

NO. A06-1982

State of Minnesota
In Supreme Court

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

v.

Group Health Plan, Inc., et al.
Respondents.

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LEGAL ISSUE

Did the trial court correctly grant summary judgment based on the statute of limitations where Plaintiff did not bring her wrongful death claim until more than four years after some damage resulted from the alleged misdiagnosis of decedent's cancer?

Both courts below ruled that Plaintiff's claim was time-barred because a cause of action for failure to diagnose accrues at the time of the misdiagnosis where some damage begins to occur at that time.

Apposite Authorities:

Minn. Stat. § 541.076

Minn. Stat. § 573.02

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

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

STATEMENT OF THE CASE

This is a wrongful death action arising out of an alleged misdiagnosis of skin cancer on January 17, 2001. The decedent, Roderick MacRae, was diagnosed with malignant melanoma in the fall of 2004. Mr. MacRae passed away on August 26, 2005.

On February 20, 2006, Plaintiff Margaret MacRae, trustee for the next of kin, commenced this lawsuit against Group Health Plan, Inc., HealthPartners, Inc., Dr. Subramanian (the pathologist who interpreted the original biopsy slides), and Dr. Kelly (Mr. MacRae's primary care physician), hereafter "Defendants." (A. 16) Plaintiff alleges that Defendants were negligent in failing to diagnose decedent's skin cancer in January 2001. (A. 16-18)

After preliminary discovery Defendants moved for summary judgment on the ground that suit was untimely because Plaintiff had not commenced her claim within four years of accrual of the alleged malpractice claim as required under Minn. Stat. § 541.076. (A. 26) Plaintiff argued that the statute of limitations should not begin running until such time as Mr. MacRae was more likely than not going to die from his cancer. Hennepin County District Court Judge Marilyn Brown Rosenbaum granted Defendants' motion for summary judgment, holding that Plaintiff's wrongful death claim was time-barred. (A. 9)

Plaintiff sought review of Judge Rosenbaum's decision. A unanimous court of appeals panel affirmed. (A.1-8) This Court granted further review.

STATEMENT OF THE FACTS

For purposes of this appeal, Defendants do not dispute Plaintiff's recitation of the material facts. This appeal presents purely legal questions for the Court's determination.

ARGUMENT

I. STANDARD OF REVIEW.

In reviewing a district court's order of summary judgment, this Court determines whether there is any genuine issue of material fact and whether the district court correctly applied the law. *Offerdahl v. Univ. of Minn. Hosp. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). "Construction of a statute of limitations is a question of law that this court reviews *de novo*." *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 415-16 (Minn. 2002); *Noske v. Friedberg*, 670 N.W.2d 740, 742 (Minn. 2003).

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT WHERE PLAINTIFF FAILED TO BRING HER WRONGFUL DEATH CLAIM UNTIL MORE THAN FOUR YEARS AFTER SOME DAMAGE RESULTED FROM THE ALLEGED MISDIAGNOSIS OF DECEDENT'S CANCER.

Plaintiff is seeking a wholesale change in Minnesota law as to the statute of limitations in failure to diagnose cases. Plaintiff argues that *Fabio* and *Molloy* were wrongly decided, and that the court did not mean what it said in those cases. To the contrary, there is no need to deconstruct the court's decisions or reasoning in those cases because both decisions are clear on their face and decided in accordance with longstanding Minnesota law. Plaintiff's claim is time-barred and the lower courts' decisions should be affirmed.

A. A Four-Year Statute of Limitations Applies.

Under Minnesota law, the statute of limitations for wrongful death claims allegedly resulting from the negligence of a physician or hospital is three years from the date of death, but in no event longer than the four year limitation period set forth in Minn. Stat. § 541.076, the medical malpractice statute of limitation. *See*, Minn. Stat. § 573.02:

An action to recover damages for a death caused by the alleged professional negligence of a physician, surgeon, dentist, hospital or sanitarium, or an employee of a physician, surgeon, dentist, hospital or sanitarium shall be commenced within three years of the date of death, *but in no event shall be commenced beyond the time set forth in section 541.076.*

(emphasis added). Section 541.076 in turn requires that all medical malpractice claims be commenced within four years from the date of accrual:

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.*

Minn. Stat. § 541.076(b) (emphasis added). Thus, the statute of limitations for wrongful death resulting from medical malpractice begins running at the same time that the statute would commence for a medical malpractice personal injury case – here, the time of the alleged misdiagnosis. *DeRogatis v. Mayo Clinic*, 390 N.W.2d 773, 776 (Minn. 1986).

