

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 AND APPENDIX OF PETITIONER
MARGARET MACRAE, TRUSTEE FOR
THE NEXT OF KIN OF RODERICK MACRAE**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE AND FACTS 2

 A. Mr. MacRae’s Left Leg Lesion Was Misdiagnosed as Compound
 Nevus 2

 B. There Was No Abnormality of Mr. MacRae’s Lymph Nodes as of
 December 2002 3

 C. In November 2004, Mr. MacRae Was Informed of the Misdiagnosis
 and that the 2001 Biopsy Revealed Malignant Melanoma 4

 D. Mr. MacRae Died on August 26, 2005 4

 E. This Lawsuit for Wrongful Death Was Commenced in February
 2006 and Defendants Sought Summary Judgment Dismissal
 Claiming Suit Was Untimely 5

 F. The Only Record Evidence Is That the Lawsuit Is Timely 5

 G. The Trial Court Dismissed the Case as Time Barred 6

ARGUMENT

MRS. MACRAE’S CAUSE OF ACTION FOR MEDICAL MALPRACTICE
DID NOT ACCRUE UNTIL AFTER DECEMBER 2002, AND
THEREFORE, THIS CASE IS NOT TIME BARRED 7

 A. Standard of Review 7

 B. Minnesota Has Adopted the “Some Compensable Damage” Rule of
 Accrual 8

 C. Lower Courts Failed to Apply Damage Rule of Accrual to the Facts
 of This Case 11

D.	<i>Molloy v. Meier</i> , 679 N.W.2d 711 (Minn. 2004), Was Not a Failure to Diagnose Cancer Case and Its Dicta Has Created Confusion	16
1.	<i>Molloy</i> did not concern misdiagnosis of cancer	16
2.	<i>Fabio</i> does not support a holding that cause of action accrues as a matter of law at time of misdiagnosis	17
3.	Misdiagnosis causes injury and some damage as a matter of law contrary to <i>Leubner v. Sterner</i>	21
E.	Adverse Consequences From Lower Courts' Rulings Cannot Be Ignored	23
	CONCLUSION	25
	CERTIFICATION OF BRIEF LENGTH	26

TABLE OF AUTHORITIES

Statutes:

Minn. Stat. § 541.076 (2006) 2
Minn. Stat. § 573.02, subd. 1 2

Cases:

Antone v. Mirviss,
720 N.W.2d 331 (Minn. 2006) 1, 7-10

Cooper v. Hartman,
533 A.2d 1294 (Md. 1987) 13

Dalton v. Dow Chemical Co.,
280 Minn. 147, 158 N.W.2d 580 (1968) 8, 9

DeBurkarte v. Louvar,
393 N.W.2d 131 (Iowa 1986) 15

Delaney v. Cade,
873 P.2d 175 (Kan. 1994) 14

DeRogatis v. Mayo Clinic,
390 N.W.2d 773 (Minn. 1986) 8

Dickey on behalf of Dickey v. Daughety,
917 P.2d 889 (Kan. 1996) 14

Eklund v. Evans,
211 Minn. 164, 300 N.W. 617 (1941) 9

Fabio v. Bellomo,
504 N.W.2d 758 (Minn. 1993) 1, 7, 12, 13, 16-20

Golden v. Lerch Bros.,
203 Minn. 211, 281 N.W.2d 249 (1938) 7

Grondahl v. Bulluck,
318 N.W.2d 240 (Minn. 1982) 8

<i>Johnson v. Rouchleau-Ray Iron Land Co.</i> , 140 Minn. 289, 168 N.W. 1 (1918)	9
<i>K.A.C. v. Benson</i> , 527 N.W.2d 553 (Minn. 1995)	1, 9, 10
<i>Leubner v. Sterner</i> , 493 N.W.2d 119 (1992)	1, 12, 18, 20-23
<i>Mayhue v. Sparkman</i> , 653 N.E.2d 1384 (Ind. 1995)	22
<i>Mead v. Adrian</i> , 670 N.W.2d 174 (Iowa 2003)	13
<i>Molloy v. Meier</i> , 679 N.W.2d 711 (Minn. 2004)	6, 9, 12, 15-17, 20, 24
<i>Offerdahl v. Univ. of Minn. Hosp. & Clinics</i> , 426 N.W.2d 425 (Minn. 1988)	8, 10
<i>Reliance Ins. Co. v. Arneson</i> , 322 N.W.2d 604 (Minn. 1982)	9
<i>Thornton v. Turner</i> , 11 Minn. 336 (1866)	9
<u>Other Authorities:</u>	
Roxanne Benton Conlin & Gregory S. Cusimano, 5 ATLA's Litigating Tort Cases (2007)	13
David W. Feeder II, Comment, <i>When Your Doctor Says, You Have Nothing to Worry About, Don't Be So Sure: The Effect of Fabio v. Bellomo on Medical Malpractice Actions in Minnesota</i> , 78 Minn. L. Rev. 943 (1994)	12, 13
Stephen J. Freeland, et al., "Delay of Radical Prostatectomy and Risk of Biochemical Progression in Men With Low Risk Prostate Cancer," 175 <i>The Journal of Urology</i> 1298-1303 (2006)	23

