

A11-402

State of Minnesota  
In Court of Appeals

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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.

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**REPLY BRIEF OF APPELLANTS**

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**I. IT IS UNCLEAR WHETHER THE TRIAL COURT ACTUALLY APPLIED THE SUMMARY JUDGMENT STANDARD GIVEN RESPONDENTS' MOTION TO THE COURT.**

Respondents<sup>1</sup> assert that their motion, which was granted by the trial court resulting in the dismissal of this action, was predicated on Minn. R. Civ. P. 56. Respondents' motion, their accompanying memorandum and their reply make no mention of Minn. R. Civ. P. 56, its standard or how it is implicated in this case. (A. 188; Defendants' Memorandum of Law in Support of Motion to Dismiss Plaintiff Jocelyn Dickhoff's Claim for Loss of Chance of Life and Plaintiffs' Claim for Medical Expenses Based on the Recurrence of Cancer, dated June 29, 2010; Defendants' Reply Memorandum of Law in Support of Motion to Dismiss Plaintiffs' Claim . . . , dated September 23, 2010). Respondents in their Memorandum simply reference their motion as a "motion in limine." (Id. at Memorandum dated June 29, 2010 at p. 2). It was also so identified in the trial court's Amended Scheduling Order. (A. 22). In fact, the only time the Respondents mention summary judgment is in passing at the October 25, 2010 hearing at T. 21 and 39. The trial court, in dismissing this case, never states it is in fact applying the Rule 56 standard. (Add. 1).

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<sup>1</sup> As in the initial brief, 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.

Before the trial court, the relevant facts according to Respondents were the expert testimony of Plaintiffs' experts, highlighting that of Dr. Forman. (Defendants' Memorandum of Law in Support of Motion to Dismiss, pp. 3-7 dated September 23, 2010). The same is true in Respondents' June 29, 2010 reply. As presented to the trial court, the question before the Court is whether Dr. Forman's expert testimony somehow mandates dismissal of this action as a matter of law. The answer to that question is no.

Under the Rule 56 standard, the trial court must view the relevant facts, which are set forth in Dr. Forman's affidavit testimony, in a light most favorable to Plaintiffs, and all doubts and factual inferences must be resolved against Respondents. Hopkins by LaFontaine v. Empire Fire & Marine Ins. Co., 474 N.W.2d 209, 212 (Minn. Ct. App. 1991). 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 Dept. of Natural Resources, 693 N.W.2d 181, 186 (Minn. 2005). Applying that standard to the facts of record, specifically Dr. Forman's testimony, and as applied to Minnesota law, Appellants/Plaintiffs Jocelyn Dickhoff by her parents and natural guardians Joseph Dickhoff and Kayla Dickhoff (collectively Plaintiffs) are entitled to reinstatement of their lawsuit.

## II. PLAINTIFFS' ACTION IS IN ACCORD WITH MINNESOTA LAW.

### A. MacRae v. Group Health, Inc., 753 N.W.2d 711 (Minn. 2008), Is the Only Minnesota Supreme Court Case to Address Delay in Diagnosis of Cancer Where There Is a Change in Probabilities of Survival.

In a failure to or delayed diagnosis of cancer case, the doctor did not cause the cancer. Nonetheless, the Minnesota Supreme Court recognizes that a doctor is answerable in tort for his medical malpractice in failing to diagnose under certain circumstances. Under the traditional rule – sometimes referred to as the all-or-nothing rule – where the patient can show that with prompt diagnosis and proper treatment the patient in all probability would have survived her cancer, but due to the delayed diagnosis which is the claimed physician negligence, the patient in all probability will not survive, the patient may recover from the doctor under well-established tort principles.

5 Litigating Tort Cases § 61:33 (Aug. 2010) (giving Minnesota law as an illustration). If this were not true, the Supreme Court had no reason to undertake the analysis it did in MacRae v. Group Health, Inc., 753 N.W.2d 711 (Minn. 2008). MacRae is the only Minnesota Supreme Court case to address failure to diagnose cancer where evidence was presented and the argument was premised on the probabilities of survival changing because of the delay.