The alleged misdiagnosis was January 17, 2001. The statute of limitations expired at the very latest on January 17, 2005, more than 1 year before Plaintiff brought suit.

B. Since Mr. MacRae Could Allege Facts Sufficient to Survive a Rule 12 Motion at the Time his Cancer was Misdiagnosed, the Cause of Action Accrued on That Date.

Minnesota law provides that a cause of action accrues when the claim will survive a motion to dismiss for failure to state a claim. *Herrmann v. McMenomy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999). In misdiagnosis cases like this one, this Court has definitively held that because “some damage” occurs at the time of the misdiagnosis the statute of limitations begins to run on that date:

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.

Molloy v. Meier, 679 N.W.2d 711, 722 (Minn. 2004) (emphasis added) (citing *Fabio v. Bellomo*, 504 N.W.2d 758 (Minn. 1993)).

In *Zagaros v. Erickson*, a case involving misdiagnosis of bipolar disorder, the court of appeals addressed a similar issue, finding that the misdiagnosis itself results in some nominal damage, on account of the absence or delay of appropriate treatment:

Zagaros was at least nominally injured when important information relating to her mental health and the safety of her child was not communicated and appropriate treatment not recommended. Where a psychologist diagnoses a patient with a serious mental disorder requiring treatment and the psychologist fails to communicate that information or to recommend appropriate treatment, *at least nominal damages, sufficient to accrue the cause of action, will be inferred.* Thus, Zagaros's cause of action for medical malpractice arose before Erickson's testimony and is barred by the applicable statute of limitations.

558 N.W.2d 516, 521-22 (Minn. App. 1997) (emphasis added). Like *Zagaros* where the patient was denied information and appropriate treatment, thus sustaining damages sufficient to accrue the cause of action, here Mr. MacRae's misdiagnosis itself resulted in some damage – it deprived him of (or at least delayed) the necessary treatment.

Plaintiff mistakenly focuses on the summary judgment standard rather than the motion to dismiss standard in arguing that a cause of action for failure to diagnose does not accrue until the patient's prognosis changes from a probability of survival to the probability of death. The distinction between the Rule 12 and Rule 56 standards is an important one.

In *Noske v. Friedberg*, this Court held, “[t]he showing a plaintiff must make in order to survive a motion to dismiss under Minn. R. Civ. P. 12.02(e) is minimal. The plaintiff need only *allege* sufficient facts to state a claim.” 670 N.W.2d 740, 742 (Minn. 2003). On summary judgment, on the other hand, plaintiff must *prove* actual, compensable damage. The court of appeals recognized this distinction in *Doyle v. Kuch*, holding that “[w]hile [the plaintiff] ultimately bears the burden of presenting evidence tending to show each element of negligence in order to survive a motion for summary judgment, she need not present evidence to prove her allegations in order to survive a rule 12.02(e) motion to dismiss.” 611 N.W.2d 28, 32 (Minn. App. 2000).

The Eighth Circuit Court of Appeals, in construing Fed. R. Civ. P. 12 (which mirrors Minnesota's Rule 12) has also found the Rule 12 standard to be minimal:

When ruling on a motion to dismiss, the district court must accept the allegations contained in the complaint as true and all reasonable inferences from the complaint must be drawn in favor of the nonmoving party. A

complaint shall not be dismissed for its failure to state a claim upon which relief can be granted *unless it appears beyond a reasonable doubt that plaintiff can prove no set of facts in support of a claim entitling him to relief.*

Young v. City of St. Charles, Mo., 244 F.3d 623, 627 (8th Cir. 2001) (emphasis added) (internal citations omitted); *Midwestern Machinery, Inc. v. Northwest Airlines, Inc.*, 167 F.3d 439, 441 (8th Cir. 1999) (same).

In analyzing the instant case, the court of appeals agreed that there is an important distinction between the Rule 12 standard and the Rule 56 standard:

Respondents argue that appellant has confused the standard for when a cause of action accrues with the standard for when a cause of action can withstand summary judgment. Respondents assert that because the mere assertion of damages in a complaint alleging medical malpractice for misdiagnosis of a malignancy would defeat a motion for dismissal on the pleadings, MacRae's medical-malpractice action accrued on the date of the misdiagnosis. We agree.

