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State of Minnesota

In Supreme Court

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

Respondents,

vs.

Rachel Green, M.D., et al.,

Appellants.

JOINT BRIEF OF AMICI MINNESOTA HOSPITAL ASSOCIATION AND MINNESOTA MEDICAL ASSOCIATION

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INTRODUCTION AND INTEREST OF AMICI

The two Amici Curiae submitting this brief have both public and private interests in this appeal.[1] These Amici are directly involved in efforts to improve the quality of healthcare in Minnesota and work to deliver the best possible healthcare at the most reasonable cost. The Minnesota Hospital Association ("MHA") and the Minnesota Medical Association ("MMA") are voluntary associations comprised of hospitals and physicians throughout the State of Minnesota. MHA, MMA and their members are extremely concerned that affirmance of the Court of Appeals' decision will drastically and unfairly change the law in Minnesota on the issue of causation in medical negligence cases. Such a change would mean that those providing healthcare services are subject to a different, lower burden of proof, and thus treated much harsher than those in any other profession. The "more probable than not" threshold requirement on causation that applies to all other negligence cases would not apply to claims against healthcare providers accused of negligently failing to diagnose a condition. As a result, healthcare providers would be subject to potential liability even where this minimum standard is not met.

The Minnesota Hospital Association

MHA is a statewide organization comprised of almost all hospitals in the State of Minnesota, including 145 community-based hospitals and 17 health systems, as well as

[1] Pursuant to Rule 129.03, the undersigned counsel certifies that no counsel for a party to this case authored this brief in whole or in part and no one made a monetary contribution to the preparation or submission of this brief other than Amici Curiae the Minnesota Hospital Association and the Minnesota Medical Association.

the more than 5,000 physicians practicing in those hospitals. MHA assists Minnesota Hospitals in carrying out their responsibility to provide quality healthcare services to their communities, promote universal healthcare coverage, access, and value, and to coordinate the development of innovative healthcare delivery systems. MHA serves its members and the State of Minnesota as a trusted leader in healthcare policy and is a valued source for healthcare information and knowledge. MHA is regularly asked to provide its expertise to the Legislature on issues impacting the delivery of healthcare and sound healthcare policy in the State of Minnesota.

The Minnesota Medical Association

MMA is a professional association representing more than 10,000 physicians, residents and medical students in the State of Minnesota. The MMA seeks to promote excellence in healthcare, to ensure a healthy practice environment, and to preserve the professionalism of medicine through advocacy, education, information and leadership. For more than 150 years, the MMA and its members have worked together to safeguard the quality of medical care in Minnesota as well as the future of medical professionalism. Like the Minnesota Hospital Association, the Minnesota Medical Association is frequently asked to provide its insight and expertise on the development of sound healthcare policies to achieve the highest level of healthcare in the State of Minnesota.

* * *

The interests of the MHA and MMA in this case are both public and private in nature. These Amici have no interest whatsoever in the particular dispute between these litigants. Rather, our interests primarily focus on our concern that by applying a statute

of limitations analysis to interpret the level of proof in a malpractice case needed to survive summary judgment, the lower court drastically changed the law. This change lowered the burden of proof, and created a cause of action for "loss of chance" that this Court repeatedly has rejected. Moreover, affirming the Court below would result in treating defendants in medical negligence cases under a different standard from defendants in every other occupation. More specifically, affirming the decision below would unfairly impose liability on healthcare providers even when their alleged negligence was not "more probably than not" the cause of harm, the well-established standard consistently applied in every other tort claim in Minnesota. From a public perspective, this change would significantly increase insurance premiums and the cost of healthcare for the citizens of the State of Minnesota. This would negatively impact our State healthcare environment and decrease the quality of health care in this state as resources will need to be used to pay for trials and verdicts on cases that should have been dismissed at summary judgment.