In contrast, in Fabio v. Bellomo, 504 N.W.2d 758 (Minn. 1983), even with the delayed diagnosis Fabio's expert believed Fabio would survive her cancer, as this Court made clear at 489 N.W.2d at 245, citing Fabio's expert's prognostication. The same was also true in Leubner v. Sterner, 493 N.W.2d 119, 121 (Minn. 1992): "Indeed, as even the

Court of Appeals observes, ‘in Dr. Newman’s statistical opinion, death is overwhelmingly improbable.’”<sup>2</sup>

Here we have the situation where Jocelyn’s cancer would have been curable if there had been a prompt and timely diagnosis of her cancer by Respondents. To follow Respondents’ arguments would be to preclude a lawsuit as a matter of law where the probabilities of survival have changed due to the delayed diagnosis, which delayed diagnosis is the claimed physician negligence. Respondents have cited to this Court not one case where a Minnesota court has so held. And the Minnesota Supreme Court has certainly not so held because the only time it addressed this situation was MacRae. There it reinstated the case on a summary judgment record, which record included expert testimony on the change in probabilities of survival.

Even though MacRae is a statute of limitations case, it is important because of the “some damage” accrual rule. Under Minnesota law, the statute of limitations analysis is inextricably intertwined with substantive Minnesota law. One has four years from the accrual date (i.e., “some damage”) to bring a malpractice action. Minn. Stat. § 541.076(b).

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<sup>2</sup> The Supreme Court in Leubner later cites to Dr. Newman’s opinion regarding the doubling risk of recurrence. Id. at 122. The record before the Supreme Court, as admitted by John Carey, counsel for Leubner, and to which this Court can take judicial notice, is Dr. Newman’s statistics with regard to the risk of recurrence were not to be confused with survival. Leubner’s counsel admitted that her expert would not testify that but for the delay, Leubner would have been cured of her disease. (Brief of Petitioner/Defendant Ronald Jensen, et al. to the Minnesota Supreme Court, Appendix A5-6, containing trial testimony, dated July 2, 1992).

As previously stated, MacRae came before the Supreme Court on a summary judgment record. 753 N.W.2d at 716. Mrs. MacRae necessarily had to present evidence of some compensable damage in order to defeat Defendants' summary judgment motion, and she did so by expert affidavit testimony. In MacRae, the defendants' negligent act of failure to diagnosis MacRae's cancer occurred in 2001. Id. at 714. Mr. MacRae died of cancer in 2005. Id. Defendants there argued MacRae had a cause of action against his physicians because he suffered some compensable damage immediately at the time of misdiagnosis. Id. at 715. MacRae's widow did not disagree that a cause of action could accrue while Mr. MacRae was alive, but asserted that Mr. MacRae factually did not sustain some compensable damage until, due to the failure to diagnose his cancer, the probabilities of his survival changed from more likely than not to not survive with timely diagnosis to more likely than not to not survive. Id. In other words, Mrs. MacRae recognized that a physician's inept diagnostic skills in identifying Mr. MacRae's cancer resulting in the delayed diagnosis was not in itself "some damage" for which Minnesota law generally allows recovery. But because Mrs. MacRae could show that Mr. MacRae would have survived if timely diagnosed and the doctor's inept diagnostic skills deprived him of that survival, that lost survival – i.e., his death – constitutes some compensable damage. "Some damage" existed even though Mr. MacRae was still alive because Minnesota's accrual rule does not await the patient's death.

The Supreme Court agreed with MacRae that in a failure to timely diagnose cancer case, "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.” Id. at 722.

But the Supreme Court recognized this is not the only possible compensable damage.

The Supreme Court continued:

Although the continued presence of a patient’s cancer alone might not be compensable damage, the progression of the disease may require the patient to undergo a different course of treatment or to incur additional medical expenses. Moreover, the continued presence of the cancer may cause the patient to suffer pain, loss of bodily functions, or some other damage.

Id.

