IN THE SUPREME COURT OF IOWA

SHARON K. SUSIE, an individual and LARRY D. SUSIE, an individual **Plaintiffs-Appellants** **v.** **FAMILY HEALTH CARE OF SIOUXLAND, P.L.C., D/B/A FAMILY HEALTH CARE OF SIOUXLAND URGENT CARE, a professional limited liability company; and SARAH HARTY, P.A.C., an individual** **Defendants-Appellees**	**S.CT. NO. 17-0908** **PLAINTIFFS'-APPELLANTS' RESISTANCE TO APPLICATION FOR FURTHER REVIEW**

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY
HONORABLE JOHN D. ACKERMAN, JUDGE

PLAINTIFFS'-APPELLANTS' RESISTANCE TO APPLICATION FOR FURTHER REVIEW (COURT OF APPEALS DECISION NOVEMBER 7, 2018)

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II. PLAINTIFFS' RESISTANCE TO DEFENDANTS' APPLICATION FOR FURTHER REVIEW

Pursuant to Iowa Rule of Appellate Procedure 6.1103(2), Plaintiffs resist the application of Defendant for further review and state:

1. The Court of Appeals correctly applied established principles of Iowa law to the factual record in this case in reversing the District Court's grant of summary judgment in a medical negligence case on causation grounds.

2. This case does not present a novel question or important issue of law that has not already been decided by this Court.

3. Defendants' application for further review mischaracterizes the underlying facts of the case. Specifically, there is virtually no mention of important testimony from both treating physicians and Defendants' own expert which solidify Plaintiffs' causation case and justifies its submission to the jury.

4. Defendants' application for further review relies on cases which are clearly distinguishable from the causation case developed on behalf of Sharon Susie and therefore provide no legal justification in support of Defendants' application for further review.

5. "Further review by the Supreme Court is not a matter of right, but of judicial discretion. An application…will not be granted in normal

circumstances." Iowa Rule of Appellate Procedure 6.1103(1)(b). This case does not warrant further review.

WHEREFORE, for the reasons set forth above and below, Plaintiffs respectfully request that Defendants' application for further review be denied.

III. ARGUMENT

I. Summary of facts and proceedings.

This is a medical negligence case in which Plaintiff Sharon Susie tragically ended up having her right arm and eight (8) of her toes amputated when a skin infection, a cellulitis, progressed to a deep tissue infection known as necrotizing fasciitis. Plaintiff Sharon Susie alleges a number of specific allegations of negligence and further alleges that the negligence alleged was a substantially producing cause of the massive tissue loss which developed in response to the progressive infection. In addition, Sharon Susie relies on the concept of "loss of a chance" as an alternative method for establishing causation in her medical negligence claim.

This case presents a classic example of how a case can sometimes take years to make its way to trial. The case was originally scheduled to begin trial on March 8, 2016 at the Woodbury County Courthouse in Sioux City. Just eight (8) days before the start of that trial, Defendants filed a second motion in limine which challenged the sufficiency of Plaintiff Sharon Susie's causation case. (Defendants' second motion in limine dated March 2, 2016, Appendix pp. 0029-0043). The Honorable Judge Ackerman overruled that motion in limine and the case was scheduled to proceed to trial. However, on the first day of trial, the case was continued to allow

defense counsel to depose two (2) lay witnesses, both of whom had observed the appearance of Sharon Susie's arm in the days just prior to her presentation to the urgent care clinic on September 29, 2012. Because of that continuance, the case was rescheduled for May 9, 2017 (Order of Continuance, Appendix pp. 0074-0076).

In the interim, one of Plaintiffs' experts, Dr. John Crew, an expert on deep tissue necrotizing fasciitis infections, died prior to the second trial. Plaintiffs moved the court for a substitution of experts (Plaintiffs' Motion for Substitution of Experts, Appendix pp. 0078-0080). The court granted that request and a new expert was designated, Dr. Roger Schechter. Dr. Schechter provided a Rule 1.508 summary of his opinions which included an opinion on causation which read as follows:

> "Dr. Schechter will also opine to a reasonable degree of medical probability regarding the treatability of Sharon Susie's infection at the point in time she presented to the urgent care clinic on September 29, 2012. He is also expected to testify that had the infection been diagnosed on the day of her visit to the clinic, and treatment initiated immediately, the spread of the infection, more likely than not, could have been avoided, the infection would not have become systemic; and the amputation of Sharon's arms and toes would more likely than not have been avoided."