Since the members of the MHA and MMA include hospitals and healthcare professionals who themselves may be sued for malpractice, a decision by this Court could implicate Amici's private interests as well. We believe that lowering the standard of proof on causation for medical malpractice cases would result in improper, adverse jury verdicts against our members. Correspondingly, since all adverse jury verdicts must be reported to the Minnesota Board of Medical Practice and the National Practitioner's Data Bank, the statewide impact of affirming the decision below extends beyond dollars to the actual licensure of the physician members of the MHA and MMA. The analysis offered

by the lower court's decision will prevent trial courts from dismissing cases at the summary judgment stage of litigation when the plaintiff fails to put forth evidence to establish it is more probable than not that a defendants' negligence caused harm to the patient. Rather, those cases will now be submitted to a jury and will not only result in unnecessary trials that will increase the cost of healthcare, but also will result in adverse, unfair outcomes to defendants in malpractice cases even though the plaintiff failed to satisfy the *legal standard* necessary to allow the case to be submitted to the jury in the first place.

Beyond the lowering of the standard of proof on causation, we are also greatly concerned that the lower court decision creates a cause of action for "loss of chance" that has repeatedly been unconditionally rejected by the Supreme Court.

Amici believe this Court ought to have a broader perspective of the legal policy issues raised by this case than what may be presented by the parties. Naturally, the parties will focus on the particular facts of the case as those facts bear on the ruling below. Amici do not intend to reargue or restate Appellants' arguments. Instead, Amici seek to provide guidance on the issues of law and policy that should inform this Court's decision in analyzing what the law of this issue *should be.*

ARGUMENT

MHA and MMA are concerned that the decision below improperly created a cause of action for loss of chance of survival, a legal theory that this Court has repeatedly rejected. First, the lower court's reliance on a statute of limitations analysis in reaching its decision was flawed. The decision below confuses the standard of proof necessary for

a plaintiff to survive summary judgment under Rule 56 with a statute of limitations analysis used to determine whether a plaintiff has timely commenced an action. Secondly, the decision below results in the unusual circumstance that the standard of proof required of plaintiffs to survive summary judgment in certain medical negligence cases is lower than the standard applied to defendants in all other negligence cases. More specifically, plaintiffs pursuing medical negligence cases alleging failure to diagnose would no longer have to establish that it is "more probable than not" that the defendant's alleged failure to diagnose resulted in harm. Rather, a plaintiff would only need to allege some change in the chance of survival, possibly as little as one percent, in an analysis that does not even take into account the underlying disease, yet reduces the percentage chance of survival to a number less than fifty. This is not only an unfair and radical change in the law, it also creates a separation of powers concern because such a result should only occur through the legislative process. In a time of drastically increasing costs of health care, affirmance of the opinion below would result in more trials, expense and unfavorable verdicts in cases that should be dismissed at summary judgment.

This Court's rejection of loss of chance of survival is clear, straightforward and repeated. The Court of Appeals used the term "improbable-survival claim" to describe "a reduction in chance that drops the prognosis of survival below 50%." (A. 8) Regardless of its title, the claim offered here is identical to the "'loss of chance' of life expectancy and a greater risk of recurrence" that this Court rejected in *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). In light of this Court's consistent rejection of the cause of action

propounded here, MHA and MMA encourage the Court to reverse the Court of Appeals' decision.

I. A STATUTE OF LIMITATIONS ANALYSIS SHOULD NOT DETERMINE WHETHER A PLAINTIFF PRODUCES SUFFICIENT EVIDENCE TO SUBMIT A CASE TO THE JURY.

As representatives of hospitals, physicians and other medical providers across the state, Amici are deeply concerned that the analysis used by the Court of Appeals deviates sharply from long-standing precedent and will have an unfortunate long-standing impact on tort law and the medical profession in Minnesota. The issue in this case should focus on the *evidentiary* standard of proof necessary for a plaintiff to survive a motion for summary judgment in order for her case to be submitted to a jury. We are concerned that the statute of limitations analysis utilized by the lower court led it to inadvertently create a cause of action that this Court has consistently rejected. In other words, using the wrong analysis resulted in the wrong conclusion and created a previously rejected loss of chance claim.