Here Respondents urge this Court to hold, even though the probabilities of survival have changed due to Respondents’ negligence, and even though Jocelyn has suffered a recurrence, her parents are incurring additional medical expenses and Jocelyn will suffer pain and certain death, Plaintiff has no compensable claim on this record. This is not and cannot be the law.

**B. Plaintiffs Are Entitled to Have Record Viewed in a Light Most Favorable to Them.**

It is important to look at the record in a light most favorable to Plaintiffs, which is not how it is presented in Respondents’ brief. This lawsuit was initiated by Plaintiffs on April 2, 2009, when Jocelyn was less than three years old. Jocelyn, whose cancer would have been curable if timely diagnosed by Respondents, is now going to die of cancer. Even Respondents have so admitted, stating “the claim in this lawsuit based upon the affidavits filed by the Plaintiff, and specifically Dr. Forman, is that based on the alleged negligence of Dr. Tollefsrud it is more probable than not that Jocelyn Dickhoff will die

from her cancer.” (T. 5/6/10, p. 7). The basis for the lawsuit has never changed from its inception. Due to Respondents’ negligence, Jocelyn’s cancer was not timely and appropriately diagnosed and her treatment was therefore delayed. (A. 10). Had Respondents correctly diagnosed Jocelyn’s symptoms earlier, her cancer would have been curable. (Id.) For that, Respondents must respond in damages. The Complaint continues:

As a direct result of [Respondents’] negligence, Jocelyn has suffered injuries to her body which are permanent and/or fatal, and has incurred and will incur in the future, medical and other related expenses, pain, disability and disfigurement. In addition, Jocelyn has sustained permanent diminution of her earning capacity and loss of enjoyment of life.

(Id.)

As Respondents must admit, Jocelyn’s cancer has recurred. The evidence of record, viewed in a light most favorable to Plaintiffs, is Jocelyn would not be in the same physical condition had she received proper medical treatment.

Respondents would have this Court ignore the affidavit statements made by Dr. Forman as to Jocelyn’s specific situation and the effect of the Respondents’ delay in diagnosis. It instead would have this Court focus solely on Dr. Forman’s generic statements about the class of persons who have the same kind of cancer as Jocelyn, which are the statistics to which he cites. This the Court cannot do, and certainly not on summary judgment. For the Court’s benefit, Plaintiffs will set out Dr. Forman’s testimony in detail.

The record in this case is the rhabdomyosarcoma (the cancer) was not metastatic when its symptoms were first observed by Jocelyn's mother and brought to Dr. Tollefsrud's attention. Dr. Tollefsrud did nothing. Due to Respondents' failure to undertake any testing, etc., and the resulting delay in diagnosis, there was no surgical removal of Jocelyn's cancer during the first year of Jocelyn's life. The cancer instead grew, invaded and crossed tissue planes. (Add. 17-18). Respondents' failure to diagnose prevented Jocelyn's cancer's total surgical removal when fully diagnosed. This cancer, which would have been curable, is no longer curable. (Id.) Dr. Forman explicitly so states:

Based upon the changes which occurred prior to the correct diagnosis and the extent of metastasis, it is my opinion that the alveolar rhabdomyosarcoma was not metastatic when its symptom was first observed by Jocelyn's mother when Jocelyn was a neonate. If this diagnosis had occurred at or shortly after the bump was noticed when Jocelyn was a neonate, more likely than not, Jocelyn's alveolar rhabdomyosarcoma would have been curable. Unfortunately, Jocelyn's disease is at Stage III/IV, and, more likely than not, she will not survive her disease. I believe that Jocelyn is likely at Stage III, which gives her a 40% chance of survival. Stage IV implies a distant metastasis with a survival rate of less than five percent.

(Add. 17-18).<sup>3</sup>

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<sup>3</sup> Dr. Weigel, Jocelyn's treating physician, stated that at the time of Jocelyn's diagnosis the generally accepted survival rate is 30% for an event-free three-year survival. (Add. 17). That means more likely than not one will not survive the disease – i.e., 70% die within three years.