(A.7)

Plaintiff argues that "some damage" should mean "fatal damage" – that before a cause of action would accrue for a failure to diagnose, it must be more likely than not that Mr. MacRae would die from his cancer. (App. Br., p. 6) That is not how Minnesota appellate courts have defined "some damage."

Just over a year ago, this Court reaffirmed that a cause of action accrues, and the statute of limitations begins to run, on the occurrence of some damage, whether specifically identified in the complaint or not. *Antone v. Mirviss*, 720 N.W.2d 331, 335-36 (Minn. 2006). In *Antone* the Court recognized that Minnesota case law supports "a broad interpretation of the concept of 'some damage.'" *Id.* at 336. This Court held that

the statute of limitations on Antone's claim began running from the date of the marriage, even though the potential increase in the value of the property at issue was unknown at the time, explaining that "the inability to calculate the precise damage at the time of marriage does not preclude the running of the statute of limitations from that point in time." *Id.* at 338.

Contrary to Plaintiff's assertion that decedent's condition must first become fatal to support a claim, the existence of "some damage" is all that is required to trigger the statute of limitations under Minnesota law. When "some" damage exists, "the cause of action comes into being and the applicable statute of limitations begins to run *even though the ultimate damage is unknown or unpredictable.*" *Dalton v. Dow Chemical Co.*, 158 N.W.2d 580, 585 (Minn. 1986) (emphasis added).

Here, it was undisputed that some damage began to occur at the time Mr. MacRae's cancer was misdiagnosed. Although not explicitly, Plaintiff essentially concedes in the Complaint that Mr. MacRae suffered damage following the misdiagnosis, alleging that "within four years of the date of this Complaint, Roderick MacRae's illness *progressed* to the point where it was no longer more likely that he would have survived his illness." (A.17) Thus, under the Rule 12 standard, this allegation must be taken as true and based solely on the allegations in the Complaint Plaintiff would have survived a motion to dismiss from the date of the misdiagnosis and at any time thereafter.

Plaintiff's own expert, Dr. Dudek, expressly acknowledged that the disease progressed and worsened from the date of the misdiagnosis going forward. Dr. Dudek opines that in January 2001, decedent's melanoma was likely stage I. (A.36) Thereafter,

it continued to grow and progress until it eventually became fatal. (A.36) Dr. Dudek goes on to state that, “Based upon the early stage of melanoma in 2001, *the natural progression of the disease*, and the known state when correctly diagnosed in 2004, Mr. MacRae *would not have had the same grim prognosis in 2002.*” (A.36) (emphasis added)

Thus, even Dr. Dudek concedes that “some” damage began to occur at the time of the alleged misdiagnosis and that Mr. MacRae’s prognosis worsened day-by-day over time. From the misdiagnosis date forward, a medical malpractice claim would have survived a motion to dismiss. The cause of action therefore accrued at the time of the misdiagnosis.

Amicus curiae Minnesota Association for Justice (“the Association”) suggests (at page 2) that it is always difficult to determine when a medical malpractice cause of action accrues. To the contrary, sometimes it is easy. If a physician operates on the wrong body part, the cause of action obviously accrues at the time of the surgery. Likewise, in cancer misdiagnosis cases like this one, the plaintiff suffers damage in the form of a continually growing, untreated, cancer from the date of the misdiagnosis going forward, just as the hypothetical patient suffers some damage the moment the doctor makes an incision on the wrong leg.

The Association relies (at page 9) on *Plutshack v. University of Minnesota Hospitals, et al.*, in support of its argument that “legal damages” must be established before a cause of action will accrue. 316 N.W.2d 1 (Minn. 1982). First, the phrase “legal damages” is not used in the *Plutshack* opinion. Moreover, both Plaintiff and the

Association are misinterpreting the applicable standard – *Plutshack* was a directed verdict case – not a Rule 12 case. Minnesota Rule of Civil Procedure 50.01, Judgment as a Matter of Law During Trial (previously known as a directed verdict), provides in part,

If during a trial by jury a party has been fully heard on an issue and there is *no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue*, the court may decide the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(emphasis added). Thus, in *Plutshack*, the court was required to analyze the evidence and determine if the party with the burden of proof had actually come forth with sufficient evidence to *prove damages* – versus sufficiently *alleging damages* which is all that is required to survive a Rule 12 motion to dismiss.