(Schechter Rule 1.508 expert summary, Appendix pp. 0086-0087).

Dr. Schechter was also deposed on April 25, 2017 (Schechter deposition, Appendix pp. 0324-0454). In the course of that deposition, Dr. Schechter admitted the obvious. Specifically, he admitted that because of the negligent acts and/or omissions of the healthcare team involved in evaluating and caring for Sharon Susie at the urgent care clinic on September 29, 2012, it would be speculation to opine as to how specifically Sharon Susie would have responded to the immediate and timely administration of antibiotic therapy for her developing infection. **No expert witness could ever testify as to that fact without speculating because the Defendants failed to timely initiate antibiotic medication therapy to Sharon Susie.**

However, in this case, despite Dr. Schechter's admission as to the obvious speculative nature of opining **specifically** as to how Sharon Susie might have responded to the immediate and timely administration of antibiotic therapy for her progressively developing infection, the record before the trial court and the record before the Court of Appeals establishes an abundance of admissible evidence which takes Sharon Susie's causation case out of the realm of speculation. In resisting this application for further review, Plaintiff Sharon Susie would like to highlight the "building block" approach to establishing the causation case as is clearly contained within the

trial court record leading up to trial. In highlighting important aspects of Plaintiffs' causation case for this Court to consider, she would respectfully emphasize the fact that she and her counsel have lived with this case for years. In all due respect to Judge Ackerman, it was impossible for him to have a clear command of all aspects of the record which established the causation case like a mosaic. Defendants' motion for summary judgment was filed only five (5) days before the scheduled start of the trial, May 4, 2017. The motion for summary judgment was filed on a Thursday. Judge Ackerman requested that a resistance be put on file by Saturday, May 6, 2017. The motion was scheduled to be heard on the Monday morning before the start of trial the next day, May 8, 2017. While Plaintiffs' counsel filed a thirty-six (36) page resistance on Saturday afternoon at 5:02 p.m., the resistance likewise contained an extensive appendix (170 pages) supporting the causation case outlined in the resistance. Through no fault of Judge Ackerman, given the short window of opportunity to absorb all of the information provided in her resistance, Plaintiff Sharon Susie respectfully suggests that Judge Ackerman did not appreciate the significance of some of the testimony generated through depositions of treating physicians and some of the testimony generated through depositions of Defendants' retained experts with regard to the causation case. The focus of both Judge

Ackerman and Judge McDonald, in his dissent in the Court of Appeals' decision which reversed Judge Ackerman's grant of the motion for summary judgment, is almost exclusively on the sworn testimony of Dr. Roger Schechter, Plaintiffs' retained expert. There is very little, if any consideration, of the other aspects of the causation case which was methodically put together through a series of some 13 depositions leading up to trial.

Before embarking upon the details of the trial court record which distinguish Plaintiff Sharon Susie's causation case from some of the causation cases considered within the case law cited as support for Defendants' application for further review, Plaintiff Sharon Susie would like to remind this Court of a quote contained in its decision entitled *DeBurkarte v. Louvar*, 393 N.W.2d 131, 135-38 (Iowa 1986). In discussing the causation concept in medical negligence cases, this Court quoted from a case entitled *Hicks v. United States*, 368 F.2d 262, 232 (4th Cir. 1966) as follows:

> When a defendant's negligent action or inaction has effectively terminated a person's chance of survival, **it does not lie in the defendant's mouth to raise conjecture as to the measure of the chances that she has put beyond the possibility of realization**. If there was any substantial possibility of survival and defendant has destroyed it, she is answerable. Rarely is it possible to demonstrate to an absolute certainty what would have happened **in circumstances that the**

> **wrongdoer did not allow to come to pass**. The law does not…require the plaintiff to show to a ***certainty*** that the patient would have lived had she been hospitalized and operated on promptly.

Id.