A. This Court Has Consistently Rejected "Loss of Chance" Due to Reduced Life Expectancy.

For many years the law in this State has been clear – there is no cause of action for a loss of chance of survival of a terminal illness. This Court first declined to adopt loss of chance in *Leubner v. Sterner*, holding in a case alleging failure to diagnose cancer, that a theory for "negligent aggravation of a preexisting condition" is not actionable. *Leubner v. Sterner*, 493 N.W.2d 119, 122 (Minn. 1992). A year later, this Court directly rejected plaintiff's theory of recovery for "loss of chance," which the court defined as an

"increased chance of a recurrence of cancer and [a] decreased chance of living another 20 years." *Fabio v. Bellomo*, 504 N.W.2d 758, 762 (Minn. 1993). More recently, this Court reaffirmed the holdings in *Fabio* and *Leubner*:

> [In *Fabio* and *Leubner*] we rejected 'loss of chance' due to reduced life expectancy and increased risk of recurrence as a theory of compensable damages, and reaffirmed our rejection of 'negligent aggravation' of a preexisting condition.

MacRae v. Group Health Plan, Inc., 753 N.W.2d 711, 722 (Minn. 2008), citing *Fabio,* 504 N.W.2d at 762-63 and *Leubner*, 493 N.W.2d at 122.

Of course, a potential "negligent aggravation of a preexisting condition" claim is particularly relevant in cases alleging a delay in diagnosing terminal cancer. This is because, unlike most tort actions, cases involving healthcare providers do not involve situations in which the physician/alleged tortfeasor *created* the initial harm. Whereas a case involving an automobile accident may involve fracture of a bone, as this Court recognized, the patients of our members come to the doctor or hospital already with an illness:

> 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 prevented.

Leubner, 493 N.W.2d at 122. Because the physician who allegedly failed to timely diagnose a patient's cancer did not *create* the cancer, this Court's consistent rejection of claims alleging a heightened risk of recurrence of cancer and possible death makes sense.

A thorough analysis of causation issues is essential to the fair administration of justice. For that reason, this Court does not hesitate to dismiss cases in which the causal

connection is not sufficiently established and reliable. *See e.g., Lickteig v. Alderson, Ondov, Leonard & Sween*, 556 N.W.2d.557, 560 (Minn. 1996) (expressing concern about expanding the availability of damages that may be too speculative as it creates "a potential for abuse of the judicial process"); *K.A.C. v. Benson,* 527 N.W.2d 553, 559 (Minn. 1995) (emphasizing the importance in emotional distress cases that there be objective evidence to ensure stability and predictability in allowing recoveries); *Smith v. Knowles,* 281 N.W.2d 653, 656 (Minn. 1979) (affirming directed verdict because "[T]he record would have compelled the jury to speculate as to whether earlier diagnosis or earlier treatment would have resulted in a cure.") Consequently, *Leubner* expressly noted 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.

Justice requires fairness to all parties. Just as principles of fairness allow a plaintiff to recover damages for injuries caused by a negligent defendant, those same principles protect defendants by only holding them liable for the damages they cause. Indeed, this Court has made it clear that even the most unfortunate consequence cannot support recovery in the absence of the necessary causal proof:

> While it is natural that our sympathies are with the next of kin of a child who has unfortunately come to such an untimely end, we must not permit our sympathies to blind our judgment to such an extent that we allow it to take the place of the evidence required to prove a cause of action. Negligence, *and its causal relation to the injuries upon which the right to recover rests must be proved by the degree of proof required by law.* * * *[M]ere proof of the happening of the accident or proof that death or injury was the result of the act of another, without proof of negligence *or its causal relation to the result complained of, is not sufficient.*

Hagsten v. Simberg, 232 Minn. 160, 44 N.W.2d 611, 613 (1950) (emphasis added). Likewise, this Court reinforced that principle in *Leubner,* noting, "[D]amages for aggravation of a preexisting condition are simply a means to assure that the defendant pays only for the harm he causes, not the harm plaintiff already had." *Leubner*, 493 N.W.2d at 122.

Our members fear that the Court of Appeals' use of a statute of limitations analysis from *MacRae* confused the fundamental burden of proof principles established by *Leubner* and its progeny. In turn, this confusion created a cause of action for loss of chance of survival that this Court had consistently rejected and which is too speculative and unfair to allow. Despite the title granted it by the lower court, its 'loss of chance' result is contrary to Minnesota law and is simply unfair as it would hold medical professionals liable for damages they did not cause and which are simply too speculative to award. The importance of establishing sufficient evidence of causation before a jury is allowed to consider a case is lost in the decision below.

