

NO. A06-1982

State of Minnesota
In Supreme Court

Margaret MacRae,
Trustee for the next of kin of Roderick MacRae,
Petitioner,

v.

Group Health, Inc., a nonprofit Minnesota Health
Maintenance Organization; HealthPartners, Inc., a nonprofit
Minnesota Health Maintenance Organization;
Amar Subramanian, M.D.; and Michael Kelly, M.D.,
Respondents.

**BRIEF OF AMICUS CURIAE
MINNESOTA ASSOCIATION FOR JUSTICE**

Kay Nord Hunt (#138289)
Stephen C. Rathke (#89771)
LOMMEN, ABDO, COLE,
KING & STAGEBERG, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Attorneys for Petitioner

Rebecca Egge Moos (#74962)
Charles E. Lundberg (#6502X)
Paula M. Semrow (#0339131)
BASSFORD REMELE
Suite 3800
33 South Sixth Street
Minneapolis, MN 55402
(612) 333-3000

Attorneys for Respondents

(Additional Counsel for Amici appear on next page)

Mark Hallberg (#39639)
Teresa Fariss McClain (#312873)
HALLBERG & McCLAIN, P.A.
380 St. Peter Street
Suite 715
St. Paul, MN 55102
(651) 255-6810

*Attorneys for Amicus Curiae
Minnesota Association for Justice*

John M. Degnan (#21817)
Diane B. Bratvold (#018696X)
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 877-8400

*Attorneys for Amicus Curiae
Minnesota Defense Lawyers Assoc.*

William M. Hart (#150526)
MEAGHER & GEER, PLLP
33 South Sixth Street
Suite 4400
Minneapolis, MN 55402
(612) 338-0661

*Attorneys for Amicus Curiae
Minnesota Medical Association*

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STATEMENT OF THE ISSUE

Whether a medical negligence delay of diagnosis of cancer cause of action “accrues” on the date of misdiagnosis or the date that the plaintiff sustains actionable damage?

The district court and the court of appeals held that a delay of diagnosis of cancer cause of action accrues on the date of misdiagnosis.¹

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

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

Offerdahl v. Univ. of Minn. Hosp. & Clinics, 426 N.W.2d 425 (Minn. 1988)

Molloy v. Meier, 679 N.W.2d 711 (Minn. 2004)

¹ Amicus Curiae Minnesota Association of Justice (“MNAJ”) urges this court to reverse the lower courts. MNAJ is an organization of trial attorneys dedicated to obtaining fair and just compensation for injured tort victims. The lead author of this brief, Mark Hallberg, is a member of MNAJ. Mr. Hallberg has frequently appeared in the appellate courts of this state on behalf of plaintiffs in medical negligence actions; he is Adjunct Professor of Medical Malpractice at William Mitchell College of Law, and he has authored articles in the legal literature regarding Minn. Stat. § 541.076(b) (2002). No monetary contribution has been made by any other person or entity in the preparation of this brief. This disclosure is made pursuant to *Minn. R. Civ. App. P. 129.03*.

ARGUMENT

A. The Legislature has Appropriately Deferred to the Courts the Responsibility for Determining When a Medical Negligence Cause of Action “Accrues.”

The determination of whether a cause of action is time-barred requires a court to address four questions:

1. When did the cause of action accrue?
2. When was the cause of action commenced?
3. What is the applicable statutory period?
4. Has the statutory period been tolled or suspended by action of statute or equitable principles?

This appeal focuses on the first question. Specifically, when does a medical negligence action for a negligent delay in diagnosis of cancer “accrue” as that term is used in Minn. Stat. § 541.076(b) 2002?²

The legislature has not provided any guidance on when a cause of action has “accrued.” Therefore, the courts have appropriately adopted various definitions of “accrued” based upon the circumstances of the case.