Mark Hallberg & Teresa Fariss McClain, <i>Molloy v. Meier Extends Genetic Counseling Duty of Care to Biological Parents and Establishes That Legal Damages Must Occur Before Wrongful Conception Action Accrues for Statute of Limitations Purposes</i> , 31 Wm. Mitchell L. Rev. 939 (2005)	12
K. Kerlikowske, et al., <i>Evaluation of Abnormal Mammography Results and Palpable Breast Abnormalities</i> , 139 Ann. Intern. Med. 274-284 (2003)	24
Restatement (Second) Torts § 12A	9
Restatement (Second) Torts § 7	9
Restatement, Torts § 902	9
Richard D. Sowery and D. Robert Siemens, <i>Growth Characteristics of Renal Cortical Tumors in Patients Managed by Watchful Waiting</i> , 11(5) The Can. J. of Urol. 2004, 2407-10 (2004); N. Karavitaki, et al., <i>What is the Natural History of Nonoperated Nonfunctioning Pituitary Adenomas?</i> , 67 Clinical Endocrinology 938-43 (2007)	23
Webster's New International Dictionary 13 (3 rd ed. 1961)	9

STATEMENT OF THE ISSUES

UNDER MINNESOTA LAW, “A CAUSE OF ACTION ACCRUES, AND THE STATUTE OF LIMITATIONS BEGINS TO RUN, ON THE OCCURRENCE OF COMPENSABLE DAMAGE.” *Antone v Mirviss*, 720 N.W.2d 331, 336 (Minn. 2006). DOES MINNESOTA LAW PRESUME THE OCCURRENCE OF INJURY AND COMPENSABLE DAMAGE AT THE TIME THE HEALTHCARE PROVIDER FAILS TO DIAGNOSE A PATIENT’S MEDICAL CONDITION OR IS OCCURRENCE OF INJURY AND COMPENSABLE DAMAGE (AND THEREFORE THE DETERMINATION OF WHEN THE CAUSE OF ACTION ACCRUES) TO BE DETERMINED BY THE RECORD EVIDENCE AS APPLIED TO MINNESOTA LAW?

K.A.C. v. Benson, 527 N.W.2d 553 (Minn. 1995).

Antone v. Mirviss, 720 N.W.2d 331 (Minn. 2006).

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

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

STATEMENT OF THE CASE AND FACTS

Appellant/Plaintiff Margaret MacRae (Mrs. MacRae), as trustee for the next of kin of her spouse, Roderick MacRae, challenges the district court's grant, and the Court of Appeals' affirmance of that grant, of summary judgment dismissing Mrs. MacRae's wrongful death action as time barred by Minn. Stat. § 541.076 (2006), the statute of limitations for medical malpractice actions. Minn. Stat. § 573.02, subd. 1. The trial court, the Honorable Marilyn Brown Rosenbaum, granted to Respondents/Defendants Group Health, Inc., HealthPartners, Inc., Amar Subramanian, M.D. and Michael Kelly, M.D.¹ summary judgment holding as a matter of law that Mrs. MacRae's cause of action for wrongful death accrued as of January 17, 2001, the date of Defendants' negligent act of misdiagnosis. (Appellant's Appendix [A.] 9.) The relevant facts in this case are undisputed.

A. Mr. MacRae's Left Leg Lesion Was Misdiagnosed as Compound Nevus.

This is a failure to diagnose cancer case. On January 15, 2001, Roderick MacRae (Mr. MacRae), age 64, came to Respondent/Defendant Dr. Michael Kelly (Dr. Kelly), his primary care physician, for routine health maintenance. (A. 37.) Dr. Kelly is an employee of Respondent Group Health, Inc., d/b/a Respondent HealthPartners, Inc. (HealthPartners). (A. 21.) Mr. MacRae informed Dr. Kelly that he had a few skin lesions

¹ When Respondents/Defendants are referred to jointly, they will be referred to as Defendants.

which needed a look, including one on his left leg. Mr. MacRae described the left leg lesion as “a big, ugly mole.” (A. 37, 97.) Dr. Kelly noted a “brownish, purplish, 1 centimeter lesion on the left lateral leg” which he shave-biopsied. (A. 37-38.) Respondent Dr. Amar Subramanian (Dr. Subramanian), a pathologist, also employed by HealthPartners, received the biopsy slides on January 17, 2001 and reported on January 18, 2001 his misdiagnosis of Mr. MacRae’s lesion as a non-malignant compound nevus. (A. 21, 38, 42.)

On April 4, 2001, Dr. Kelly saw Mr. MacRae in a follow-up of the skin lesions. They discussed the skin lesions which Dr. Kelly had removed in January and had biopsied. According to Dr. Kelly’s note, it took about two weeks for the biopsy site on the leg to heal, which was longer than Mr. MacRae expected and “[Mr. MacRae] has noticed some new persistent changes that he was unfamiliar with.” After a visual skin check, Dr. Kelly determined there was a patch of angiomatous change 3 or 4 centimeters x 1.5 centimeters surrounding the biopsy site which was purple and intact. (A. 42.) Dr. Kelly recommended that Mr. MacRae come back if any additional problems developed, “[o]therwise, [Dr. Kelly] recommended to leave it alone.” (*Id.*) Dr. Kelly did not call into question the January 2001 surgical pathology report. (*Id.*)

B. There Was No Abnormality of Mr. MacRae’s Lymph Nodes as of December 2002.

In July 2002, Dr. Kelly determined that Mr. MacRae may need a right inguinal hernia repair. (A. 50.) In December 2002, Dr. Kelly performed the pre-operative

examination on Mr. MacRae. (A. 55.) The standard of care requires the examiner to palpate both inguinal lymph nodes. There is no notation of any abnormality of these lymph nodes in his pre-operative report. (A. 35, 55; *see also* A. 57.)