B. A Statute of Limitations Analysis is Different from a Causation Analysis.

The Court of Appeals hinged much of its decision on this Court's opinion in *MacRae v. Group Health*, 753 N.W.2d 711 (Minn. 2008). *MacRae* focused on when, for purposes of the accrual of the statute of limitations, damages accrue. The Court of Appeals largely relied on language from *MacRae* stating that 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. While that summary statement

might be sound in the context of a *statute of limitations* analysis under Rule 12, the *summary judgment* analysis under Rule 56 must go much deeper and consider whether there is sufficient evidence that the recurrence *was actually caused by the alleged delay or the disease itself.* This is where the Court of Appeals confused the issue by focusing on the *allegations* that are appropriate for a statute of limitations analysis rather than the *evidence* necessary for a summary judgment analysis.

The statute of limitations is an affirmative defense. It is ordinarily waived unless it is asserted in the answer to the complaint. *Parsons v. Town of New Canada*, 295 N.W. 907, 130 (Minn. 1941); *Rye v. Phillips*, 282 N.W. 459, 459 (Minn. 1938). As this Court pointed out in *MacRae*, the issue to evaluate on the statute of limitations is whether the cause of action may survive "at such time as it *could be brought* in a court of law without dismissal for failure to state a claim." *MacRae*, 753 N.W.2d at 716-717 (emphasis added). Of course, a determination as to whether a plaintiff has sufficient evidence to submit the case to a jury is quite different from the evidence necessary to commence a cause of action. As it applies to causation, to survive summary judgment in a medical malpractice case the plaintiff must provide sufficient evidence that it is "more probable than not" the defendant's departure from the standard of care was a direct cause of the plaintiff's injuries. *Plutshack v. University of Minnesota Hospitals*, 316 N.W.2d 1, 7 (Minn. 1982). In this case, since the cancer already existed, a viable claim at summary judgment must establish the alleged delay in diagnosis (as opposed to a natural recurrence of the disease) will likely cause the patient's premature death.

Summary judgment motions are governed by the provisions of Rule 56 of the Minnesota Rules of Civil Procedure. That Rule provides that judgment may be entered if all of the evidence including the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits "show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.05. Rule 56 requires the non-moving party to produce sufficient *evidence* to raise a genuine issue of material fact to allow the case to be submitted to the jury. *Thiele v. Stich,* 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid-America Employers Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

In other words, whereas surviving a statute of limitations question is necessary for the plaintiff to get *into court*, surviving a Rule 56 motion is necessary for the plaintiff's case to get *to the jury*. Questions of summary judgment focus on whether that evidence is sufficient for the jury to consider and decide. In that regard, such an important evaluation requires a much deeper analysis, focused on the additional question of whether the recurrence was caused by the alleged delay *or* the underlying disease. That is the critical evidentiary point the Court of Appeals failed to properly consider.

As members of the medical profession, Amici fear that adopting the Court of Appeals' analysis will create a threshold statute of limitations standard rather than a more probative assessment of the relative causal impact of the alleged negligence *and* the underlying disease. This is the difference between whether a plaintiff can conceivably submit sufficient evidence to survive a Rule 12 motion based on the statute of limitations and the *actual evidentiary standard* necessary for the jury to hear the case. At summary

judgment, the question is a fundamental burden of proof issue – something the lower court disregarded.

Amici believe that as a matter of policy, a Rule 56 summary judgment analysis focused on the legal sufficiency of the plaintiff's causation evidence must continue to be the gatekeeper in terms of whether a case may be submitted to the jury. That is where the decision below erred. In short, the law in Minnesota should remain the same as it has always been: To get to a jury, the plaintiff must produce sufficient actual evidence that it *is more probable than not* the patient's anticipated death was caused by the alleged failure to diagnose, and not by the disease itself or some other factor. Unfortunately, the decision below failed to appreciate this critical distinction. Rather, the lower court failed to incorporate the essential, analytical comparison of whether the disease recurred because of the delay or the disease itself – thereby creating for the first time a claim of lost chance of survival.