Dr. Forman reiterates that opinion in response to Respondents' experts'

submissions, stating:

On the other hand, as stated in my first affidavit, Jocelyn's rhabdomyosarcoma, more likely than not, would have been curable if diagnosed and treated before nine months of age. I found nothing in the opinions of [Respondents' experts] Dr. Dehner and Dr. Waterhouse or in the testimony of Dr. Weigel which takes issue with that favorable prognosis if diagnosis and treatment had occurred in that time frame.

(Add. 21-22).

After Jocelyn's recurrence of her cancer in April 2010, Dr. Forman further states:

If Jocelyn Dickhoff's rhabdomyosarcoma had been timely diagnosed and treated, it is unlikely that she would have suffered the 2010 recurrence, required the subsequent medical care and potential additional care in the future. In other words, it is the defendants' failure to timely diagnose and treat Jocelyn Dickhoff's rhabdomyosarcoma that changed the likelihood of recurrence and need for additional care from unlikely to probable. It is impossible to put precise statistics on the circumstances with or without timely care. It is without question, 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.

(Add. 23).

Where, as here, the plaintiff shows that at the time of the failure to diagnose she more probably than not would have survived with proper treatment, and that due to the defendant's negligence resulting in delayed diagnosis, she more probably than not will not survive, she meets the traditional proximate cause tort standard and is entitled to all damages flowing from that negligence. On this record, one cannot say, as Respondents

urge this Court to hold, that Respondents' negligence is not a substantial factor in bringing about the harm Jocelyn has suffered – i.e., the recurrence of cancer and her most certain death. What is presented here is in accord with the traditional all-or-nothing rule presently followed in Minnesota.

**C. Under Traditional Tort Principles, Plaintiffs' Action Is Entitled to Proceed.**

The traditional all-or-nothing rule is best illustrated in the Ohio case of Cooper v. Sisters of Charity, Inc., 272 N.E.2d 97 (Ohio 1971).<sup>4</sup> In that case, like here, the patient already had a condition that jeopardized the patient's health before the doctor's negligence. In Cooper, a teenager suffered a basal skull fracture resulting from a bicycle accident. Id. at 98. The doctor obviously did not cause the basal skull fracture. The fracture, however, was not timely diagnosed by the doctor and the child died due to an intracranial hemorrhage and cerebral pressure. Id. The Ohio Supreme Court, applying the traditional proximate cause standard, explained when such a case could be presented to a jury.

In this case, we are convinced that in order for the jury question to be presented, giving plaintiff's evidence, and inferences reasonably deductible therefrom its most favorable consideration and indulgence, there must be sufficient evidence that

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<sup>4</sup> Ohio, after Cooper, has adopted loss of a chance. Roberts v. Ohio Permanente Med. Group, Inc., 668 N.E.2d 480, 488 (Ohio 1996), and citing Restatement of Torts § 323. In fact, only around 10 states have refused to adopt the loss of chance doctrine in some form. Matsuyama v. Birnbaum, 890 N.E.2d 819, 828 n. 23 (Mass. 2008). Minnesota is in a distinct minority.

Dr. Hansen's negligence denied plaintiff's decedent the probability of survival.

Id. at 103-04.

The Ohio Supreme Court concluded that appellant had not produced such evidence. Id.

There, one of appellant's experts stated that there was no way to ascertain with any degree of certainty whether the child would have survived with timely diagnosis and treatment. Id. at 104. Appellant's other expert testified that with surgical intervention, decedent's expectation of survival was "maybe . . . around 50%." Id. The Ohio Supreme Court concluded this was insufficient. "Probability is most often defined as that which is more likely than not." Id. The expert's opinion that with surgical intervention decedent's expectation of survival was "maybe . . . around 50%," in the Ohio Supreme Court's judgment, did not provide a basis from which probability can reasonably be inferred. Id.

The Supreme Court continued:

In view of the requirement that proximate cause, in this type of case, is a matter demanding medical expert testimony, there are no facts available in this case from which a juror could infer that survival would have been more likely, than not, if surgery had been performed.