1. Accrual Defined as “Termination of Treatment.”

As early as 1929, the Supreme Court recognized the difficulty of determining the date when a medical negligence cause of action accrued. See *Schmitt v. Esser*, 226 N.W. 196 (Minn. 1929). In *Schmitt*, the plaintiff suffered a

² Minn. Stat. § 541.076(b) provides “An action by a patient or former patient against a health care provider alleging malpractice, error, mistake, or failure to cure, whether based on a contract or tort, must be commenced within four years from the date the cause of action accrued.”

fracture of a bone in her ankle. The initial date of treatment was March 5, 1926. The last date of treatment was July 1, 1926. Between those two dates, the plaintiff was seen and cared for by the physician defendant on multiple occasions. The Summons and Complaint were served on June 5, 1928.

The defendant sought dismissal arguing that the action was time-barred under the two year statute of limitations. The trial court denied the dismissal. On appeal, the Supreme Court stated, "In malpractice cases, there is, of course, difficulty in determining the precise moment when the act or omission which caused the damage took place." *Id.* at 196. Accordingly, the Court concluded that it was inappropriate to bar the action unless the act of negligence and the harm occurred more than two years after service of the Summons. In reaching its decision, the Court stated:

The law should not require impossible or unreasonable things. It should not impose upon the patient a duty he can only know through expert testimony which he does not possess, but as to which he is compelled to accept the judgment of his physician or surgeon. In this case, the patient could not know just when the initial trouble occurred that resulted from the alleged mistreatment.

Id. (citing *Bowers v. Santee*, 99 Ohio St., 124 N.E. 238).

In an effort to balance the interests of the patient in being able to pursue a claim for damages against a negligent tortfeasor with the interest of the physician in not being required to defend a stale claim, the Court adopted what is now known as the "termination of treatment rule" by stating:

We think the treatment and employment should be considered as a whole, and, if there occurred therein malpractice, the statute of limitations begins to run when the treatment ceases.

Id. at 197.

Under the termination of treatment rule, it is assumed that the negligent conduct of the physician caused harm on the last day of treatment unless plaintiff's injury was caused by a discreet, identifiable act. *Offerdahl v. Univ. of Minn. Hosp. & Clinics*, 426 N.W.2d 425 (Minn. 1988) (citing *Swang v. Hauser*, 180 N.W.2d 187 (Minn. 1970)).

2. The "Single Act Exception" to the "Termination of Treatment Rule."

The Minnesota Supreme Court has fashioned an exception to the termination of treatment rule where it is obvious that the plaintiff's injury was the result of a single act. In *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980) the court stated:

When the injury complained of consists of a 'single act,' the limitations period commences from the time of the act, even though the doctor patient relationship may continue thereafter.

Id. at 694.

The "single act exception" applies if the defendant can establish:

1. The injury arises out of single act by the physician;
2. The single act is complete at a precise time;
3. Additional treatment cannot cure or relieve the plaintiff of his/her injury; and

4. The plaintiff is actually aware of the facts upon which the claim is based.

See: *Ciardelli v. Rindal*, 582 N.W.2d 910 (Minn. 1998).

3. Tolling of Accrual for Fraudulent Concealment.

This Court has also held that there is a tolling of the statute of limitations where the defendant participates in fraudulent concealment. *Schmucking v. Mayo*, 235 N.W. 633, (Minn. 1931). Fraudulent concealment occurs where the physician prevents the patient from acquiring knowledge and allows the statute of limitations to toll until the cause of action is discovered. *Id.* at 633. The reasons for the tolling of the statute were set forth as follows:

First, one cannot assert his right because the necessary knowledge is improperly kept from him is not within the mischief the statute was intended to remedy; but is within the spirit of the law that restrains its operation...Secondly, a person should not be permitted to shield himself behind the statute of limitations...He should not be permitted to profit by his own wrong, and it would strike the moral sense strangely to permit him to do so.

Id.

4. "Accrual" Defined as Date Action Could Survive Motion to Dismiss.