C. In November 2004, Mr. MacRae Was Informed of the Misdiagnosis and that the 2001 Biopsy Revealed Malignant Melanoma.

In September 2004, Mr. MacRae reported to Dr. Kelly that he had a swollen left leg and groin with “some pain” in the leg. (A. 66.) He was referred to Dr. Mestitz, a surgeon, who diagnosed a left groin adenopathy and ordered a pelvic lymph node biopsy, which revealed that Mr. MacRae had metastatic malignant melanoma. (A. 67, 71, 76-78.) The consulting radiation oncologist, Dr. Kurt Nisi, opined that the “large nevus resected from the left leg in 2001 . . . seems to be the most likely source of his disease.” (A. 78.)

Mr. MacRae then questioned the accuracy of the 2001 biopsy report that had reported his lesion as a non-malignant compound nevus. (A. 80.) On November 3, 2004, Mr. MacRae was informed of the misdiagnosis. (A. 82, 85.) Mr. MacRae was told that “on further review of his original biopsy done from his left lower leg in 2001, it was determined that he indeed had a malignant melanoma.” He was also told that “[m]ost likely, this is the primary melanoma that now he has metastatic disease as a result of.” (A. 85.)

D. Mr. MacRae Died on August 26, 2005.

Mr. MacRae died on August 26, 2005 from extensive metastatic malignant melanoma. (A. 105.)

E. This Lawsuit for Wrongful Death Was Commenced in February 2006 and Defendants Sought Summary Judgment Dismissal Claiming Suit Was Untimely.

On February 20, 2006, Mrs. MacRae sued Defendants for wrongful death as a result of the Defendants' failure to correctly diagnose Mr. MacRae's malignant melanoma. (A. 16.) Defendants moved for summary judgment asserting that the action is barred by the four-year statute of limitations that applies to wrongful death actions based on medical malpractice. (A. 26.) It is Defendants' position, and their summary judgment dismissal of this case was premised solely upon the premise, that "[t]he law in Minnesota is that in cases of misdiagnosis, the cause of action accrues at the time of the alleged misdiagnosis." (Defendants' Reply Memorandum of Law in Support of Their Motion for Summary Judgment, p. 1, dated June 29, 2006.) Defendants asserted that Mr. MacRae's cause of action therefore accrued on January 17, 2001, the date of misdiagnosis, and the statute of limitations expired at the very latest on January 17, 2005. (*Id.*) Since Mrs. MacRae commenced suit on February 20, 2006, Defendants asserted this medical malpractice claim for Mr. MacRae's wrongful death was time barred. (*Id.*)

F. The Only Record Evidence Is That the Lawsuit Is Timely.

Mrs. MacRae opposed Defendants' "law presumes damage at the time of misdiagnosis" position and asserted, based on the expert affidavit of Arkadiusz Dudek, M.D. as applied to Minnesota law, her claim is not time barred. (A. 34.) Dr. Dudek is board certified in internal medicine with subspecialty certificates in hematology and medical oncology. He practices with the University of Minnesota Physicians. He is also

an assistant professor of medicine and the director of the clinical trial office in the hematology, oncology and transplantation division of the University of Minnesota medical school. His clinical interest is focused on the management of malignant melanoma, kidney cancer and thoracic malignancies. (*Id*)

When melanoma originates in the left leg, it will first become metastatic in the inguinal lymph node. (A. 35.) Dr. Dudek opined that because the preoperative examination performed on Mr. MacRae in December 2002 did not reveal pathology in either inguinal lymph node, it is more likely than not that the melanoma had not metastasized by that date to a point that it was palpable. (*Id.*) Accordingly, Mr. MacRae would more likely than not have survived if the melanoma had been properly diagnosed and treated in December 2002. (A. 36.) It was at some point in time after December 2002 that the delay brought about by the misdiagnosis caused Mr. MacRae to lose the ability to survive. (*Id.*) Mrs. MacRae asserts that, under Minnesota's traditional tort principles, it was therefore sometime after December 2002 that her cause of action for medical malpractice accrued. Accordingly, Mrs. MacRae asserted this medical malpractice action for wrongful death, which was brought on February 20, 2006, is not time barred.

G. The Trial Court Dismissed the Case as Time Barred.

The trial court ignored the only evidence presented (Dr. Dudek's affidavit) and dismissed the case as time barred. Quoting from and referring to this Court's decision in *Molloy v. Meier*, 679 N.W.2d 711, 721-22 (Minn. 2004), the trial court states "[t]his

Court cannot ignore precedent and must find that [Mrs. MacRae's] cause of action accrued as of January 17, 2001 [the date of misdiagnosis] and that this claim is time barred by the applicable statute of limitations." (A. 14-15.) The Court of Appeals affirmed. (A. 1.)

ARGUMENT

MRS. MACRAE'S CAUSE OF ACTION FOR MEDICAL MALPRACTICE DID NOT ACCRUE UNTIL AFTER DECEMBER 2002, AND THEREFORE, THIS CASE IS NOT TIME BARRED.

A. Standard of Review.

Defendants seek dismissal of Mrs. MacRae's medical malpractice claim asserting this action is time barred. Since the statute of limitations is an affirmative defense, the burden is on Defendants to show when every element of Mrs. MacRae's cause of action was met and that Mrs. MacRae's action was time barred at the time she brought this lawsuit. *Golden v. Lerch Bros.*, 203 Minn. 211, 281 N.W.2d 249, 253 (1938). And because this case comes before the Court on a grant of summary judgment to the Defendants, the evidence of record must be viewed in a light most favorable to Mrs. MacRae and all factual inferences and ambiguities in the record must be viewed in her favor. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Furthermore, whether the lower courts erred in applying the law regarding the accrual of a cause of action and the running of a statute of limitations is a question of law that this Court reviews *de novo*. *Antone v. Mirviss*, 720 N.W.2d 331, 334 (Minn. 2006).