Id.

In that case, like here, the patient already had a medical condition that jeopardized his health. In that case, if survival would have probably resulted with proper medical care, the traditional rule of causation is met and plaintiff has suffered a compensable loss.

Take for example, a 65-year-old patient who dies from a negligently misdiagnosed ruptured aortic aneurysm whose expert testimony is that there was only a 40% probability of survival with accurate timely diagnosis – i.e., more likely than not to survive. Under the traditional rule, he cannot recover. Matsuyama, 890 N.E.2d at 829-30 (“the all or nothing rule provides a ‘blanket release from liability for doctors and hospitals any time there was less than a 50 percent chance of survival, regardless of how flagrant the negligence”). If, however, as here, the Plaintiffs prove “causation” by establishing through expert testimony the patient’s probability of survival if timely diagnosed and treated, a cause of action is established and damages are calculated at 100% certainty. Donnini v. Ouano, 810 P.2d 1163, 1168 (Kan. App. 1991) (recognizing a cause of action where a patient had a greater than 50% chance of surviving is not a loss of chance case). Under the first scenario, the court views there was no loss and does not allow damages for reduced “chance” of survival. Under the second one, it views there was a loss with 100% certainty and allows 100% damages if the jury agrees.

What is important in the jurisdictions which follow the traditional rule is whether the probabilities of survival have changed. “Where the relation of cause and effect between two facts has to be proved, the testimony of an expert that such relation exists or probably exists is sufficient.” Berardi v. Menicks, 164 N.E.2d 544, 547 (Mass. 1960). The testimony of record here so establishes.

And where, due to the Respondents’ negligence, the probabilities of survival have changed, titling or labeling such an action as “loss of a chance” is inaccurate. Saroyan,

The Current Injustice of the Loss of Chance Doctrine: An Argument for a New Application to Damages, 33 Cumb. L. Rev. 15, 34 (2002-2003); Furrow, Greaney, Johnson, Jost and Schwartz, Hornbook on Health Law §§ 6-7 (2d ed. 2000) (where resulting delay reduces plaintiff's chances of survival – even though chance of survival was below fifty percent before missed diagnosis – that is a loss of chance case).

A typical loss of chance claim is where, for example, a patient visits her doctor, who fails to immediately diagnose her with cancer. If diagnosed immediately, she would have had a 40% chance of survival; however, she only has a 20% chance by the time she is correctly diagnosed. In many jurisdictions, she can sue the doctor for the 20% reduction, even though the probabilities always were she would not survive. Compensation for this reduction is calculated by multiplying the 20% lost chance by the full amount of the resulting injury. Note: Dillon v. Evanston Hospital: Illinois Adopts the New Increased Risk Doctrine Governing Recovery for Future Injury, 34 Loy. U. Chi. L.J. 685, 711-12 (Spring 2003) (describing loss of a chance). Plaintiffs here are not asking the jury to value the damages based on differences in percentages of survival – which one does do under some jurisdictions' view of loss of a chance. Plaintiffs are asking the jury to “return damages because negligence made something probable that wasn't probable without it.” (T. 5/6/10, pp. 53-54). And such testimony did not exist in either Leubner or Fabio.

Respondents notably cite to no case law that supports their use of the statistics presented by Dr. Forman regarding survival as somehow defeating the right of Plaintiffs

to proceed where, as here, the probabilities of survival based on Jocelyn's particular situation have changed. Contrary to Respondents' statement, nowhere does Dr. Forman state that "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 [Respondents'] alleged negligent delay in diagnosis (20%)," as Respondents state on page 9 of their brief. That is Respondents' unsupported argument. Instead, what Dr. Forman has provided are generic statistics about the class of persons who have the same kind of cancer as Jocelyn. Cancer statistics are based on various survival rates which represent the length of survival time after a given date, such as date of diagnosis or the beginning of treatment.