In Sharon Susie's case, the very things that the Defendants failed to do left Sharon Susie's medical records void of the very types of information which an expert would routinely rely on in order to establish the causation case. Notwithstanding that fact, in Sharon Susie's situation, there are a multitude of well-established medical facts which elevate her case out of the realm of pure speculation. Yes, it is speculative to opine exactly how Sharon Susie's body would have reacted to the timely and aggressive administration of antibiotic medication therapy in response to her infection, but **given the type of bacteria which caused this infection,** a jury to find causation at a level of certainty or higher that is required by the Iowa case law. Sharon Susie's "building block" approach to her causation case can be summarized as follows:

1. **The bacterial agent responsible for the cellulitis (skin infection) which progressed to a deep tissue necrotizing fasciitis.**

   The bacterial culprit for Sharon Susie's infection was *Group A strep bacteria*. **It was not some rare, antibiotic resistant bacteria** for which the doctors have little or no response. *Group A strep*

bacteria is an extremely common type of bacteria. It is the bacteria responsible for strep throat. It is the bacteria that is responsible for millions of cellulitis or skin infections diagnosed annually in this country (Vemuri deposition pp. 42:25-44:22, Appendix p. 0247; Lamptey deposition pp. 79:14-80:10, Appendix p. 0234).

The importance of the fact that the source of Sharon Susie's infection was Group A strep bacteria is obviously found in the fact that Group A strep bacteria is successfully treated with a multitude if different antibiotics for millions of patients in the United States on an annual basis. (Lamptey deposition pp. 39:13-40:6, Appendix pp. 0223-0224; Vemuri deposition p. 9:10-25, pp. 11-14, pp. 43:11-44:5, Appendix pp. 0239, 0240, 0247). In fact, statistics from the Centers for Disease Control (CDC) which Dr. Vemuri, the defendants' retained infectious disease expert, agreed with estimates the total of Group A Strep infections in this country at **10 million (throat and skin infections—cellulitis). Because of the extreme sensitivity of that bacteria to a myriad of antibiotics, only 9,000 to 11,500 progress to invasive deep tissue infections like what Sharon Susie experienced. That is less than 1/10th of one percent. (Vemuri deposition, pp. 43-44, Appendix p. 0247)**

2. **Group A strep bacteria is very susceptible to a wide number of antibiotics.**

Sharon Susie was seen at the urgent care clinic on September 29, 2012 (Appendix pp. 0456-0459). After becoming increasingly ill at home that evening and into the early morning hours of September 30, 2012, she presented to the emergency room the next day. When she presented, she was in septic shock. Cultures were done of her infectious wound and the bacteria was isolated as Group A strep bacteria (Exhibit 31, Appendix pp. 0460-0462). Antibiotic sensitivity evaluations were done at the same time and it clearly demonstrated that this particular strain of Group A strep bacteria was highly sensitive to some eleven (11) different types of antibiotics, including Anthocyanin, Chloramphenicol, Ceftriaxone, Clindamycin, Cefotaxime, Cefepime, Erythromycin, Levofloxacin, Penicillin, Tetracycline, and Vancomycin (Exhibit 31, Appendix p. 0460). In other words, had antibiotics been commenced at the Urgent Care Clinic the day before, there is no reason to believe that Sharon Susie's infection could have been brought under control.

3. **It is not uncommon for a cellulitis or skin infection to progress downward into the deeper tissues where it can develop into a life-threatening necrotizing fasciitis.**

Dr. Daniel Lamptey was Sharon Susie's treating infectious disease specialist. Dr. Ravi Vemuri was Defendants' retained infectious disease expert. Dr. William Rizk was one of Sharon Susie's treating general surgeons. Of course, Dr. Roger Schechter, a wound care specialist retained by Plaintiff Sharon Susie, was also prepared to testify. All of those experts, in their sworn deposition testimony, confirmed the fact that it was not uncommon for a skin infection, a cellulitis, if not treated, to progress to the deeper tissues of the patient's body where it can then turn into a more serious, life threatening, condition known as necrotizing fasciitis. (Schechter deposition pp. 119-125, Appendix pp. 0442-0448; Lamptey deposition pp. 64-80, Appendix pp. 0230-0234; Vemuri deposition pp. 21, Appendix p. 0242; Rizk deposition pp. 53-54, Appendix pp. 0303-0304).

4. When Sharon Susie presented to the urgent care clinic on September 29, 2012, there was no medical evidence documented in the chart suggesting that her infection had progressed to necrotizing fasciitis.