The Minnesota courts have also held that a cause of action does not "accrue" for statute of limitations purposes until it may be brought without dismissal for failure to state a claim upon which relief may be granted. *Dalton v. Dow Chemical Co.*, 158 N.W.2d 580 (Minn. 1968). In *Offerdahl, supra*, the Court stated that "alleged negligence coupled with the alleged resulting damage is the gravamen in deciding the date when a cause of action accrues." 426 N.W.2d at

429 (applying the holding of *Dalton* in the medical malpractice context). An example of the rule that a cause of action does not accrue until both negligence and damages occur is found in *Peterson v. St. Cloud Hospital*, 460 N.W.2d 635 (Minn. App. 1990) (where a pathologist negligently concluded that a biopsy specimen was cancerous when, in fact, the specimen was benign and the patient began chemotherapy and radiation therapy several weeks later; the court held that damages did not occur and therefore the cause of action did not accrue until the inappropriate therapy was commenced). See also: *Broek v. Park Nicollet Clinic*, 660 N.W.2d 439 (Minn. App. 2003) rev. denied (July 15, 2003).

5. Any Definition of “Accrual” Requires Plaintiff Have an Opportunity to Commence an Action that will Survive a Motion to Dismiss.

All of the above definitions of “accrual” demonstrate the willingness of the court to consider the facts of a particular case when balancing the interest of the plaintiff to have a meaningful opportunity to pursue an action for damages against the interest of the defendant in not being required to respond to “stale” claims. Each definition recognizes that “accrual” requires that plaintiff have a meaningful opportunity to have knowledge of the facts upon which the claim is based and that accrual cannot occur until all the elements of the cause of action can be established.

B. The Implication of *Fabio* and *Molloy* that a Delay of Diagnosis of Cancer Action Accrues on the Date of Misdiagnosis is Contrary to Established Minnesota Precedent.

In *Molloy v. Meier*, 679 N.W.2d 711 (Minn. 2004), this Court addressed the definition of “accrued” as used in Minn. Stat. § 541.076(b) in the context of a medical negligence action alleging a failure to diagnose an inheritable genetic condition in a child. Subsequently, the mother of the undiagnosed child gave birth to another child with the same genetic defect. The cause of action was commenced more than four years after the alleged misdiagnosis, but less than four years after the subsequent child was conceived. The physician defendants, relying upon *Fabio v. Bellomo*, 504 N.W.2d 758, 762 (Minn. 1993), argued that in the case of a misdiagnosis, the action accrues on the date of misdiagnosis. The plaintiff, relying upon *Offerdahl, supra*, argued that her cause of action did not accrue until she conceived the subsequent child because there was no injury or damage until that date.

The *Molloy* Court, appropriately, treated the matter as one of statutory interpretation and focused on the definition of the term “accrued.” The Court stated:

An action does not ‘accrue’ until it may be brought without dismissal for failure to state upon which relief may be granted (citations omitted). According to Webster’s Dictionary, “accrue” is defined as “To come into existence as an enforceable claim; vest as a right.” *Webster’s New International Dictionary* 13 (3d Ed. 1961). In the context of a malpractice action, the action accrues when the plaintiff establishes each of the four elements of negligence. See *Plutshack*, 316 N.W.2d at 5. Therefore, “alleged negligence coupled with the alleged resulting damage is the gravamen in deciding the date when the cause of action accrues.” *Offerdahl*, 426 N.W.2d at 429 (applying *Dalton* to a medical malpractice context).

504 N.W.2d at 720-1.

The Court recognized, as did the *Schmitt* Court in 1929, that in a long-running relationship between a patient and a physician, it is sometimes difficult to determine when a breach occurred. However, the termination of treatment rule establishes the date for the breach of duty, but does not determine when the date of injury occurs. The Molloy Court held that in the context of a misdiagnosis of a genetic condition that results in pregnancy, the date of injury is the date of conception. *Id.* at 722.

In an effort to respond to the physician defendant's argument that "some damage occurs as a matter of law when the physician fails to make a correct diagnosis and recommend the appropriate treatment," (*citing Fabio, supra,*) the *Molloy* Court attempted to distinguish *Fabio* by stating,

The misdiagnosis in *Fabio* caused the plaintiff immediate injury in the form of a continually growing cancer, which became more dangerous to the plaintiff each day it was left untreated. The action accrued at the time of misdiagnosis because **some damage** occurred immediately. In the case of failure to diagnose Fragile X, however, the error does not directly damage the patient and but for the fact that she conceived another child, Molloy would have suffered no damage.