Plaintiff contends (at page 16) that the damage Mr. MacRae suffered as the melanoma progressed from stage I to stage III was not “compensable” and therefore not sufficient to trigger accrual of the cause of action. Indeed, Plaintiff seems to argue *there is no damage at all – that no suit can be brought – until it ultimately becomes more probable than not that the patient will die as a result of the misdiagnosis*. (See App. Br. at p. 16) Plaintiff essentially asks this Court to radically change the law by holding that “some” damage is no longer enough, that only when a failure to diagnose becomes *fatal* does the cause of action accrue – as if a progressive disabling disease allowed to progress for years without proper treatment is not damage.

This case is the legal counter-part to *Peterson v. St. Cloud Hosp.*, 460 N.W.2d 635 (Minn. App. 1990). In *Peterson*, the plaintiff was diagnosed with lung cancer, only to

find out later – after unnecessary chemotherapy and radiation therapy – that the pathology slides had been misinterpreted; and in fact, he did not have cancer. *Id.* Plaintiff commenced suit more than two years¹ after the misdiagnosis, and the trial court held the claim was time-barred because the cause of action accrued at the time of the misdiagnosis. *Id.* at 637. The court of appeals correctly reversed, holding that Peterson’s cause of action related to the misdiagnosis did not accrue until he sustained some damage – in that case, undergoing unnecessary radiation and chemotherapy treatments. *Id.* at 639. In explaining its decision, the court hypothesized the very situation at issue in this case, stating, “[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 the misdiagnosis.*” *Id.* (emphasis added).

Plaintiff contends it is impossible to square the lower courts’ decisions with this Court’s opinion in *Leubner v. Sterner*, 493, N.W.2d 119 (Minn. 1992). Not so. *Leubner* was not a statute of limitations / accrual of a cause of action case – it rejected a new theory of liability, refusing to recognize loss of chance and negligent aggravation as new causes of action. Nowhere in the *Leubner* decision does the court address accrual of a cause of action for failure to diagnose. In addition, *Leubner* was decided in the context of a summary judgment motion, to which the Rule 56 standard, not the Rule 12 standard applied.

Plaintiff also claims (at pages 17-20) that *Fabio* does not support the lower courts’ decisions. However, Plaintiff ignores the relevant holding in *Fabio* – that the 1982/1984

¹ At that time the medical malpractice statute of limitations was two years.

misdiagnosis was time-barred. In *Fabio*, Plaintiff essentially alleged that her breast cancer had been misdiagnosed on two occasions; once between 1982 and 1984, and again in 1986. *Fabio*, 504 N.W.2d 758. In 1988 when plaintiff brought suit, a two year statute of limitations applied to medical malpractice claims. Therefore, unless she could prove a continued course of treatment, plaintiff's medical malpractice claim for failure to diagnose during the 1982 to 1984 time frame was barred by the statute of limitations. Plaintiff sought to amend her complaint to add a continuing course of treatment theory. *Id.* at 760-61.

The trial court denied plaintiff's motion to amend holding that the statute of limitations barred amendment. *Id.* at 761. The court of appeals affirmed, finding there was no continued course of treatment that would have tolled the statute of limitations because Dr. Bellomo did not recommend any further treatment in 1982 or 1984 after telling plaintiff not to worry about the fibrous mass. *Fabio*, 489 N.W.2d at 244. This Court also affirmed, holding that each misdiagnosis constituted a single act of negligence. *Fabio*, 504 N.W.2d at 761-62. Plaintiff's cause of action based on the first misdiagnosis between 1982 and 1984 accrued at the time of that misdiagnosis and was time-barred because it was not brought within the applicable limitations period. *Id.* Plaintiff's attempt to distinguish *Fabio* is unsupported.

Plaintiff has not cited, and cannot cite, a single case standing for the proposition that a cause of action for wrongful death allegedly arising from a misdiagnosis does not accrue until the resulting condition becomes fatal.

C. This Court Has Definitively Determined as a Matter of Law That in Cancer Misdiagnosis Cases the Statute of Limitations Begins to Run on the Date of the Misdiagnosis – That Law Should not be Overturned.