Dr. Roger Schechter clearly testified that when Sharon Susie was at the urgent care clinic on September 29, 2012, she was not yet **septic**. According to Dr. Schechter, at the urgent care clinic "she did

not have any of the vital signs that would at that point in time be consistent with such a syndrome [sepsis]." She did not meet the SIRS criteria. SIRS is an acronym for Systemic Inflammatory Response Syndrome which is an inflammatory response to an infection which affects the entire body. (Schechter deposition pp. 101-102, 119-121, Appendix pp. 0424-0425, 0442-0444). Further, according to Dr. Schechter, Group A strep bacteria does not always develop into necrotizing fasciitis (Schechter deposition p. 121-122, Appendix p. 0444-0445). The witnesses that observed her right forearm have described a condition consistent with cellulitis (Sharon Susie deposition pp. 59-64, Appendix pp. 0171-0172; Brian Susie deposition pp. 15-17, 24-28, Appendix pp. 0180-0182, 0184-0188). When she presented at the urgent care clinic, she was "more than likely was experiencing some type of inflammatory response but was not frankly systemic, she did not meet the criteria for systemic inflammatory response syndrome." (Schechter deposition pp. 121-125, Appendix p. 0444-0448). According to Dr. Schechter, it is the destruction of the blood vessels caused by an overwhelming systemic infection (that is an infarction of the blood vessels in response to necrotizing fasciitis) that would impair the ability of antibiotic

administration to effectively treat Sharon Susie's infection. According to Dr. Schechter, when she was at the urgent care clinic on September 29, 2012, there was very little evidence that her infection had progressed to the point of a full blown systemic response which may have obliterated the blood vessels – that is, the vessels that would carry the antibiotics to treat the infected area were more likely than not still intact when Sharon was at the Urgent Care Clinic which supports the inference that her infection was very treatable at that point in time. (Schechter deposition pp. 121-125, Appendix pp. 0444-0448).

5. Cellulitis caused by Group A strep bacteria is routinely effectively treated with various forms of antibiotics.

The record before the trial court and the record before the Iowa Court of Appeals was replete with testimony from various experts, including retained experts and treating experts, that if a *Group A strep* cellulitis is timely treated with antibiotics, **a complete recovery is expected**. According to Dr. Schechter, "The standard of care on empiric therapy for somebody who has a suspected soft tissue infection, if that diagnosis had been made and entertained, it is something that would act on gram positive organisms [like Group A strep bacteria]. That's the very first line…you're looking at an

organism that's actually **uniquely sensitive** to most drugs for gram positive organisms." (Schechter deposition p. 128, Appendix p. 0451).

Dr. Lamptey felt the source of the bloodstream infection which was present when Sharon Susie presented to the emergency room was "felt to be from severe skin and soft tissue involving the right upper extremity." (Lamptey deposition pp. 41-42, Appendix p. 0225). According to Dr. Lamptey, cellulitis can make patients ill, but cellulitis does not ordinarily make a patient as ill as what Sharon Susie was when she came to the emergency room on September 30, 2012. (Lamptey deposition pp. 64-65, Appendix pp. 0230-0231). According to Dr. Lamptey, **if you begin antibiotics for what appears to be a cellulitis, you would expect a *complete recovery* for that patient**. (Lamptey deposition p. 70, Appendix p. 0232). In fact, to give some context to that statement, Dr. Vemuri was presented with an article from the Center for Disease Control and Prevention which states that there are over ten million non-invasive Group A strep infections which occur annually in this country. They primarily involve throat and superficial skin infections. Out of the over ten million non-invasive Group A strep infections, only nine thousand to eleven

thousand five hundred progress to invasive infections of the deep tissue, including necrotizing fasciitis (Vemuri depo 43-44, Appendix p. 0247; see also CDC publication entitled *Group A Strep for Clinicians* dated May 1, 2014, Appendix pp. 0463-0464; see also Lamptey deposition pp. 79-80, Appendix p. 0234). Clearly, Plaintiffs' causation case was not based on mere speculation. The record would clearly allow the jury to determine that Sharon Susie first presented with a skin infection known as cellulitis which then progressed over the next twenty-four hours into a deep tissue necrotizing fasciitis. Because of the exquisite sensitivity of Group A strep bacteria to a variety of antibiotics, had Sharon Susie been diagnosed with cellulitis at the time of her presentation on September 29, 2012 to the urgent care clinic, and had antibiotics been immediately commenced, from a **statistical basis** as confirmed by the data from the Center for Disease Control, there is an overwhelming probability that this infection would have been stopped in its tracks and Sharon Susie would have not had massive tissue destruction resulting in the amputation of her right arm and eight of her toes. In the words of Dr. Lamptey, if you begin antibiotics for what appears to be a cellulitis, you would expect

a complete recovery for that patient (Lamptey deposition p. 70, Appendix p. 0232).