B. Minnesota Has Adopted the “Some Compensable Damage” Rule of Accrual.

In Minnesota, the statute of limitations for a wrongful death action occurring as a result of medical malpractice begins to run at the same time as the limitation period for the decedent’s medical malpractice claim. *DeRogatis v. Mayo Clinic*, 390 N.W.2d 773, 776 (Minn. 1986). Therefore, in order to determine whether the statute of limitations precludes Mrs. MacRae from asserting this wrongful death action, this Court must determine whether this wrongful death action, which was initiated in February 2006, was commenced within four years from the date the cause of action accrued.

When the plaintiff alleges an identifiable single act by the Defendants as the basis for his negligence claim, the general rule of accrual applies. *Offerdahl v. Univ. of Minn. Hosp. & Clinics*, 426 N.W.2d 425, 429 (Minn. 1988).² Under longstanding Minnesota law, occurrence of the wrongful act is never enough to trigger a Minnesota statute of limitations. *Antone*, 720 N.W.2d at 335 (confirming rejection of occurrence rule); *Dalton v. Dow Chemical Co.*, 280 Minn. 147, 158 N.W.2d 580, 584 (1968).

² This rule is known as the single act exception, which is the general accrual rule. In the medical malpractice area, this Court has also fashioned the “termination of treatment rule” under which a cause of action for medical malpractice will not accrue until the plaintiff ceases treatment with the physician. *Grondahl v. Bulluck*, 318 N.W.2d 240, 243 (Minn. 1982). The trial court held that while Mr. MacRae sought medical treatment for multiple skin and scalp ailments after the misdiagnosis, the particular lesion biopsied by Dr. Kelly healed and he did nothing more for the specific ailment. Therefore, the single act rule applied. (A. 14-15.)

Under Minnesota law, a cause of action for medical malpractice does not “accrue” until an action may be brought without dismissal for failure to state a claim upon which relief may be granted. *Dalton*, 158 N.W.2d at 584. “Accrue” has been defined by this Court as “to come into existence as an enforceable claim: vest as a right.” *Molloy*, 679 N.W.2d at 719, quoting Webster’s New International Dictionary 13 (3rd ed. 1961). As this Court stated in *Molloy*, “[i]n the context of a malpractice action, the action accrues when the plaintiff establishes each of the four elements of negligence.” *Id.*

This Court has declared that “the breach of a legal duty without compensable damages recognized by law is not actionable.” *K.A.C. v. Benson*, 527 N.W.2d 553, 561 (Minn. 1995). And as this Court stated in *Antone*, there must be some compensable damage in order for a cause of action to accrue.³ 720 N.W.2d at 336. “It is the damage, and not the anticipation thereof, that gives rise to the cause of action.” *Johnson v. Rouchleau-Ray Iron Land Co.*, 140 Minn. 289, 168 N.W. 1, 2 (1918); *Thornton v. Turner*, 11 Minn. 336 (1866) (“Until damage is occasioned, the right of action does not accrue, nor the time of limitation commence to run.”); *Reliance Ins. Co. v. Arneson*, 322 N.W.2d

³ This Court has defined damages as “the award made to a person because of a legal wrong done to him by another.” *Eklund v. Evans*, 211 Minn. 164, 300 N.W. 617, 619 (1941), citing Restatement, Torts § 902, comment a. Although the term “damages” and “injury” often are used interchangeably, the difference in meaning can be significant. The Restatement (Second) of Torts defines “injury” as “the invasion of a legally protected interest of another.” Restatement (Second) Torts § 7. The Restatement, as previously stated, defines “damages” as “a sum of money awarded to a person injured by the tort of another.” Restatement (Second) Torts § 12A. Under that definition, damage constitutes the tort, and the monetary value of an injury. Accordingly, the date of injury often will be earlier than the date when damage is ascertainable.

604, 607 (Minn. 1982) (concluding that a threat of future harm, not yet realized, will not satisfy damage requirement in negligence action).

Minnesota law, as elsewhere, does not recognize an inchoate wrong. As a result, even though there exists a possibility of injury and future damage because of a negligent act, a mere possibility is not enough on which to sustain a claim. A plaintiff must wait to bring suit until he or she sustains injury and some compensable damages recognized by law. *K.A.C.*, 527 N.W.2d at 561.

In *Offerdahl v. University of Minnesota Hospitals and Clinics*, for example, the plaintiff had a Copper-7 IUD inserted on August 9, 1977. 426 N.W.2d at 429. She was hospitalized on January 28, 1979, for pelvic inflammatory disease (PID) related to the IUD. She filed suit against the doctors who inserted the IUD, claiming they were negligent in the insertion. This Court held that “Offerdahl sustained damage . . . by January 28, 1979, when she was hospitalized for PID and the Copper-7 IUD was removed.” *Id.* at 429. It was on that date that Offerdahl’s cause of action accrued. *Id.*

This damage rule of accrual has been viewed as the middle ground between the occurrence rule and the discovery rule of accrual.

Minnesota has taken the middle ground by adopting the “damage” rule of accrual, under which the cause of action accrues and the statute of limitations begins to run when “some damages occurred as a result of the alleged malpractice.”

Antone, 720 N.W.2d at 335-36 (internal citations omitted).