Plaintiff contends (at page 16) that the lower courts are confused by the *Molloy* decision. Not true. This Court could not have been more clear: “We reaffirm the long-standing 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.*” *Molloy*, 679 N.W.2d at 722 (emphasis added). The lower courts properly applied Minnesota law in holding that Plaintiff’s case was time-barred as a matter of law because on this record Mr. MacRae began to suffer some damage at the time of the misdiagnosis.

It is Plaintiff who is confused and she misstates the issue, contending (at page 11) that we are arguing the lower courts’ rulings stand for the proposition that “when a healthcare professional fails to diagnose a *medical condition*, the court is to presume the patient has sustained some compensable damage at that point in time as a matter of law.” Wrong.

First, we are not dealing with any hypothetical “medical condition;” this is a *failure to diagnose cancer* case. In *Molloy* this Court cited the decision in *Fabio v. Bellomo*, 489 N.W.2d 241, 244 (Minn. App. 1992), which distinguished a physician’s negligent failure to diagnose a genetic disorder from misdiagnosed cancer cases like this one, explaining that “[t]he 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.*” *Id.* (emphasis added). *Fabio* was distinguishable from *Molloy* because in *Molloy* plaintiff suffered from a genetic disorder that *did not get worse*

over time – it was static and unchanging. *Id.* at 721. Thus, the mere misdiagnosis of that disorder did not result in any harm whatsoever to Molloy – there was no damage at all whatsoever until she conceived a second child years later, to whom she passed on the genetic disorder. *Id.* at 722. But for her pregnancy, Molloy would have suffered no damages from the misdiagnosis. Therefore, the court held, that the cause of action accrued at the time of conception rather than at the time of the misdiagnosis. *Molloy*, 679 N.W.2d at 722.

In *Broek v. Park Nicollet Health Services*, the court based its holding on precisely the same reasoning. The decedent suffered from a genetic heart defect; he was treated by the defendant physicians who monitored the condition, but did not restrict his physical activity. *Broek*, 660 N.W.2d 439, 440 (Minn. App. 2003). Decedent went into cardiac arrest while playing basketball and subsequently died. *Id.* Decedent’s wife brought suit and the trial court granted defendant’s motion for summary judgment finding that treatment had ceased and the claim was time-barred because the statute of limitations began to run at the time of the alleged improper treatment. *Id.* at 441. The court of appeals reversed, holding that the key issue was *whether any damage had occurred* following the alleged negligent conduct. *Id.* at 444. The court found there was no damage prior to the date of the ultimate cardiac arrest, *expressly distinguishing failure to diagnose progressive condition cases*:

As it currently stands, the record contains no medical evidence that [decedent’s] preexisting heart condition changed or progressed during the seven-year time period after he consulted with [defendant]. There is no evidence that his rigorous exercise or failure to return to Park Nicollet for periodic checkups caused his condition to deteriorate. *The record before*

us indicates his condition was the same from the date he was seen by Dr. Ranheim until the time of his heart failure. In this respect, this case differs from failure to diagnose or inform, in which the plaintiff's illness or injury progressed during a time period after the alleged negligence occurred, and thus triggered the running of the statute of limitations.

Id. at 443 (emphasis added). Like the plaintiff in *Molloy*, Broek's condition was static and unchanging. There was no damage until years later, when he suffered cardiac arrest. Therefore, the cause of action did not accrue until that date. Both *Molloy* and *Broek* carefully point out that in cases involving a misdiagnosis – and specifically a misdiagnosis of cancer – damage occurs immediately because the cancer continues to grow and metastasize.

Plaintiff contends (at page 24, fn 7) that “Defendants will be prevented from proving that a 10 day delay did not produce harm because of the overriding *legal presumption*” that in misdiagnosis cases some damage occurs from the date of the misdiagnosis going forward. The courts below have not created a presumption.

First, the discussion in *Molloy* is not a *presumption* at all -- it is an empirical observation this Court used to distinguish cancer misdiagnosis cases like this one from the genetic misdiagnosis at issue in that case. The court explained that *Molloy* suffered no damage whatsoever before she became pregnant and thus the statute of limitations had not been triggered -- unlike *Fabio*, a cancer misdiagnosis case, where, as here, damage

began to occur from the date of the alleged misdiagnosis. *Molloy*, 679 N.W.2d at 722, citing *Fabio v. Bellomo*, 504 N.W.2d 758 (Minn. 1993).