Dr. William Rizk, Sharon's treating general surgeon, agreed with Dr. Lamptey on that issue, testifying that if you get antibiotics on board early, they usually work for soft tissue cellulitis (Rizk deposition p. 53, Appendix p. 0303). Even the Defendants' own retained expert added significant strength to the causation argument. Dr. Vemuri describes cellulitis as the bread and butter of his infectious disease practice (Vemuri deposition p. 12, Appendix p. 0239). He routinely diagnoses cellulitis without even doing blood work (Vemuri deposition p. 13, Appendix p. 0240). He routinely diagnoses a cellulitis condition from his visual observation and from palpation of the area and he routinely treats it with antibiotics (Vemuri deposition p. 13, Appendix p. 0240). Dr. Vemuri testified that there are three classic features of a cellulitis infection: "redness, warmth and tenderness." (Vemuri deposition p. 12, Appendix p. 0239). He acknowledges that a cellulitis can progress downward into the deeper tissue and develop into necrotizing fasciitis (Vemuri deposition p. 21, Appendix p. 0242). **Dr. Vemuri agrees that complete recoveries routinely occur for a soft tissue cellulitis where antibiotics are timely administered** (Vemuri deposition p. 37, Appendix p. 0246).

In all due respect to the Defendants, in their application for further review, there is little or no discussion of the sworn deposition testimony of the numerous treating physicians who were deposed in this case; or the sworn deposition testimony of Defendants' own retained experts. The focus is almost exclusively on the testimony of Dr. Roger Schechter. No mention is made of the CDC statistics with regard to Group A strep bacterial infections and the overwhelming success that physicians in the field have treating those infections with a multitude of antibiotics. According to the Defendants in their application for further review, a quote from Dr. Schechter, **taken out of context**, was argued to be dispositive of the causation issue in this case. Specifically, Defendants quoted Dr. Schechter's deposition at page 100, Appendix p. 0423 as follows: "I'm not here to say [Plaintiff's] arm was cut off because of [Defendant] Sarah Harty." In all due respect, the complete answer of Dr. Schechter to that question reads as follows:

> Q. Or are you here to say that Sharon Susie's arm was cut off because of Sarah Harty?
>
> A. I'm not here to say her arm was cut off because of Sarah Harty. **I'm here to say that she became ill and septic because she wasn't given a thorough enough evaluation and follow up."**

To suggest that that line of Dr. Schechter's testimony, taken out of context, should be dispositive of the causation issue in this case is entirely

consistent with filing an application for further review without referencing whatsoever the sworn deposition testimony of all medical experts who offered important testimony on the causation issue. This case is clearly distinguishable from a medical negligence case where the only evidence on causation is that the earlier the treatment, the better the expected outcome. In this case, unlike the case cited by Defendants in their application for further review, Plaintiff Sharon Susie provided so much more information as detailed above. This jury would have known of the bacterial culprit for her infection; this jury would have known that the infection started as a skin infection or cellulitis; this jury would have known that cellulitis infections are overwhelmingly successfully treated when their caused by Group A strep bacteria as long as antibiotics are brought on board at the earliest opportunity. This jury would have seen the Defendants attempt to have its cake and eat it too. Stated another way, the Defendants want to argue that she was not sick enough to diagnose a cellulitis infection when she was at the urgent care clinic on September 29, 2012 out of one side of their mouth. However, on the other side of their mouth, they want to argue that this infection had progressed so dramatically on September 29, 2012 that any antibiotic administration would have been totally ineffective at preserving the massive tissue loss that Sharon Susie experienced. The evidence in this

case would have demonstrated the fallacy of that argument and would have demonstrated logical building block causation case.

The majority opinion of the Court of Appeals was well reasoned and effectively considered the lower court record. The reversal is absolutely justified, particularly when this Court considers the fact that when a hearing was held on Defendants' motion for summary judgment the day before the trial started, Judge Ackerman's initial impression was that there was enough evidence to submit a loss of a chance theory to the jury; it is only when he suggested that the parties take the issue up on appeal and was informed that it was not an appeal by right because there would still be a portion of the case pending, that he reversed his position and granted summary judgment on all issues. Sharon Susie deserves her day in court. The Court of Appeals majority opinion thoroughly analyzed the record and agreed that she deserves her day in court. This application for further review ought to be denied.

II. When closely reviewing the factual record in support of Plaintiff Sharon Susie's causation case, it is clear that the cases upon which the Defendants rely in their application for further review are clearly distinguishable and provide no valid reason for this Court to grant Defendants' application for further review.