C. Lower Courts Failed to Apply Damage Rule of Accrual to the Facts of This Case.

Defendants asserted, and the lower courts have ruled, that when a healthcare professional fails to diagnose a medical condition, the court is to presume the patient has sustained injury and some compensable damage at that point in time as a matter of law. Under Defendants' theory and the lower courts' rulings, science and the facts of the particular case, as well as Minnesota law generally defining when a patient may maintain a medical malpractice cause of action against his physician for cancer misdiagnosis, are now to be ignored in favor of a presumptive rule of accrual. Notably, neither the Defendants nor the lower courts explain what injury was caused by the Defendants and what "compensable damage" was sustained at the time of Mr. MacRae's misdiagnosis.

In every misdiagnosis case, the patient has some type of medical problem at the time the physician is consulted. In this case, Mr. MacRae, on January 17, 2001, had cancer. The Defendants did not cause that cancer. All that occurred on January 17, 2001 was Defendants' negligent act of misdiagnosis. Mr. MacRae's cancer is not the injury caused by Defendants' negligent act, nor does the failure to diagnose result in "some compensable damage" at that point in time. The question is when did Defendants' failure to alter the course of Mr. MacRae's underlying and already existing medical condition injure Mr. MacRae and result in some compensable damage such that a malpractice action could be maintained in Minnesota courts. It is this analysis the lower courts failed to undertake.

Under Minnesota law, Mr. MacRae had a cause of action against his physician for failure to diagnose cancer when the delay in diagnosis resulted in the probability of his survival dropping from above fifty percent (more likely than not to survive) to below fifty percent (more likely not to survive). *Leubner v. Sterner*, 493 N.W.2d 119, 121 (Minn. 1992). Unless and until that occurred, Mr. MacRae sustained no injury and had no compensable damage on this record from which he could maintain a medical malpractice cause of action against the Defendants under Minnesota law.

This is so because this Court has specifically refused to alter traditional tort doctrine and recognize loss of a chance as either an injury or compensable damage. This Court, in *Fabio v. Bellomo*, 504 N.W.2d at 762, explicitly declared, “[w]e have never recognized loss of chance in the context of a medical malpractice action and we decline to recognize it in this case.” *See, e.g.*, David W. Feeder II, Comment, *When Your Doctor Says, You Have Nothing to Worry About, Don’t Be So Sure: The Effect of Fabio v. Bellomo on Medical Malpractice Actions in Minnesota*, 78 Minn. L. Rev. 943, 969 (1994) (“the court [in *Fabio*] effectively states that unless patients have lost more than a fifty percent chance of survival, they have not sustained compensable injuries”); Mark Hallberg & Teresa Fariss McClain, *Molloy v. Meier Extends Genetic Counseling Duty of Care to Biological Parents and Establishes That Legal Damages Must Occur Before Wrongful Conception Action Accrues for Statute of Limitations Purposes*, 31 Wm. Mitchell L. Rev. 939, 953 (2005) (stating the Court’s statement in *Molloy* is “directly contrary to the holding of *Leubner v. Sterner*; a tumor’s ‘unchecked growth’ is not

considered legal damages unless there is also proof that it is more probable than not that plaintiff will not survive her cancer because of the ‘unchecked growth.’”); Roxanne Benton Conlin & Gregory S. Cusimano, 5 ATLA’s Litigating Tort Cases § 61:33 (2007) (citing *Fabio* and stating that in Minnesota, unless the negligence results in the patient’s chance of survival dropping below fifty percent, there is no recovery).

The loss of a chance doctrine was developed to address the perceived injustice of traditional tort law by recognizing a cause of action in any case in which the defendant’s negligent conduct decreased the patient’s chance of recovery from a preexisting condition. *Mead v. Adrian*, 670 N.W.2d 174, 183 (Iowa 2003). Those jurisdictions which recognize loss of a chance as compensable damage address the physician’s liability for the loss of some chance of survival allegedly caused by the failure to properly diagnose or properly treat the patient.⁴

⁴ In those jurisdictions that have adopted loss of a chance, there has been a dispute as to the precise nature and extent of departure of this doctrine from traditional tort law. Some courts and commentators conceptualize the doctrine as an exception to the basic rule of legal cause. Courts employing this causation approach to the loss of a chance doctrine award compensation to lost chance plaintiffs on the grounds that the lost chance factual scenario necessitates a relaxation of the traditional requirement of proximate causation. *See Cooper v. Hartman*, 533 A.2d 1294, 1297 (Md. 1987). An alternative approach to the doctrine, the damages approach, conceives of the loss of a chance doctrine differently, and in doing so avoids the need to carve out an exception from the traditional causation standard. According to the damage approach, the loss of a chance cause of action does not depend on a relaxation of the causation standard, but on a clarification of the injury for which the plaintiff seeks compensation. *Id.* at 1297. This Court’s decision in *Fabio*, 504 N.W.2d at 762, rejecting loss of a chance and defining it as a form of damages, has been criticized as confusing causation and damage theories. Feeder, 78 Minn. L. Rev. at 969.

Loss of a chance has been applied where a patient survives but has suffered a reduced chance for a better result. *Delaney v. Cade*, 873 P.2d 175, 177-78 (Kan. 1994) (allowing paraplegic plaintiff to recover where risk of spinal cord injury was increased five to ten percent by prolonged period of shock following car accident and prior to surgery). For example, the patient is suffering from a disease such as cancer. With prompt diagnosis and proper treatment, the patient's chance of survival would be ninety percent. However, due to the physician's negligence, when the cancer is finally diagnosed and treated, the patient's chances of survival have been reduced to sixty percent. However, statistically, the patient is still more likely than not to survive. States that recognize loss of a chance will allow an award of damages to be made for the thirty percent reduction in the chance of survival. *See, e.g., Dickey on behalf of Dickey v. Daughety*, 917 P.2d 889, 892 (Kan. 1996). Under Minnesota law, however, that patient would have no cause of action.

