed.

Respectfully submitted,

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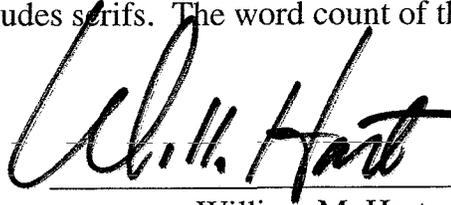
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FORM AND LENGTH CERTIFICATION

This brief was drafted using Word 2002. The font is Times New Roman, proportional 13-point font, which includes serifs. The word count of this brief is 7,193.

Dated: July 5, 2011

A handwritten signature in black ink, appearing to read "William M. Hart", written over a horizontal line.

William M. Hart