It is important to emphasize that in Defendants' application for further review, it devotes but one paragraph to the sworn deposition testimony of

Dr. Daniel Lamptey, an infectious disease treating expert of Sharon Susie, Dr. Rizk, a treating general surgeon of Sharon Susie and Dr. Ravi Vemuri, the retained infectious disease expert of the Defendants. In that paragraph, the Defendants jump on four (4) words from the Court of Appeals' decision – "If caught early enough." (Defendants' application for further review, pp. 22-23). The failure of the Defendants to discuss at length the sworn expert testimony of those three (3) additional medical experts is understandable. Clearly, as discussed in detail above, when the testimony from those doctors are reviewed closely, there is simply no question that this record provides a well-developed basis for concluding that the causation requirement in this medical negligence case has been developed with sufficient evidence to justify the reversal of the Iowa Court of Appeals. Again, in all due respect, Judge Ackerman focused almost exclusively on the testimony of Dr. Roger Schechter; so did Judge McDonald in his dissent within the Court of Appeals decision.

Both the Defendants in their application for further review and Judge McDonald want to rely heavily on another Court of Appeals' decision entitled *Waddell v. University of Iowa Community Medical Services, Inc., d/b/a University of Iowa Quick Care North Liberty, a/k/a UI Family Care Center North Liberty*, No. 17-0716 (Iowa Ct. App., Sept. 26, 2018). The

Waddell case is so clearly distinguishable from the factual record developed on behalf of Sharon Susie that it provides no legal precedent in support of Defendants' application for further review. In the *Waddell* case, the plaintiff only designated a nursing expert and the court concluded that the nursing expert lacked the qualifications to voice a causation opinion. The plaintiff also listed three (3) treating physicians as designated experts. However, as the Court of Appeals noted in its opinion, "They provided no testimony to establish a causal relationship between any alleged breaches by the clinic and Christina's illness, progression, or death. Instead, each doctor testified to the actions and decisions they made in the course of treating Christina [the plaintiff]." In *Waddell*, the plaintiff was diagnosed with cancer and two (2) of the treating physicians for the plaintiff testified that the sooner the treatment began with regard to her cancer, the better the expected outcome.

In the factual record before this Court, however, Plaintiff extensively developed the causation issue by first establishing through treating physicians the bacterial agent that was responsible for Sharon Susie's infection; the fact that her clinical presentation suggested that the infection developed as a cellulitis and then progressed to a deeper tissue where it transformed into a necrotizing fasciitis; the fact that there are approximately ten million *Group A streptococcal* infections diagnosed in this country

annually in the form of strep throat and skin infections; the fact that Group A strep infections are routinely treated with antibiotics; and the fact that out of those ten million infections annually, only a very small percentage progressed to invasive infections such as necrotizing fasciitis. It is no wonder the Defendants chose to virtually ignore the testimony of Drs. Lamptey, Vemuri, and Rizk because when that testimony is examined carefully, the causation case is nowhere close to a case of speculation. It is a case that a jury could reasonably find causation.

Plaintiff does not argue with the premise that expert testimony is necessary to establish causation and that in order to establish causation under Iowa law, something more than mere speculation is required. Something more than mere speculation was clearly developed in this factual record and both Judge Ackerman and Judge McDonald, in his dissenting opinion, chose to ignore vast portions of that record. As such, the Iowa Court of Appeals, in its majority opinion, was justified in reversing the grant of summary judgment and giving Sharon Susie her day in court. In the words of Judge Bauer in his majority opinion: "Looking at ***all of the evidence*** presented in the Susie's resistance to the motion for summary judgment, rather than just considering Dr. Schechter's deposition as the dissent has done, we conclude that Susie's presented sufficient evidence to generate a jury question on the

issue of causation." (See *Oak Leaf*, 257 N.W.2d 747 (finding evidence of "causal connection necessary to generate a jury question need not come solely from one witness"). We note, in general, "causation is a question for the jury, saved in very exceptional cases where the facts are so clear and undisputed, and the relation of cause and effect is so apparent to every candid mind, that but one conclusion may be fairly drawn therefrom." *Thompson v. Kaczinski*, 774 N.W.2d 829, 836 (Iowa 2009) (citations omitted). We determined the district court improperly granted summary judgment to defendants on the issue of negligence.