Matsuyama, 890 N.E.2d at 827 n. 15. An overall survival rate includes people of all ages and health conditions diagnosed with the same cancer, including those diagnosed early and those diagnosed late. See "Cancer survival rate: A tool to understand your prognosis," [www.MayoClinic.com](http://www.MayoClinic.com).

In trying to spin Dr. Forman's stated statistics into something he simply does not state, Respondents also cite them inaccurately. Dr. Forman explains that if Jocelyn's cancer had been diagnosed in the first nine months of Jocelyn's life and because it was not metastatic when first observed by Jocelyn's mother, Jocelyn's prognosis for survival, based on overall generic survival statistics, would be "greater than 60 percent." (Add. 19). Dr. Forman, based on Jocelyn's particular circumstances, opines that Jocelyn's cancer "would have been curable." (Add. 17 at ¶ 27). Because of the delay, it is no longer curable. (Add. 17-18). This is true whether one views the overall general

statistical survival rate at the time of diagnosis as a three-year survival rate of 30% or 40%. (Add. 17-18). The problem with statistics, as Dr. Forman explains at Add. 19, is they include broad categories of patients who have the same cancer as Jocelyn but fail to take into account distinguishing features between patients such as those who present with distinct metastases at time of diagnosis versus those who do not. Also, the size of the tumor impacts the statistics. (Add. 19). Here Respondents want this Court to ignore what Dr. Forman actually states about Jocelyn's specific situation in favor of the unsupported spin they place on the statistics quoted.

What Respondents ignore, but this Court cannot, is Dr. Forman's testimony, based specifically on Jocelyn's situation, that had she been properly and timely diagnosed, her cancer "more likely than not" would have been curable. The fact is Jocelyn would not now be facing death. Due to the delay, which is Respondents' negligence, "more likely than not, she [Jocelyn] will not survive her disease." (Add. 17-18).

**D. Damages Are Recoverable While Jocelyn Is Alive.**

Respondents have argued in large part that because Jocelyn is still alive she has no claim. Respondents stated this distinctly in their Memorandum in Opposition to Plaintiffs' Proposed Jury Instructions, p. 6, dated May 3, 2010, where they state:

Plaintiffs assert that the Minnesota civil and jury instructions do not address damages of a living Plaintiff whose probability of death caused by negligence is greater than 50%. . . . And for good reason, Minnesota does not recognize this type of claim.

This Court cannot divorce the Supreme Court's analysis of compensable damages for statute of limitations accrual purposes as set out in MacRae from the situation presented to this Court. The practical problem, given Minnesota's accrual rule for statute of limitations, is one cannot delay litigation until Jocelyn dies or her family may be unable to recover because of statutory limitations.<sup>5</sup> And delaying suit would fail to compensate Jocelyn for her very real pain and distress. According to Respondents, Jocelyn is not even entitled to pain and suffering damages or damages for the shortening of her life. (T. 5/6/10, pp. 66-68). Minnesota law again is to the contrary. Roers v. Engebretson, 479 N.W.2d 422, 423-24 (Minn. Ct. App. 1992) (recognizing that where injured party is still living at time of trial, though death is foreseen, wrongful death statute does not supersede common law action for future damages, including measuring loss by reduced life expectancy). Given the undisputed fact Jocelyn has suffered a recurrence of her cancer and she will die, there is presently actual, tangible injury which entitles Plaintiffs to compensatory damages.

Under Minnesota law, compensatory damages consist of both general and special damages. Ray v. Miller Meester Advertising, Inc., 684 N.W.2d 404, 407 (Minn. 2004). General damages "are the natural, necessary and usual result of the wrongful act or occurrence in question." Id. Actual or compensatory damages include future losses. Id.

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<sup>5</sup> Respondents, however, have also said that even if this was a wrongful death case, there is no longer a "loss of chance argument," but her action still cannot proceed. (T. 10/25/10, p. 37).

“[A] tort victim may recover future damages caused by the tortfeasor even though it may be difficult to determine the exact amount of those damages.” Id. and citing Pietrzak v. Eggen, 295 N.W.2d 504, 507-08 (Minn. 1980).

