

A06-1982

**State of Minnesota  
In Supreme Court**

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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.

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**REPLY BRIEF OF PETITIONER  
MARGARET MACRAE, TRUSTEE FOR  
THE NEXT OF KIN OF RODERICK MACRAE**

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**I. THIS CASE COMES BEFORE THE COURT ON A GRANT OF SUMMARY JUDGMENT TO RESPONDENTS/DEFENDANTS.**

Respondents/Defendants (Defendants) argue that Petitioner/Plaintiff Margaret MacRae, as trustee for the next of kin of Roderick MacRae (Plaintiff), “mistakenly focuses on the summary judgment standard rather than the motion to dismiss standard . . . .” (Respondent’s Brief, p. 6.) Plaintiff so focuses because Defendants sought summary judgment and the trial court granted summary judgment. (A. 9, 26.) In accord with the Minn. R. Civ. P. 56 standard generally, and Minnesota law as it applies to affirmative defenses, the burden of proof is on Defendants, who seek to avail themselves of the statute of limitations, to prove specifically that Plaintiff’s case is time barred. *Antone v. Mirviss*, 720 N.W.2d 331, 334 n.4 (Minn. 2006) (recognizing that when matters outside the pleadings are presented where dismissal is sought on statute of limitations grounds, the Rule 56 summary judgment standard is applied by the court);<sup>1</sup> *Golden v. Lerch Bros.*, 203 Minn. 211, 281 N.W.2d 249, 253 (1938) (burden of proof on defendant raising affirmative defense).

The stated issue, according to the Defendants in their accompanying memorandum in support of their motion for summary judgment, is:

WHETHER DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT WHEN IT IS UNDISPUTED THAT PLAINTIFF FAILED TO COMMENCE HER LAWSUIT WITHIN FOUR

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<sup>1</sup> While it is true that a statute of limitations defense may be raised on a Minn. R. Civ. P. 12.02 motion, such a defense may also be raised by motion for summary judgment. Defendants, by moving under Rule 56, obviously concluded this issue could not be decided on the face of Plaintiff’s Complaint.

YEARS OF THE ALLEGED NEGLIGENT TREATMENT AT  
ISSUE, AS REQUIRED BY MINN. STAT. § 541.076.

(Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, p. 2, dated June 7, 2006.) Defendants presented matters outside the pleadings, choosing to present select medical records of Mr. MacRae. And, in their Memorandum, they set out in detail the standard for summary judgment which they asked the trial court to apply. (*Id* at p. 5.) In their Reply Memorandum in Support of Summary Judgment, they succinctly summarized their position as follows:

The law in Minnesota is that in cases of a misdiagnosis, the cause of action accrues at the time of the alleged misdiagnosis. The pathologist report at issue was signed on January 17, 2001. Plaintiff's cause of action accrued January 17, 2001 and the statute of limitations expired at the very latest on January 17, 2005. Plaintiff commenced suit on February 20, 2006. Her claims are time barred.

(Defendants' Reply Memorandum of Law in Support of Their Motion for Summary Judgment, p. 1, dated June 29, 2006.)

Plaintiff responded to Defendants' motion for summary judgment by presenting the Affidavit of her expert, Dr. Dudek. Plaintiff argued:

In some states, a trustee may bring a wrongful death action premised on medical malpractice for "loss of a chance." Minnesota does not permit this cause of action. *Fabio*, 504 N.W.2d 762-63. Accordingly, the wrongful death action does not accrue at the time of the negligence. Instead, it accrued at the time Mr. MacRae's likelihood of a cure from treatment of his cancer fell below 50 percent which did not occur until after December 2002.

(Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 9, dated June 26, 2006.)

This Court must review the facts of record, viewing the facts and any inferences from those facts in a light most favorable to Plaintiff, in deciding whether this case is time barred. *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981).

## II. MINNESOTA HAS ADOPTED THE DAMAGE RULE OF ACCRUAL.

A fundamental principle of the law of statutes of limitations is they begin to run when the cause of action accrues and not before. There are three types of accrual rules:

- (1) The traditional occurrence rule, which assumes that nominal damages occur, the cause of action accrues, and the statute of limitations begins to run simultaneously with the performance of the negligent or wrongful act. Under this rule, the statute of limitations begins to run as soon as the negligent act is committed, even if there are no actual damages;<sup>2</sup>
- (2) The damage rule, under which the cause of action accrues and the statute of limitations begins to run when some damage has occurred as a result of the alleged malpractice; and
- (3) The discovery rule, under which the cause of action accrues and the statute of limitations begins to run only when the plaintiff knows or should know of the injury.