Id. at 722 (emphasis added).

1. **"Some Damage," Caused by Growing Cancer is not "Legal Damage" Necessary to Establish a *Prima Facie* Case.**

As stated above, the *Molloy* Court held that a medical negligence cause of action does not "accrue" until the four elements required to establish a *prima facie* case are established. These four elements consist of: (1) The standard of

care recognized by the medical community as applicable to the particular defendant's conduct; (2) the defendant in fact departed from that standard; (3) the defendant's departure from the standard was a direct cause of the patient's injuries; and (4) **legal damages**. *Plutshack, supra* at 5.

However, according to *Leubner v. Sterner* 493 N.W.2d 119 (Minn. 1992), in most cases involving a misdiagnosis of cancer, no "legal" damage occurs until the passage of time causes the patient's prognosis to change from a probability of survival (with timely diagnosis) to a probability of death (with delayed diagnosis). *Leubner* held that a negligent misdiagnosis case does not exist (i.e., does not accrue) until some legal damage occurs even though the presence of cancer cells in the patient's body causes "some harm" on the date of misdiagnosis. In other words, a plaintiff must establish legal harm, as defined by *Leubner*, in order to survive a motion to dismiss for failure to state a claim for relief. Unfortunately, the *Molloy* Court failed to consider the *Leubner* principles of legal damage when it stated, *in dicta*:

We re-affirm the longstanding principle that malpractice actions based on failures to diagnose generally accrue at the time of the misdiagnosis, because some damage generally occurs at that time.

Id. at 722 (citing *Fabio v. Bellomo*).

The Court's understanding of *Fabio*, based on the arguments of the *Molloy* defendants, was incorrect. *Fabio* raised the accrual issue in the context of the repeated failure of a physician to diagnose breast cancer in his patient. The plaintiff in *Fabio* treated with the defendant, Bellomo, from 1977 until 1986. The

plaintiff alleged that on one occasion between 1982 and 1984, and on another occasion, March 10, 1986, plaintiff had complained of a new lump in her left breast. On both occasions, defendant Bellomo, told plaintiff "not to worry" because the lump was a "fibrous mass." After the March 10, 1986 exam, Dr. Bellomo retired and the plaintiff switched her care to another physician. In 1987, that physician recommended a mammogram and thereafter the plaintiff was diagnosed with breast cancer that had metastasized to four lymph nodes.

A medical negligence action alleging negligent delay of diagnosis followed. The plaintiff offered testimony that Dr. Bellomo had departed from accepted standards of practice in failing to offer a mammogram at the time the plaintiff had complained of a lump prior to 1984 and again in 1986. However, the plaintiff failed to offer any evidence that her cancer would recur as a result of the delay or that she had a diminished life expectancy. Even after the delayed diagnosis and treatment, it was more probable that plaintiff was cured of her cancer. She was therefore unable to establish *Leubner* damages.

In an attempt to remedy her lack of proof, plaintiff sought to amend her complaint to include an allegation of negligence for misdiagnosis that occurred prior to 1984. The district court denied the motion to amend. The Supreme Court affirmed the district court and held that the examination of the breast before 1984 was not part of a continuing course of treatment and the motion to amend was properly denied because more than two years had passed since the last date of treatment. The incorrect interpretation of the holding was that the

statute of limitations began to run on the date of misdiagnosis. However, the court did not address if or when any legal damage had occurred as a result of the pre-1984 examination. There was an absence of proof on the extent of legal damages and, therefore, denial of plaintiff's motion to amend was not an abuse of discretion. Importantly, the *Fabio* Court did not decide, and did not even address, whether "some damages," the ongoing presence of cancerous cells, were enough for the cause of action to "accrue" within the meaning of Minn. Stat. § 541.076(b).

2. The "Some Damages" Rule Stated in *Fabio/Molloy* Should be Abrogated and the Court Should Reinstate the "Legal Damages" Rule in Medical Negligence Actions Based on Misdiagnosis.

