IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JOSEPH DUDLEY, SARAH DUDLEY, M.D., J.R. and L.G., Plaintiffs, vs. IOWA PHYSICIANS CLINIC MEDICAL FOUNDATION d/b/a UNITYPOINT CLINIC FAMILY MEDICINE/URGENT CARE-SOUTHGLEN and MELANIE B. CHOOS, PA-C, Defendants.	)	LAW NO. LACL138335 DEFENDANTS' TRIAL BRIEF

COME NOW the Defendants, Iowa Physicians Clinic Medical Foundation d/b/a UnityPoint Clinic Family Medicine/Urgent Care-Southglen and Melanie B. Choos, PA-C, and submits the following trial brief:

I. LEGAL STANDARDS – MEDICAL NEGLIGENCE

The *Prima Facie* Case. To establish a prima facie case of medical malpractice, the Plaintiffs must submit evidence that shows the applicable standard of care, a violation of the standard of care, and a causal relationship between the violation and the harm allegedly experienced by the Plaintiffs. *Peppmeier v. Murphy*, 708 N.W.2d 57, 62 (Iowa 2005); *Phillips v. Covenant Clinic,* 625 N.W.2d 714, 718 (Iowa 2001).

Expert Testimony Required. "[E]vidence of the applicable standard of care—and its breach—must be furnished by an expert." *Oswald v. Legrand*, 453 N.W.2d 634, 635 (Iowa 1990); *see also Kennis v. Mercy Hosp. Med. Ctr.*, 491 N.W.2d 161, 165 (Iowa 1992) ("[W]hen the ordinary care of a physician is an issue, only experts can testify and establish the standard of

care and the skill required.") "Causal connection is essentially a matter which must be founded upon expert evidence." *McCleeary v. Wirtz,* 222 N.W.2d 409, 413 (Iowa 1974). "More specifically, common knowledge and everyday experience would not suffice to permit a layman's expression of opinion" as to whether a medical provider's alleged negligence "was a substantial factor in bringing about the complained of result." *Id.; see also Donovan v. State,* 445 N.W.2d 763, 766 (Iowa 1989) ("[H]ighly technical questions of diagnoses and causation which lie beyond the understanding of a layperson require introduction of expert testimony"); *Barnes v. Bovenmyer,* 122 N.W.2d 312, 317 (Iowa 1963) ("The accepted method of proving proximate cause would be by expert testimony that defendant's delay in discovering the piece of steel in the eye was the probable cause of its loss"); *Bradshaw v. Iowa Methodist Hosp.*, 101 N.W.2d 167, 170 (Iowa 1960).

In sum, with respect to each specification of negligence asserted against Defendant, Plaintiffs must produce expert testimony which: (1) establishes the applicable standard of care; (2) demonstrates a breach of that standard of care; and (3) demonstrates the causal connection between any breach of the standard of care and Plaintiffs' claimed damages. *See Oswald*, 453 N.W.2d at 635.

Limitations on Expert Discovery – Prior Designation Required. In a medical negligence case, the plaintiff's expert witnesses who will testify regarding the standard of care must be designated pursuant to Iowa Code § 668.11. This includes all witnesses, treating health care providers among them, who will testify that a defendant health care provider failed to meet the standard of care. *Hansen v. Cent. Iowa Hosp. Corp.*, 686 N.W.2d 476, 482 (Iowa

2004). Thus, any person who will allege that Defendants made a medical error must be designated in compliance with Iowa Code § 668.11.

Furthermore, a treating physician may only offer testimony regarding opinions that were developed during the course of treatment of Plaintiffs. *Hansen*, 686 N.W.2d at 482. Thus, no treating physician may offer testimony or opinions on causation unless those opinions were developed during the course of patient care.

Limitations on Expert Discovery – Prior Disclosure of Opinion Required.

Pursuant to Iowa Code section 668.11 and Iowa Rule of Civil Procedure 1.508, an expert's opinions must be disclosed prior to trial. In addition, all opinions must be supplemented no later than 30 days prior to trial. Iowa R. Civ. P. 1.508(3).