*Antone v. Mirviss*, 720 N.W.2d 331, 335-36 (Minn. 2006).

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<sup>2</sup>“Nominal damages, unlike compensatory damages, do not attempt to compensate the Plaintiff for an actual loss. Rather they are a trivial amount awarded for the infraction of a legal right, where the extent of the loss is not shown, or where the right is one not dependent upon loss or damage . . . The award of nominal damages is made as a judicial declaration that the Plaintiff's right has been violated.” *Nappe v. Anshelewitz, Barr, Ansell & Bonello*, 477 A.2d 1224, 1230 (N.J. 1984), citing to and quoting from Dobbs, *Handbook on Law of Remedies* and C. McCormick, *Handbook on Law of Damages*.

Plaintiff recognizes that Minnesota has adopted the damage rule of accrual, and it is that rule that applies to this case.<sup>3</sup> Plaintiff is not asserting a discovery rule of accrual as Defendants and Amici Minnesota Medical Association (MMA) and Minnesota Defense Lawyers Association (MDLA) suggest. The premise of the discovery rule is that the statute of limitations does not begin to run until the patient knows or should know the essential facts of his or her medical negligence cause of action, which includes the defendant's causal role in that injury. Dan B. Dobbs, *The Law of Torts* § 218, p. 554 (2001). Here, Mr. MacRae did not know of his misdiagnosis until November 3, 2004. If one were applying a discovery rule, discovery occurred and the cause of action would accrue at that point in time at the earliest. That is not Plaintiff's position in this case.

**A. Defendants' Argument Is for an Occurrence Rule.**

Defendants' argument is one of a blanket rule -- the court presumes some compensable damage occurs as a matter of law at the time the physician fails to recognize/identify that his or her patient has cancer. Relying on dicta by this Court in *Molloy v. Meier*, 679 N.W.2d 711 (Minn. 2004) (which is not a cancer case), and this Court's affirmance of the denial of an amendment to Fabio's complaint in *Fabio v. Bellomo*, 504 N.W.2d 758 (Minn. 1993), Defendants ask this Court to adopt essentially an occurrence rule of accrual in the misdiagnosis of cancer cases. They argue that in each

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<sup>3</sup> There are many reasons that have been given for adopting a specific limitations system, but that does not aid the resolution of the case here. The Legislature has also not declared that a statute of limitations begins to run at the time of the negligent misdiagnosis of cancer. Rather, it is for this Court to make the determination of accrual as it has in other negligence cases.

and every medical misdiagnosis of cancer case the right to sue and the legal rights of a patient are fixed as soon as a breach of duty (misdiagnosis) occurs.<sup>4</sup> Such an accrual rule should be rejected. *See, e.g., Dobbs, The Law of Torts* § 217, pp. 553-554.

**B. Case Must Be Decided on Facts Before This Court.**

The determination of what constitutes “some damage” for purposes of accrual of an action must be decided on the circumstances presented in each individual case. *Bonz v Sudweeks*, 808 P.2d 876, 879 (Idaho 1991) (applying the same “some damage” accrual rule as applied in Minnesota and recognizing it is a case specific determination). The touchstone of the inquiry is when did the patient suffer legally cognizable harm caused by the physician’s negligence. In negligence actions, and particularly in misdiagnosis of cancer negligence actions, it may be difficult to discern exactly when that cause of action accrues. But Minnesota law does not relieve the Defendants of their burden of so proving when it seeks to have a case declared time barred.

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<sup>4</sup> In *Fabio*, this Court did not state that some damage occurs at the time of cancer misdiagnosis. In fact, there is no discussion by this Court of the damage rule of accrual in either the majority opinion or the dissent. *Fabio* brought suit in March 1988 based on a claim of failure to diagnose a lump as breast cancer in 1986. *Fabio* sought to amend her complaint on the eve of trial in 1991 to add a claim that sometime between 1982 and 1984 she also had a lump, which was not properly diagnosed. 504 N.W.2d at 760-761. This Court denied amendment of the Complaint based on the continuing course of treatment analysis, which was the theory argued by *Fabio*’s counsel. *Id.* at 762. The Court did not state that some compensable damage occurred at the time of misdiagnosis. Rather, this Court’s discussion was limited to the termination of treatment rule, which was in keeping with *Fabio*’s theory. As stated by this Court, under Minnesota’s termination of treatment rule, the statute of limitations begins to run when the patient ceases treatment with the doctor. *Id.* The termination of treatment rule is not before this Court.