II. IN NEGLIGENCE CASES MEDICINE SHOULD NOT BE TREATED DIFFERENTLY FROM OTHER PROFESSIONS.

Amici fear that the precedent set by the Court of Appeals' decision would result in the medical profession being treated differently in tort cases from everyone else. More specifically, whether intentionally or not the decision below has changed the standard of proof necessary for a patient/plaintiff to submit her case to a jury. In future cases, courts following this decision will fail to take into account the likelihood of the disease recurring on its own. Those courts will conclude the recurrence of the disease more probably than not stemmed from the alleged delay in diagnosis, based only on the

potential causal relationship, no matter how small that potential may be. Under the lower court's analysis, medical professionals will be treated differently in negligence cases from all other professions. This is especially troubling because such a drastic change would occur outside the legislative process.

Of course, it is black-letter law that on the issue of causation the plaintiff must establish that it is "more probable than not" that his or her injury was a result of the defendant healthcare providers' negligence. *Plutshack,* 316 N.W.2d at 7; *Cornfeldt v. Tongen*, 295 N.W.2d 638, 640 (Minn. 1980). As this Court has repeatedly explained, the "guiding principle" behind this rule is to prevent a jury from speculating as to possible causes of a plaintiff's injury or whether a different medical treatment could have resulted in a more favorable prognosis. *Leubner*, 493 N.W.2d at 121. *See also, Harvey v. Fridley Medical Center*, 315 N.W.2d 225, 227 (Minn. 1982).

In explaining the "more probable than not" standard, this Court has stressed the importance of imposing liability on a defendant health-care provider only when the substantive evidence differentiates between the natural consequence of an illness and consequences arising from a missed diagnosis. In *Silver v. Redleaf,* 194 N.W.2d 271, 273 (Minn. 1972), this Court affirmed a directed verdict for the defendant health-care providers because plaintiff failed to satisfy his "burden to show it was more probable that death resulted from some negligence for which the defendant was responsible than something for which he was not responsible." *See also Harvey v. Fridley Medical Center,* 315 N.W.2d 225, 227 (Minn. 1982) (affirming directed verdict for same reason); *Smith v. Knowles*, 281 N.W.2d 653, 656 (Minn. 1979) (affirming directed verdict for

same reason). The *Leubner* Court reached the same conclusion, noting the plaintiff's claim failed as a matter of law if it is "*equally probable* that other outside factors were causes of the recurrence." *Leubner,* 493 N.W.2d at 122 (emphasis added). Again, we fear the court below failed to appreciate this critical distinction.

We are troubled by the decision of the court below because it fails to take into account the likelihood that the patient's recurrence could have been caused simply by the disease itself, rather than the delay in diagnosis. By so doing, the court failed to follow the lessons in *Silver, Smith, Harvey* and *Leubner* in that it would impose liability for consequences for which the health-care provider was not responsible. Unfortunately, the Court of Appeals' decision appears to have strayed from this very basic principle and created a loss of chance claim as the lower court's entire analysis focused on the 60% chance of survival falling to 40% without taking into account the undisputed likelihood the disease would recur on its own.

We are concerned that if allowed to stand a plaintiff who commences suit against a physician or hospital will be allowed to submit her case to the jury as long as the expert affidavits state that the recurrence of cancer and patient's death are more likely than not caused by the alleged delay in diagnosis when, in fact, the actual evidence reveals the recurrence was more likely caused by the disease process itself than any purported delay. The first consequence is hospitals, physicians and other healthcare providers would no longer be held to the fundamental "more probable than not" proof on causation that applies to every other entity brought into court to defend a tort claim. The second

consequence is that suddenly Minnesota will create a loss of chance of survival claim, despite contrary long-standing decisions of this Court.

Simple math reveals why, despite an expert's conclusory statement to the contrary, Plaintiff's expert fails to establish that the patient's recurrence and impending death are "more probable than not" related to the alleged delay in diagnosis. In this case, the patient had a 60% chance of long-term survival and 40% chance of recurrence absent the alleged delay. Plaintiff's experts contend that in light of the alleged delay, her chance of long-term survival fell from 60% to 40%. Under Plaintiff's evidence of the post-delay chance of recurrence (60%), two-thirds would be attributable to the cancer itself (40%) and one-third to the alleged negligent delay in diagnosis (20%). In other words, any recurrence more probably resulted from the natural progression of the disease than from a delay in diagnosis. Unfortunately, the analysis of the lower court simply missed this critical, analytical step. Unless remedied by this Court, the consequence of this error will be to decrease the standard of proof on causation -- in medical cases only -- from "more probable than not" to something considerably lower and create a loss of chance theory. In fact, a plaintiff could proceed on the mere possibility that a provider's negligence could be the cause of the recurrence, even when the numbers clearly show, more probably than not, the underlying disease caused the recurrence. Simply stated, that is not fair to the medical profession, particularly when such a change was not considered and approved by the legislature and signed into law by the governor.