Then, at the time of trial, the expert's testimony may not be inconsistent with or go beyond the fair scope of the previously disclosed opinions. Iowa R. Civ. P. 1.508(4). Iowa Courts have routinely upheld a district court's limitation of expert testimony on this basis. *See, e.g.*, *Baltimore v. Drost*, No. 05-1595, 2006 WL 1279277, at *2 (Iowa Ct. App. May 10, 2006) (holding that trial court did not abuse its "considerable discretion" in excluding expert testimony where expert's testimony on damages was disclosed a few weeks before trial and that the expert's previously undisclosed opinions "prejudiced defendants by introducing a new issue on the eve of trial"); *Leet v. Burbridge*, No. 03-0557, 2004 WL 573798, at *2 (Iowa Ct. App Mar. 24, 2004) (holding trial court did not abuse its discretion by excluding "new" opinion from treating physician that was introduced for the first time a few days before trial and where new portion of expert testimony "injected a new issue into the case"); *Brown v. Pospisil*, No. 99-474, 2000 WL 378262, at *2–3 (Iowa Ct. App. Apr. 12, 2000) (holding that trial court did not abuse its discretion

in excluding portions of two experts' testimony where one expert intended to express a previously undisclosed standard of care opinion at the time of trial and the second expert was a treating physician who intended to offer standard of care and causation opinions that he had not expressed in deposition and had never disclosed in a Rule 1.508 statement.)

Causation – Degree of Certainty Required. Plaintiffs bear the burden of establishing every element of a *prima facie* case, including causation, by a preponderance of the evidence. *See Oswald*, 453 N.W.2d at 635. Under Iowa law, medical testimony that it is possible that something "could have" or "might have" caused a subsequent condition or disability does not constitute a preponderance of the evidence and is insufficient to establish the requisite causal connection. *See Bradshaw,* 101 N.W.2d at 170 ("'I think there could be.' Standing alone this is insufficient proof of the claimed causal connection. Such an answer is usually held to indicate only a possibility, rather than probability, of the alleged causal relation and hence insufficient.") To constitute a preponderance of the evidence, the evidence must show that plaintiff's theory is more probable than any other theory, not merely possible. *See id.*; *McCleeary*, 222 N.W.2d at 413.

Expert testimony on causation that fails to meet the standards addressed by these cases is insufficient to support a fact question for the jury as a matter of law. *See Dickens v. Associated Anesthesiologists, P.C.,* 758 N.W.2d 839 (Iowa Ct. App. 2008); *DeBurkarte v. Louvar,* 393 N.W.2d 131, 135 (Iowa 1986); *McCleeary*, 222 N.W.2d at 413.

Result of Treatment. Except in cases involving *res ipsa loquitur*, "[i]t is evident, and it has often been held in this state, that the mere unsuccessful result of a treatment by a physician cannot, of itself, produce a liability on the part of the practitioner." *Gebhardt v. McQuillen,* 297

N.W. 301, 303 (Iowa 1941); *see also Novak Heating & Air Conditioning v. Carrier Corp.,* 622 N.W.2d 495, 497 (Iowa 2001) ("The mere fact an accident occurred or a party was injured does not mean a party was [negligent] [at fault]."); *Tripp v. Cedar Valley Med. Specs., P.C.*, No. 05-1123, 2006 WL 2560844 *2–3 (Iowa Ct. App. Sept. 7, 2006) (affirming district court's instruction in medical malpractice case stating "the mere fact that full recovery does not result or that medical treatment is not entirely successful does not mean that the defendant was negligent or at fault"). Iowa follows a number of jurisdictions that have routinely held an inference of ordinary or specific negligence does not flow from unsuccessful treatment alone. *Tripp,* 2006 WL 2560844 at *3 (citing *Boone v. William W. Backus Hosp.,* 864 A.2d 1, 19 (Conn. 2005); *Kenyon v. Miller,* 756 So.2d 133, 136 (Fla. Dist. Ct. App. 2000); *Narducci v. Tedrow,* 736 N.E.2d 1288, 1292 (Ind. Ct. App. 2000); *Cunningham v. Riverside Health Sys., Inc.,* 99 P.3d 133, 138 (Kan. Ct. App. 2004); *Galloway v. Baton Rouge Gen. Hosp.,* 602 So. 2d 1003 (La.1992); *Wlosinski v. Cohn,* 713 N.W.2d 16, 21 (Mich. Ct. App. 2005); *Kilpatrick v. Miss. Baptist Med. Ctr.,* 461 So. 2d 765, 768 (Miss. 1984); *Seippel-Cress v. Lackamp,* 23 S.W.3d 660, 667 (Mo. Ct. App. 2000).