Second, far from creating a presumption, the lower courts looked to the undisputed facts of this failure to diagnose cancer case, applied the law as stated in *Fabio* and *Molloy* to these facts, and found that this case fit squarely within the general empirical observation in *Molloy* – that Mr. MacRae began to suffer immediate damage from and after the date of the alleged failure to diagnose metastatic malignant melanoma, a progressive disease from which he ultimately died.

D. Plaintiff and Amicus Curiae Minnesota Association for Justice Are Asking This Court to Create a Discovery Rule – a Rule This Court has Repeatedly Rejected.

Both Plaintiff and the Minnesota Association for Justice hint at adoption of a discovery rule for purposes of defining when a medical malpractice cause of action should accrue. The Minnesota Association for Justice (at page 3) relies on language from the *Schmitt* case to support its argument regarding the trigger for the statute of limitations. The *Schmitt* language cited, that the “patient could not know just when the initial trouble” occurred, implies a discovery-type standard. But, the court’s decision in *Schmitt*, was in the context of an analysis of the termination of treatment rule – a rule which is not at issue in this case.

Again hedging toward a discovery rule, at page 6, the Association contends that “[e]ach definition of ‘accrual’ requires that plaintiff have a meaningful opportunity to have knowledge of the facts upon which the claim is based . . .” (emphasis added). Wrong. As the court of appeals acknowledged in *Zagaros*, citing this Court’s opinion in

Johnson v. Winthrop Lab. Div. of Sterling Drug, Inc., 291 Minn. 145, 151, 190 N.W.2d 77, 81 (1971), “in Minnesota, the statute of limitations for medical malpractice *may bar a cause of action before the injured party discovers they are suffering damages* caused by negligent medical conduct.” 558 N.W.2d at 521 (emphasis added); *see also, Kensinger v. N.R. Kippen*, 390 N.W.2d 815 (Minn. App. 1986) (wrongful death medical malpractice action held time-barred, “the trial court properly construed the [wrongful death] statute in light of the legislative intent to bar some wrongful death actions before they accrue in the interest of preventing litigation of stale claims”).

For over 35 years this Court has unequivocally rejected the discovery rule which tolls the statute of limitations until such time as the cause of action is discovered by the patient or, in the exercise of reasonable diligence, should have been discovered by him. *See, Johnson*, 291 Minn. at 151, 190 N.W.2d at 81; *see also, Francis v. Hansing*, 449 N.W.2d 479, 481-82 (Minn. App. 1989) (rejecting discovery rule and holding that plaintiff’s medical malpractice case was time-barred even though she was unaware of the medical negligence); *St. Aubin v. Burke*, 434 N.W.2d 282 (Minn. App. 1989) (same). Finally, in *Antone v. Mirviss*, this Court again thoroughly analyzed the issue and reaffirmed its unwillingness to adopt the discovery rule for purposes of determining when a cause of action accrues, stating, “[w]e continue to agree with the rationale supporting and the policies reflected by the ‘*some* damage’ rule of accrual, and thus we reaffirm our prior case law adopting this rule.” 720 N.W.2d at 335-36 (emphasis added). In so holding, the Court recognized that defining “damages” as plaintiff (and the dissenting opinion) suggested would “insert too much ambiguity into the law and in the end come

very close to establishing a discovery rule which we previously rejected because it presented the potential for unintended, open-ended liability.” *Antone*, 720 N.W.2d at 338.

The law in Minnesota is clear: in cancer misdiagnosis cases, “some” damage occurs on the date of the misdiagnosis because – as articulated by Plaintiff’s own expert in this case – the cancer continues to grow and progress. Thus, this Court should affirm the decisions of the lower courts.

CONCLUSION

Minnesota follows the “some damage” accrual rule. Under Minnesota law “some” damage began to occur on the date of the alleged misdiagnosis of Mr. MacRae’s cancer. “Some” damage, not “fatal” damage (as Plaintiff argues), is all that is required to trigger the statute of limitations. The statute of limitations in this case was triggered on January 17, 2001 and expired on January 17, 2005. Plaintiff commenced this action on February 20, 2006. Given the record in this case, Plaintiff failed to bring her claim within the

applicable four-year statute of limitations. This Court should affirm the lower court's decisions, holding that Plaintiff's claim is time-barred.

**BASSFORD REMELE
A Professional Association**

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