III. The loss of a chance theory in Sharon Susie's case should clearly have been submitted to the jury.

It is important to emphasize that even Judge Ackerman had initially concluded that the loss of chance theory should be submitted to the jury. It was only after he suggested that the parties appeal his ruling to get some guidance from our Appellate Court system that he chose to also grant summary judgment with regard to the loss of chance theory so that the appeal would be an appeal of right, not a discretionary appeal. (See transcript of May 8, 2017 hearing, pp. 5-6, Appendix pp. 0153-0154).

Under Iowa law, a loss of chance theory is submissible to a jury even when the loss of chance is less than fifty percent. *Wendland v. Sparks*, 574 N.W.2d 327, 333 (Iowa 1998). Judge Bauer acknowledged that fact in his

opinion. Expert testimony is necessary to show the Defendants' actions probably caused a reduction in the Plaintiffs' chance of a cure. *DeBurkarte v. Louvar*, 393 N.W.2d 131, 137-38 (Iowa 1986). In a loss chance case, a plaintiff is entitled to damages for "the percentage of loss chance attributed to the intervening act of negligence." *Mead v. Adrian*, 670 N.W.2d 174, 179 (Iowa 2003). In the *Mead v. Adrian* case, as noted by Judge Bauer in his opinion, the Iowa Supreme Court held that it is up to the jury to determine the amount of proportionate reduction based on all of the evidence in the case. Dr. Schechter, in his deposition, was asked this question:

> Q. I want to read you a quote from him [Dr. Crew] on p. 95 beginning at line 11 in response to this question: "Do you believe that had antibiotics been started, more likely than not, Sharon's arm may have been saved?"
>
> And he says beginning at line 11: "I think it is" – "It may well be more likely because if you can stem the firestorm and let the body mobilize its immune system, which includes both cellular and chemical, you could slow something down. If you could do that and give the body a chance to fight it, I think it is likely that you could have shut down at least the progression. And when they finally did the procedure, it could have saved the arm. I've had arms almost half bad, but I do it a little different way so that treating it, you don't have that privilege."
>
> Do you agree with that – that the earlier you get the antibiotics on board and the more you allow the body to mobilize in someone's immune system in response to this developing infection that you may well, more likely than not, have saved her arm?

A. To – I would say it's a significant possibility ranging as high as probability that early intervention with antibiotics could have either at least reduced the progression of the infection or slowed its progression and potentially have averted as much tissue loss as she experienced.

Schechter deposition p. 119-121, Appendix pp. 0442-0444 (emphasis added).

Given the fact that this Court has left the determination of the extent to which Plaintiff lost any chance of averting the outcome in question by reason of the Defendants' negligence herein, the testimony of Dr. Schechter is clearly sufficient to justify submission of the loss of chance theory to the jury. This Court should overrule Defendants' application for further review and allow Sharon Susie, some six (6) years after this tragic outcome, to have her day in court.

IV. CONCLUSION

Consideration of a motion for summary judgment requires a careful review of the ***entire*** factual record in support of Plaintiffs' claim, including her causation claim. Judge Ackerman, the trial judge in this case, had very little time to review an extensive factual record. Plaintiffs' appendix that was filed in support of her resistance to the motion for summary judgment was some one hundred seventy pages long and much of that appendix

contained medical testimony supportive of Plaintiffs' causation theory in the case. As this Court has noted, causation may be established through more than one medical witness. *Oak Leaf Country Club, Inc. v. Wilson*, 257 N.W.2d 739, 747 (Iowa 1977). Sharon Susie, through the assistance of her counsel, methodically put together a strong causation case through multiple witnesses. As Judge Bauer analyzed in his majority opinion, the evidence from multiple medical witnesses was sufficient to submit the causation case to a Woodbury County jury. Further, the record likewise supported the submission of the loss of a chance theory. Plaintiff Sharon Susie respectfully urges this Court to overrule Defendants' application for further review for the reasons detailed herein.

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Date

CERTIFICATE OF SERVICE AND FILING

I certify that on the 14th day of December 2018, I electronically filed and served the Plaintiff-Appellants' Resistance to the Application for Further Review to all of the following persons and upon the Clerk of the Supreme Court using the Electronic Document Management System, which will send notification of electronic filing:

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Per Iowa Rule 16.317(1)(a)(2), this constitutes service of the documents for the purposes of the Iowa Court Rules.

By: /s/ Marc A. Humphrey
Marc A. Humphrey AT0003843