II. THE JURY MUST BE INSTRUCTED ON SPECIFICATIONS OF NEGLIGENCE THAT RECITE THE ALLEGED NEGLIGENT ACT, NOT THE ULTIMATE ISSUE IN THE CASE

Iowa law requires the jury be instructed as to the specific acts or omissions which support the claims in Plaintiffs' Petition that were established through evidence at trial by expert testimony and not under a generalized claim of "failing to conform his conduct to the applicable standard of care." Furthermore, each specification of negligence must be supported by expert testimony regarding a breach of the standard of care and causation.

A party claiming negligence must identify specifically the acts or omissions constituting negligence. *Welte v. Bello,* 482 N.W.2d 437, 439 (Iowa 1992). Indeed, as affirmed by the Iowa Supreme Court, on negligence claims not involving *res ipsa loquitur,* applicable rules require that a plaintiff identify the specific acts or omissions relied on to generate a jury issue. *Bigalk v. Bigalk*, 540 N.W.2d 247, 249 (Iowa 1995) (citing *Rinkleff v. Knox,* 375 N.W.2d 262, 266 (Iowa 1985) (emphasis added)). By extension, the jury should be instructed in a manner that adequately captures the specification(s) of negligence supported by the record but without duplication. *See, e.g.*, *Schuller v. Hy-Vee Food Stores, Inc.,* 328 N.W.2d 328 (Iowa 1982) (affirming district court's decision to reject duplicative specifications of negligence in marshaling instruction).

The purpose of requiring the jury to consider factual specifications is to limit the determination of facts or questions arising in negligence claims to only those acts or omissions upon which the court has had an opportunity to make a preliminary determination of the sufficiency of the evidence to generate a jury question. *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 151 (Iowa 1992) (citing *Diehl v. Diehl,* 421 N.W.2d 884, 887 (Iowa 1988); *see also Bigalk*, 540 N.W.2d at 249 (stating the requirement for instructing on specific acts or omissions is at least partially designed to assure that the jury will give consideration to each of the alleged acts or omissions in determining the overall question of breach of duty). "Jury instructions should be formulated so as to require the jury to focus on each specification of negligence that finds support in the evidence." *Bigalk*, 540 N.W.2d at 249*; see also Fuches v. S.E.S. Co.,* 459 N.W.2d 642, 644 (Iowa Ct. App.1990). Each specification should identify either a certain thing the allegedly negligent party did which that party should not have done, or a certain thing that

party omitted that should have been done, under the legal theory of negligence that is applicable. *Coker*, 491 N.W.2d at 151 (citing *Diehl*, 421 N.W.2d at 887).

Furthermore, each specification of negligence identified in the marshaling instruction must be supported by expert testimony in the record. Under Iowa law, Plaintiffs can only make a claim for negligence through expert testimony supporting specific breaches of the standard of care and causation. Only experts can establish the applicable standard of care and skill required of a physician in a medical negligence action. *See Kennis*, 491 N.W.2d at 165 ("When the ordinary care of a physician is an issue, only experts can testify and establish the standard of care and skill required."); *Oswald*, 453 N.W.2d at 635) ("Evidence of the applicable standard of care—and its breach—must be furnished by an expert."); *see also Welte,* 482 N.W.2d at 439; *Perin v. Hayne*, 210 N.W.2d 609, 613 (Iowa 1973). Expert testimony regarding the lack of skill or care therefore is necessary support a verdict. *Buckroyd*, 237 N.W.2d 808, 812 (Iowa 1976); *see Bryant v. Rankin,* 468 F.2d 510, 513 (8th Cir. 1972).

Under the well-established principles set forth above, the jury in this case should be instructed through a marshaling instruction which sets forth, with specificity, the act(s) or omission(s) Plaintiffs contend was negligent and which find support by expert testimony in the evidence, if any. Instructing the jury through a marshaling instruction setting forth specifications of negligence properly requires the jury to focus on each specification of negligence that finds support in the evidence. In this same manner, such instructions permit the Court to evaluate the evidence and make determinations as to which the allegations of negligence, if any, have support in the record.

/s/ Aaron J. Redinbaugh

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon one of the attorneys of record for all parties to the above-entitled cause by serving the same on such attorney at his/her respective address/fax number as disclosed by the pleadings of record herein, on the 2nd of November, 2022 by:

☐ U.S. Mail ☐ FAX
☐ Hand Delivered ☐ UPS
☐ Federal Express ☒ Electronic Filing
☐ Other _____

/s/ Karen Hinrichsen