Likewise, a person suffering from a preexisting condition with less than a fifty percent chance of recovery before misdiagnosis would have no cause of action under Minnesota law against a doctor who negligently failed to diagnose the condition, even if the delay brought about by the misdiagnosis caused the person to lose a chance of recovering from the condition. So, for example, a person with a thirty-five percent chance of recovering from her cancer with timely diagnosis would, according to traditional tort doctrine and Minnesota law, have no cause of action against a doctor whose failure to diagnose the cancer caused the person's chance of survival to fall to

twenty percent or even zero. Under these facts, it was always more probable than not that the patient would not survive and, therefore, no cause of action exists. The same is not true in those jurisdictions which recognize loss of a chance. *DeBurkarte v. Louvar*, 393 N.W.2d 131, 137 (Iowa 1986).

On the other hand, under traditional tort law, which is present Minnesota law, a person with a better than fifty percent chance of recovery with timely diagnosis and treatment has a cause of action against a doctor whose negligent misdiagnosis has reduced the patient's chance to survive below fifty percent. In such a case, the doctor's negligence is more likely than the preexisting condition to have caused the plaintiff's death. That is the MacRaes' situation.

In reaching the result that Mrs. MacRae's wrongful death action is time barred, the lower courts and the Defendants have relied on this Court's statement in *Molloy* that "malpractice actions based on failures to diagnose generally accrue at the time of the misdiagnosis, because some damage generally occurs at that time." 679 N.W.2d at 722. There may indeed be cases where failure to diagnose and the resulting injury and damage are close to simultaneous. An example is where a patient presents himself with a fracture of the leg. The physician fails to diagnose a compartment syndrome, a condition that occurs when there is swelling inside an enclosed compartment of the body. If not diagnosed and treated quickly, paralysis of the foot and related complications occur almost immediately. In that case, perhaps this Court's statement in *Molloy* may be true.

But here, there is no record evidence to establish that Mrs. MacRae's cause of action accrued at the time of misdiagnosis. The record evidence here is to the contrary.

On this record, a cause of action for medical malpractice could accrue, at the earliest, when it was more probable than not that Mr. MacRae would not survive his cancer. It is at that point in time there is no longer an inchoate wrong and Mr. MacRae has sustained injury and some compensable damage. At that point in time, the medical malpractice action would not be subject to dismissal for failure to state a claim. That occurred sometime after December 2002. Accordingly, this action, commenced in February 2006, is not time barred.

D. *Molloy v. Meier*, 679 N.W.2d 711 (Minn. 2004), Was Not a Failure to Diagnose Cancer Case and Its Dicta Has Created Confusion.

1. *Molloy* did not concern misdiagnosis of cancer.

Confusion has been generated in the lower courts by this Court's statements in dicta in *Molloy*, 679 N.W.2d at 721-22, primarily regarding this Court's statements regarding *Fabio v. Bellomo*, 504 N.W.2d 758. In *Molloy*, Molloy and her husband brought a medical malpractice action claiming the doctors were negligent in failing to diagnose a genetic disorder in Molloy's daughter and their negligence caused Molloy to conceive another child with the same genetic disorder. It was Molloy's claim that the harm occurred at the date of conception and that all damages occurred on or after that date. *Id.* at 713. In *Molloy*, this Court held the failure to diagnose Fragile X, a genetic disorder, did not "directly damage the patient" and, therefore, there was no damage at the

time of misdiagnosis. Rather, the damage did not occur until M.M.'s conception. *Id.* at 722. This Court held Molloy's claim was not time barred. *Id.*

In *Molloy*, the defendant doctors had cited *Fabio* to this Court for the proposition that "some damage occurs as a matter of law when the physician fails to make a correct diagnosis and recommend the appropriate treatment." *Id.* at 721. But *Fabio* contains no such holding.

2. *Fabio* does not support a holding that cause of action accrues as a matter of law at time of misdiagnosis.

Fabio treated with the defendant Bellomo from 1977 until 1986. *Fabio*, 504 N.W.2d at 760. Fabio alleged that on one occasion sometime between 1982 and 1984 and on another occasion, March 10, 1986, she had complained of a lump in her left breast. *Id.* On both occasions, defendant Bellomo told Fabio "not to worry" because the lump was a fibrous mass. After Dr. Bellomo retired in 1986, Fabio switched her care to another physician. *Id.* In 1987, that physician recommended a mammogram and thereafter diagnosed a breast cancer that had metastasized to four lymph nodes. *Id.* The tumor was excised and Fabio underwent chemotherapy. *Id.* Fabio brought her lawsuit against Dr. Bellomo in March 1988. *Fabio v. Bellomo*, 489 N.W.2d 241, 243 (Minn. Ct. App. 1992).

Fabio offered expert testimony that Dr. Bellomo had departed from accepted standards of practice in failing to offer mammography at the time Fabio had complained of a lump prior to 1984 and in 1986. In addition, expert testimony established that the

cancer had “more probably than not” spread from the breast to the lymph nodes between 1984 and 1987. *Id.* Unlike the present case before this Court, however, at no time in *Fabio* was it more probable than not that Fabio would not survive her cancer. So the question was what injury was caused by Dr. Bellomo’s failure to diagnose which caused Fabio some compensable damage.

Fabio asserted she suffered three forms of damages: chemotherapy, “loss of a chance” and “negligent aggravation of a preexisting condition.” 504 N.W.2d at 762. Fabio’s first theory of damages caused by undergoing chemotherapy was rejected because Fabio admitted that chemotherapy would have been necessary even if Dr. Bellomo had diagnosed her cancer in 1986. *Id.*

Fabio’s second theory of recovery was for “loss of a chance.” Fabio argued that her increased chance of recurrence of cancer and her decreased chance of living another 20 years are compensable injuries. This Court rejected that theory of recovery. *Id.* at 762-63.