This damage rule of accrual is in accord with the fact that a necessary element in a cause of action for negligence is actual loss or damage resulting to the interests of another. “[T]here is no such thing as a negligence suit for nominal damages, much less one for presumed damages.” Dobbs, *The Law of Torts* § 110, p. 258. In tort, there is no enforceable right until and unless there is actual loss. *Id.* at § 1 (“A tort is conduct that amounts to a legal wrong and that causes harm for which courts will impose civil liability.”); *see, e.g., Harding v. Ohio Cas. Ins. Co.*, 230 Minn. 327, 41 N.W.2d 818, 825 (1950) (“It is the damage wrongfully done, and not the conspiracy, that is the gist of the action on the case for conspiracy.”); *Olson v. Fraase*, 421 N.W.2d 820, 827 (N.D. 1988), *reh’g denied* (actual damage is an element of negligence). To accept Defendants’ argument would be to wrest negligence from its moorings – the compensation of an actual loss.

The question now posed by Defendants’ responsive brief is whether Minnesota law recognizes some compensable damage by a patient’s cancer “progression” secondary to a delay in diagnosis without regard to a patient’s ultimate survivability. Two hypotheticals show the problem with Defendants’ argument.

Assume Mr. MacRae’s cancer is misdiagnosed, but 30 days later this misdiagnosis is detected. The consensus opinion is that Mr. MacRae would likely have had a fatal outcome in any case, the delay in diagnosis notwithstanding. The delay in treatment had no effect on his treatment, recovery or prognosis and all medical expenses would have been incurred regardless of when the cancer was diagnosed. The Defendants would have

this Court hold that Mr. MacRae has sustained some compensable damage on the day of misdiagnosis because his cancer “progressed.” If that analysis is adopted by this Court, the real issue would now be whether Mr. MacRae can get his personal injury case to resolution in the court before he dies. If so, he is entitled to a damage award as a matter of law under the Defendants’ formulation.

Another hypothetical is where the misdiagnosis of Mr. MacRae’s cancer delays an accurate diagnosis by one year. It nonetheless leaves Mr. MacRae with a relatively equal and favorable chance of survival, as it would in the case of a diagnosis one year earlier. According to the Defendants, Mr. MacRae can also now sue and recover damages as a matter of law without any proof besides delay because his “cancer progressed.” In that case, the patient’s damages would, one would suppose, include shortening his life even if he actually wins the survival battle.

But under present Minnesota law, the fact that cancer progresses and a doctor’s misdiagnosis of cancer causes one to suffer perhaps a reduced chance of survival, say 90% to 75%, is not compensable. The loss of a chance rule and its rejection in Minnesota has severely limited when there is some compensable damage for cancer misdiagnosis. That limitation in present Minnesota law has ramifications to when Plaintiff’s cause of action accrues for statute of limitations purposes and cannot be ignored. Only if and when a delay in diagnosis caused Mr. MacRae’s probability of survival to drop from above 50% (more likely than not to survive) to below 50% (more likely than not to

survive) did he sustain some compensable damage under Minnesota law on the record before this Court.

To argue, as Defendants now do, that cancer “progression” in and of itself is “some compensable damage” unquestionably alters present Minnesota medical malpractice liability law. Under their formulation, even the standard allowances for time in pursuing a cancer diagnosis in the practice of medicine would cause some compensable damage to the patient as a matter of law. (*See* Appellant’s discussion in n.7 at page 24 of Appellant’s Brief.) It is difficult to understand Defendants’ or the MMA’s arguments on some compensable damage, given the increased tort liability to which they and their membership will now be exposed if their position on compensable damage in cancer misdiagnosis cases is adopted by this Court. After all, one cannot have one rule for accrual purposes and reject those principles when addressing the case on its merits.

Defendants, the MMA and MDLA would also have this Court hold, with no record basis, that Mr. MacRae must have incurred some compensable damage caused by Plaintiff’s negligence before his survivability dropped below 50%. Again, they argue for a blanket rule regardless of the facts before the Court. There is no record evidence that an earlier diagnosis would have resulted in different treatment for Mr. MacRae or that a “different treatment” is somehow “compensable damage.” Nor is there any evidence that

Mr. MacRae incurred greater medical expenses because of the diagnosis delay.<sup>5</sup> One would guess the medical expenses were less because of the delay.