The instant case provides the Court with an excellent opportunity to clarify Minnesota law and establish a fair and just definition of "accrual" in misdiagnosis actions. As a result of the *Fabio/Molloy* "some damages" rule, a "Catch 22" has been created for some medical negligence plaintiffs. If a plaintiff commences an action too soon, their cause of action could be dismissed because the damages are premature under the *Leubner* principles (legal damage can only be established if plaintiff's cancer went from a prognosis of survival at the time the diagnosis should have been made, to a prognosis of non-survival at the time the cancer was diagnosed). However, if the plaintiff waits until the damages satisfy the *Leubner* principle, (or the cancer is discovered), the claim is often time-barred. Indeed, some negligent delay in diagnosis actions might never survive a

motion to dismiss (i.e., where it takes more than four years from the date of the misdiagnosis for the plaintiff's prognosis to transform from a probability of survival to a probability of non-survival).

The *Fabio/Molloy* quandary can only be solved if the Court either modifies *Leubner* so that any reduction of a plaintiff's chance of survival caused by a delay of diagnosis is deemed actionable, or if the Court adopts a definition of accrual that is consistent with the *Dalton/Offerdahl* definition of accrual (i.e., "alleged negligence coupled with the alleged resulting damage is the gravamen in deciding the date when the cause of action accrues"). The discussion of the *Leubner* principles is not before the Court and must wait for another day. Accordingly, this Court can and should follow well-established precedent and apply the *Dalton/Offerdahl* definition to misdiagnosis of cancer actions. Simply stated, the course of action does not "accrue" until "legal damages" occur.

CONCLUSION

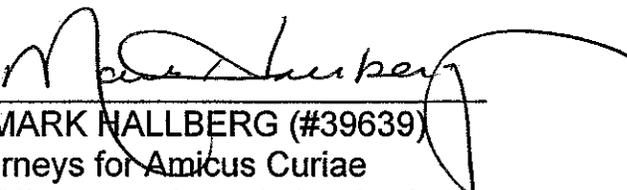
Amicus Curiae MNAJ, urges this Court to take this opportunity to clarify Minnesota law on when a misdiagnosis of cancer action "accrues" for statute of limitations purposes. The awkward presentation of the issue of accrual in *Fabio* resulted in the erroneous belief that accrual occurs on the date of misdiagnosis. That error was further entrenched in Minnesota jurisprudence in *Molloy*. However, longstanding precedent establishes that accrual does not occur until "legal damages" occur. See e.g., *Dalton*; *Offerdahl*; *Molloy*; (*supra*).

There cannot and should not be an exception to the "legal damages" rule for misdiagnosis cases. As stated in *Schmitt* over 78 years ago, "The law should not require impossible or unreasonable things." This Court should not accept a rule of accrual that would start the statute of limitations clock before a plaintiff could commence a valid cause of action.³

Respectfully submitted,

Dated: December 28, 2007

HALLBERG & McCLAIN, P.A.

By: 
MARK HALLBERG (#39639)

Attorneys for Amicus Curiae
Minnesota Association for Justice
380 St. Peter Street, Suite 715
St. Paul, MN 55102
(651) 255-6810

³ The instant case would have been an excellent opportunity for this Court to consider adoption of a discovery rule. Under the discovery rule, the statute of limitations does not begin to run until the patient discovers, or reasonably should discover through the exercise of reasonable diligence, his injury. *Miller v. Mercy Medical Center*, 380 N.W.2d 827, 831 (Minn. App. 1986). In *Fabio* it was noted that as of 1993, 41 states have adopted the discovery rule in some form for medical negligence cases. *Fabio*, 504 N.W.2d at 765 (Gardebring, dissenting). Several Minnesota appellate jurists have suggested that Minnesota should adopt a discovery rule. However, the district court and the parties in this case have not addressed this issue. Therefore, unless this Court requests additional briefing, the adoption of the discovery rule should not be considered.

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 in 13 point font using Microsoft Office Word 2003, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count. The length of the brief is 3,401 words.

Dated: December 28, 2007

HALLBERG & McCLAIN, P.A.

By: 

MARK HALLBERG (#39639)
Attorneys for Amicus Curiae
Minnesota Association for Justice
380 St. Peter Street, Suite 715
St. Paul, MN 55102
(651) 255-6810