Fabio’s third theory of recovery for “negligent aggravation of a preexisting condition” was, according to this Court, rejected in its earlier case of *Leubner v. Sterner*. *Id.* at 763. Accordingly, at no time did *Fabio* hold that the ongoing presence of cancer cells was enough for a cause of action to accrue. In fact, as the above discussion reveals, it held to the contrary.

The notion that injury and some damage occurred at misdiagnosis is premised not on what this Court actually stated in *Fabio* but has been premised solely on the fact this

Court affirmed the denial of an amendment to Fabio's complaint to add a malpractice claim against Dr. Bellomo for alleged misdiagnosis that occurred sometime between 1982 and 1984. *Id.* at 761.

Fabio had commenced a timely action (it was a two-year statute of limitations at that time) alleging negligence for the misdiagnosis on March 10, 1986. Prior to trial, Fabio had sought to amend her complaint to include an allegation of negligence for the misdiagnosis that occurred prior to 1984. Fabio had asserted as damage that she would not have had to undergo chemotherapy if she had been diagnosed in 1982-84. This was her claim of alleged injury and some damage that a correct diagnosis would have avoided. And Fabio never conceded her claim of damage in regard to the 1982-84 misdiagnosis, only that regarding the 1986 misdiagnosis. *Id.* at 762. (A. 112-113.)

Because Fabio claimed she was damaged in 1982-84, her way to avoid the then two-year statute of limitations was to assert that the continuing course of treatment exception applied.⁵ If the single act exception applied, and given her claim of resulting injury and some damage as a result of the failure to diagnose, her complaint based on her claim of damages before 1984 was time barred. The district court denied Fabio's motion to amend, finding there was no extension based on the continuing course of treatment doctrine. *Id.* at 761-62. It is this Court's denial of the amendment which defendants have focused on.

⁵ As previously stated, under this doctrine, the statute of limitations is extended when a doctor's negligence is part of a continuing course of treatment. *Id.* at 762.

In *Fabio*, this Court affirmed the district court's discretionary ruling denying amendment of the complaint. Examination of the breast before 1984 was held not to be part of a continuing course of treatment and the motion to amend was denied because more than two years had passed. *Id.* The implication that has been made of that holding was that the statute of limitations began to run on the date of misdiagnosis. However, this Court did not address if or when injury and compensable damage had occurred. It only rejected the amendment based on the continuing course of treatment rule, the theory articulated by Ms. Fabio.

With all due respect to this Court, neither the record nor this Court's analysis in *Fabio* supports an assertion that in *Fabio* "some damage occurs as a matter of law when the physician fails to make a correct diagnosis and recommend the appropriate treatment." *Molloy*, 679 N.W.2d at 721. In *Molloy*, this Court also stated:

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.

Id. at 722. But any purported holding in *Fabio* that misdiagnosis of cancer causes some compensable damage as a matter of law immediately at the time of misdiagnosis is contrary to this Court's decision in *Leubner v. Sterner*, 493 N.W.2d at 121, which decision was issued eight months earlier.

3. Misdiagnosis causes injury and some damage as a matter of law contrary to *Leubner v. Sterner*.

In *Leubner*, a 54-year-old woman visited her family doctor, who confirmed two small lumps in the area of her left breast. A mammogram was negative. 493 N.W.2d at 120. The family doctor referred her to another physician, who examined Ms. Leubner but chose not to order a biopsy at that time. *Id.* Instead, that doctor scheduled another appointment six months later. When that doctor examined his patient on the appointed day, he noticed that two nodules were enlarged and advised a biopsy. The biopsy, which was performed about seven months after the doctor's first examination, revealed cancer in the patient's left breast and a partial mastectomy was done. *Id.*

Unlike this Court's analysis in *Leubner*, in dismissing this case as time barred, the lower courts never articulate what injury was sustained by the MacRaes as a result of Defendants' negligence which results in some compensable damage. This Court in *Leubner* recognized that determining the injury is critical because the trier of fact cannot answer the question of causation unless it knows which injury the defendant's act or omission is said to have caused. Or, as this Court stated, causation cannot be "discussed intelligently without reference to the injury claimed to be caused." *Id.* at 121. As this Court also recognized in *Leubner*, the misdiagnosis is the negligent act or omission. It is not the injury. This misdiagnosis may or may not result in an injury for which compensable damages may be awarded.

Minnesota law does recognize that a patient has sustained injury as a result of a misdiagnosis of cancer when it is more probable than not he will not survive the cancer because of its unchecked growth. *Leubner*, 493 N.W.2d at 121. Under the facts in *Leubner*, however, “[e]veryone agrees that the offer of proof fails to establish that death will more probably than not result from Dr. Jensen’s alleged negligence.” 493 N.W.2d at 121. As this Court explained, if Ms. Leubner’s claimed injury is the failure to survive (i.e., her death), Leubner’s proffered proof failed. *Id.*

The Court then examined Mrs. Leubner’s contention that the claimed injury is “the enlarged, unchecked tumor.” In this regard, the Court found the tumor was removed in February 1988. The Court found “it is unclear what the damages would be for removal of a larger rather than a smaller tumor.” *Id.*

Leubner also asserted that her claimed injury is that she faced “a decreased likelihood of survival as a direct result of the tumor’s unchecked growth.” *Id.* This Court was troubled with that theory because “first of all, there is no proof it is more probable than not the plaintiff will not survive her cancer.” *Id.* In so ruling, this Court rejected the Court of Appeals’ citation to a 20-year-old medical textbook that delay in diagnosis “invariably results in a more serious prognosis.” *Id.* at 122. The Court concluded that “particularly in malpractice cases, the plaintiff cannot use the fact her condition has worsened as proof the defendant doctor made it worse.” *Id.* at 122.⁶

⁶ In contrast, the lost chance approach is based on the theory that the lost chance is the injury – i.e., the loss of a chance at a better result. *Mayhue v. Sparkman*, 653 N.E.2d 1384, 1387-88 (Ind. 1995).