The general rule of damages, as enunciated by the Minnesota Supreme Court, is that “it is well settled that a person injured by the tortious conduct of another is entitled to recover from the other damages for all harm, past, present, and prospective, legally caused by the tort.” Prior Lake State Bank v. Groth, 259 Minn. 495, 108 N.W.2d 619, 622 (1961), citing Restatement of Torts § 910. The Minnesota Supreme Court has also explained:

The general rule with respect to damages for a tortious act is that “the wrongdoer is answerable for all the injurious consequences of his tortious act, which according to the usual course of events and the general experience were likely to ensue, and which, therefore, when the act was committed, he may reasonably be supposed to have foreseen and anticipated.”

Tarnowski v. Resop, 236 Minn. 33, 51 N.W.2d 801, 804 (1952), *reh’g denied*. As Plaintiffs asserted, they have a right to all such damages due to Respondents’ negligent conduct, which would include such things as the medical expenses following recurrence. (T. 10/25/10, pp. 41-42). The fact that Plaintiffs are not claiming medical expenses prior to recurrence does not somehow limit Plaintiffs’ entitlement to all other damages.

The traditional American rule, which is followed in Minnesota, is that the recovery of damages based on future consequences may be had where the plaintiff proves that it is

more likely than not that a projected consequence will occur. Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 119 (D.C. Cir. 1982).

If such proof is made, the alleged future effect may be treated as certain to happen and the injured party may be awarded full compensation for it . . . .

Id.

Here, to a certainty, Jocelyn will die of cancer and Dr. Forman opines that was the case before her April 2010 recurrence. If damages are recoverable for wrongful death, there must be recoverable damages where death is a certainty. This Court so recognized in Roers, 479 N.W.2d at 423-24. Because all human beings eventually die, a wrongful death is a claim that the defendant's conduct brought on the death of the decedent sooner than it otherwise would have occurred. Here, where that patient is still living but will die, the decreased life expectancy must be an independent element of damages. Bauer v. Memorial Hospital, 879 N.E.2d 478, 498-502 (Ill. App. 2007) (citing many jurisdictions that recognize decreased life expectancy as an independent element of damages in a personal injury action); see Kevin G. Burke, A New Remedy for a Life Cut Short, 40-Mar Trial 64, 67 (2004).

Respondents say a shortened life expectancy under these circumstances cannot be recoverable damages under Minnesota law. No case in Minnesota so holds. The Minnesota Supreme Court in Leubner and Fabio was not faced with a living plaintiff whose life is cut short to a certainty by the Respondents' negligence. Roers certainly suggests to the contrary. 479 N.W.2d at 423-24. And the Minnesota Supreme Court in

Slater v. Baker, 301 N.W.2d 315, 317 n. 2 (Minn. 1981), appears to disagree with Respondents' unsupported proposition. In that case, while the appeal was on an evidentiary ruling, the Supreme Court noted sufficient medical evidence to prove shortened life expectancy in a breast cancer case. Id.

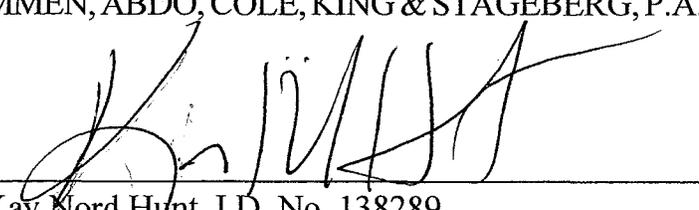
Plaintiffs' damages are not limited, as Respondents assert. Plaintiffs are entitled to all damages for all harm, past, present and prospective, which the jury finds was caused by Respondents' negligence, which is true here as in any other negligence case.

**CONCLUSION**

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

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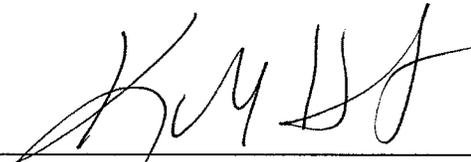
**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,811 words. This brief was prepared using Word Perfect 10.

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