As providers of medical care to patients across the State of Minnesota, Amici are deeply troubled that regardless of the term used to describe it, the Court of Appeals failed

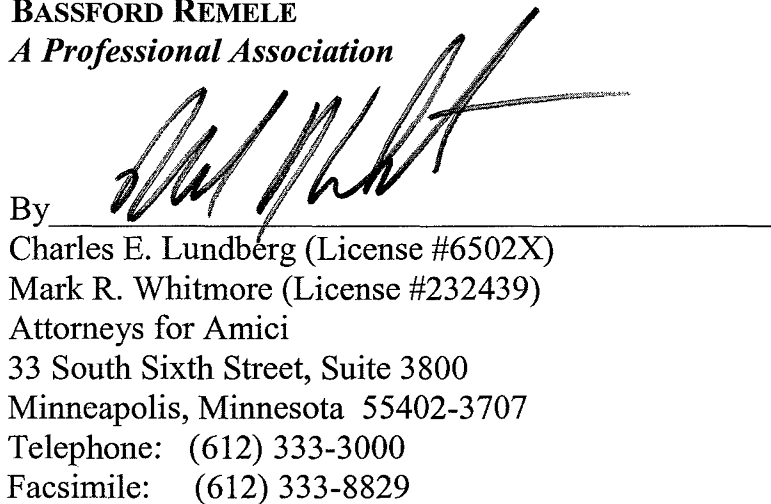
to recognize the important, undisputed change in the law it created. This error would cause courts in future cases involving health-care providers to treat the medical community differently than any other profession. We are concerned that the analysis of the court below does not apply the "more probable than not" standard utilized in every other type of negligence claim in this State. Rather, the lower court's analysis allows a plaintiff who commences an action against her medical provider to submit the case to the jury in a failure to diagnose case even when her condition undisputedly was *not* more likely than not caused by the alleged delay but was, in the terms previously used by this Court, a result of "something for which he [the defendant] was not responsible." Of course, the consequence of the lower court's analysis is that despite the prior holdings in *Leubner, Fabio,* and *MacRae,* loss of chance of survival will become an actionable claim and lower the standard of proof for a plaintiff to prevail.

The lower court's analysis treats medical providers in delay of diagnosis cases differently than other defendants. While we submit that medical providers should be treated in tort actions like every other defendant, to the extent there should be any variance, such a decision must come from the Legislature rather than the court system. The Legislature, with the support of the Governor, has the ability to pass laws treating entities differently. However, that is not what occurred in this case. To the contrary, the lower court's decision created a different standard of proof specific to the medical profession which is not fair and which violates fundamental basics of separation of powers.

CONCLUSION

As leaders of the medical profession, the Minnesota Hospital Association and the Minnesota Medical Association are deeply concerned that affirmance of the decision below not only strays far from basic principles of tort law but also creates different standards for medical defendants in negligence actions. This Court has unequivocally stated that Minnesota does not recognize the cause of action for loss of chance of survival that the Court of Appeals has now created. Beyond that, by focusing on the statute of limitations, the court below strayed from the thorough summary judgment analysis it should have applied and lowered the standard of proof for future cases. As a result, the Minnesota Medical Association and the Minnesota Hospital Association encourage this Court to overturn the Court of Appeals' decision.

BASSFORD REMELE
A Professional Association



Dated: 26 April 2012

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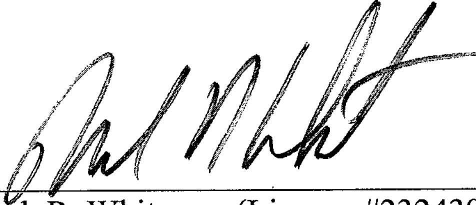
CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief complies with the requirements of Minn. R. Civ. App. P. 132.01 in that it is printed in proportionately spaced typeface utilizing Microsoft Word 2003 and contains 4,738 words, excluding the Table of Contents and Table of Authorities.

Dated: 26 April 2012



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