E. Adverse Consequences From Lower Courts' Rulings Cannot Be Ignored.

The lower courts have also ignored the impact that a ruling that presumed damage follows misdiagnosis as a matter of law will have on the law in this state. Following the lower courts' rulings here, now even a one-day delay in the diagnosis of cancer by a healthcare professional gives the patient an un rebuttable damage case. One would suppose, then, if the lower courts' rulings would be affirmed by this Court, in other failure to diagnose cases the jury would be so instructed on this presumed damage.

But as recognized by this Court in *Leubner*, there is no basis for a legal ruling that any delay in diagnosis is presumed to cause adverse consequences to the patient as a matter of law. A tumor can grow for years with no awareness and prompt treatment does not inevitably improve the diagnosis. This Court in *Leubner* made that point distinctly. 493 N.W.2d at 121.

Cancer may be very slow growing. It may lie dormant. Someone that does have a very early stage cancer that is undetected in one year, may be at the same place five years later. In fact, medical experts reject that delay in the treatment of cancer inevitably negatively impacts even on a chance of a cure. *See, e.g.,* Stephen J. Freeland, et al., "Delay of Radical Prostatectomy and Risk of Biochemical Progression in Men With Low Risk Prostate Cancer," 175 *The Journal of Urology* 1298-1303 (2006) ("Given that a prostate cancer is generally a slowly growing tumor," patients with low risk prostate cancer can be reassured that immediate treatment is not necessary.); Richard D. Sowers

and D. Robert Siemens, *Growth Characteristics of Renal Cortical Tumors in Patients Managed by Watchful Waiting*, 11(5) *The Can. J. of Urol.* 2004, 2407-10 (2004); N. Karavitaki, et al., *What is the Natural History of Nonoperated Nonfunctioning Pituitary Adenomas?*, 67 *Clinical Endocrinology* 938-43 (2007).⁷

The fact is that delay in diagnosis does not inevitably cause injury and some compensable damage to the patient. If the opposite were true, in every case where cancer is diagnosed, the healthcare provider would start treatment immediately and every patient would survive. Delay in the diagnosis of cancer means nothing unless and until you can equate that delay with its effect on the prognosis of survival or cure of a particular patient.

⁷ For example, a woman suspected of possible breast cancer on a screening examination is typically scheduled for biopsy or other follow up examination in a week or two. Sometimes follow up is delayed for 6 months to see if the suspected lesion acts like cancer. See, e.g., www.breastcancer.org ("The actual process of diagnosis can take weeks . . ."). K. Kerlikowske, et al., *Evaluation of Abnormal Mammography Results and Palpable Breast Abnormalities*, 139 *Ann. Intern. Med.* 274-284 (2003). Under the trial court's analysis, and as suggested by this court's comment in *Molloy*, the patient, if a cancer diagnosis is ultimately confirmed, has suffered a compensable injury by reason of the delay in the diagnostic approach. In other words, the standard allowances for time in pursuing a cancer diagnosis in the practice of medicine causes injury to the patient as a matter of law. The science, as evidenced by the record in this case, is to the contrary. It is recognized that, except in extraordinary circumstances, cancer is not an acute illness like, say, bacterial meningitis where an hour can be critical. The implications of "injury as a matter of law" have significant impact for medical malpractice. If, for example, upon standard back up review ten days later, the lab had discovered its error in Mr. MacRae's case and a proper diagnosis had been made with a happy outcome for Mr. MacRae, he would nonetheless possess a viable malpractice case and a right to presumed damages under the lower courts' rulings. Defendants will be prevented from proving that a 10 day delay did not produce harm because of the overriding legal presumption. How juries will be persuaded to arrive at damages in such cases will become the subject of many CLE hours.

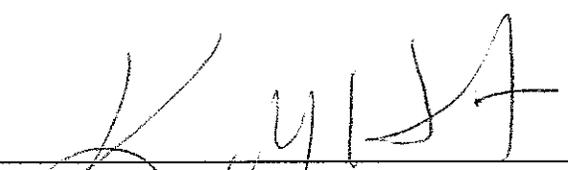
In summary, there cannot be one rule for accrual (presuming some compensable damage because of delay in treatment) and another rule that delay in treatment is not sufficient in itself to support a prima facie case of medical malpractice. Here, Mr. MacRae's action did not accrue until it was more probable than not he would not survive his cancer. Since the undisputed facts of record are that occurred sometime after December 2002, this action commenced in February 2006 is not time barred as a matter of law.

CONCLUSION

Appellant respectfully requests that the judgment of dismissal be reversed and this case remanded for a trial on the merits.

Dated: December 21, 2007

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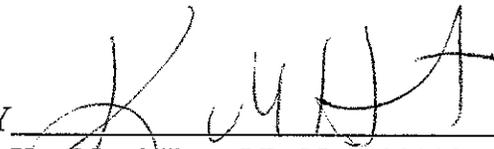
CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,524 words. This brief was prepared using Word Perfect 10.

Dated: December 21, 2007

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