To argue that the fact there are many different cancer treatment options and choices is “some compensable damage” as a matter of law is also to ignore the science of cancer. Cancer is unlike most diseases. Treatments vary greatly from patient to patient because there is no blanket solution for cancer. One patient’s mastectomy due to breast cancer may be another’s lumpectomy. Cancer treatment may include surgery, radiation therapy, chemotherapy and biologic therapy in a multitude of combinations. In chemotherapy cancer treatment, there are often multi-target therapies with countless drugs, “all of which can be used in any number of ways and in conjunction with countless combinations of other treatments.” Jaclyn C. Stevenson, *The Test of Time: As Cancer Care Changes, Chemotherapy Remains a Constant Concern* (July 2006), <http://www.healthcarenews.com/article.asp?id=1358>.

One need only look at the American Cancer Society website to see the ever-changing nature of cancer treatment, which not only depends on the type of cancer being treated but other patient-specific features such as side-effects. To simply declare that “additional or more intensive therapies” is some compensable damage with nothing more than a declaration in an amicus brief is to ignore the reality of cancer treatment. See, e.g., L.J. Fallowfield, *Evolution of Breast Cancer Treatments: Current Options and Quality of*

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<sup>5</sup> Amici and Defendants ignore that all facts and any inferences from the facts must be viewed in a light most favorable to Plaintiff. 305 N.W.2d at 339.

*Life Considerations*, Eur. J. Oncol. Nurs. 8 Suppl. 2:575-82 (2004); A. Pollock, et al., *Mindless or Mindful? Radiation Oncologists' Perspectives on the Evolution of Prostatic Cancer Treatment*, Urol. Clin. North Am. 30(2):337-49 (2003). And how can this Court possibly hold that this “some hypothetical compensable damage” occurred at the time of misdiagnosis, which is the ruling Amici MDLA and MMA are also asking this Court to affirm? The record, the science and the logic do not support these types of arguments.

### **III. COURT OF APPEALS DICTA IN OTHER CASES ILLUSTRATES THE NEED FOR A RULING BY THIS COURT.**

Defendants present two cases of the Court of Appeals – *Peterson v. St. Cloud Hosp.*, 460 N.W.2d 635 (Minn. Ct. App. 1990), and *Broek v. Park Nicollet Health Services*, 660 N.W.2d 439 (Minn. Ct. App. 2003) – asserting, in essence, that the dicta in these cases should somehow influence this Court’s decision here.

Plaintiff does not disagree with the Court of Appeals’ ultimate holding in *Peterson*. In that case, the patient was diagnosed to have cancer when he did not. Based on this misdiagnosis, Peterson made the decision to go ahead with chemotherapy and radiation treatments, which he did not need. The Court of Appeals held that the patient did not suffer any damage until he received the chemotherapy and radiation therapy treatments. 460 N.W.2d at 638.

Defendants rely on the Court of Appeals’ dicta in *Peterson* that “[h]ad the alleged negligent act been a failure to correctly diagnose and treat cancer, damages would have occurred, and a cause of action would have accrued, at the time of misdiagnosis.” *Id.* at 639. To support this proposition, the Court of Appeals cites *Willette v. Mayo Foundation*,

458 N.W.2d 120 (Minn. Ct. 1990), which it misidentifies as a Supreme Court opinion. *Willette*, another Court of Appeals decision, does not remotely support the Court of Appeals' statements of dicta in *Peterson*.

*Broek*, a case also cited by the Defendants, does not factually concern the misdiagnosis of cancer. 660 N.W.2d at 440. Defendants point to that portion of *Broek* where the Court of Appeals speculates as to how it might rule under facts not before it. *Id.* at 443. Again, the Court of Appeals' speculation does not aid analysis in this case.

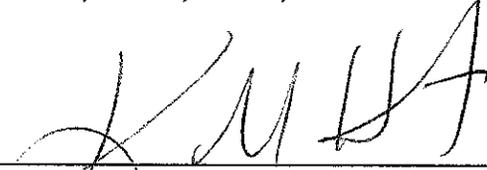
What these cases illustrate is the need for this Court's guidance and ruling on this important issue of accrual in cancer misdiagnosis cases.

### CONCLUSION

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

Dated: February 5, 2008

**LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.**

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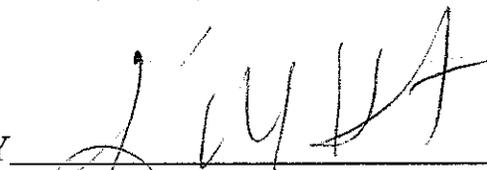
**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 2,995 words. This brief was prepared using Word Perfect 10.

Dated: February 5, 2008

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