NO. A06-1982

State of Minnesota
In Supreme Court

Margaret MacRae,
trustee for the next of kin of Roderick MacRae,

Appellant,

v.

Group Health, Inc., et al.,

Respondents.

JOINT BRIEF OF *AMICI CURIAE* THE MINNESOTA MEDICAL ASSOCIATION AND THE MINNESOTA DEFENSE LAWYERS ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF LEGAL ISSUES

1. Consistent with this court's precedent and the legislature's intent, when does a cause of action for medical malpractice accrue where the alleged negligence is misdiagnosis of cancer?

The district court and the court of appeals held that a cause of action for alleged negligence in the misdiagnosis of cancer accrues when the plaintiff can allege sufficient facts to survive a motion to dismiss for failure to state a claim, generally, the date of misdiagnosis.

Apposite Authorities:

Minn. Stat. § 541.076.
Antone v. Mirviss, 720 N.W.2d 331 (Minn. 2006).
Molloy v. Meier, 679 N.W.2d 711 (Minn. 2004).
Fabio v. Bellomo, 504 N.W.2d 758 (Minn. 1993).

INTEREST OF *AMICI CURIAE*[1]

The Minnesota Medical Association

The Minnesota Medical Association is a professional association representing over 11,000 physicians, residents, and medical students in the State of Minnesota. The MMA seeks to promote excellence in health care, to insure a healthy practice environment, and to preserve the professionalism of medicine through advocacy, education, information, and leadership. For more than 150 years, the MMA and its members have worked together to safeguard the quality of medical care in Minnesota as well as the future of

[1] Pursuant to Rule 129.03, the undersigned certifies that no counsel for a party authored this brief in whole or in part and that no one made a monetary contribution to the preparation or submission of this brief other than the *amici curiae* and their counsel.

medical professionalism. The MMA's interest in this case is primarily a public one, but because this case has the potential for extending the statute of limitations in actions against healthcare providers, its individuals members may have a private interest as well.

The Minnesota Defense Lawyers Association

The MDLA, founded in 1963, is a non-profit Minnesota corporation whose members are trial lawyers in private practice. The MDLA devotes a substantial portion of its efforts to the defense of clients in civil litigation. Over the past 45 years, it has grown to include representatives from over 180 law firms across Minnesota, with 800 individual members.

Among the MDLA's many goals is the protection of the rights of litigants in civil actions, the promotion of high standards of professional ethics and competence, and the improvement of the many areas of law in which its members regularly practice. The MDLA takes no interest in the particular dispute between these litigants. Rather, the MDLA's interest in this case is primarily a public one: to promote clarity of the law and uniform application of important legal principles at issue in civil litigation in Minnesota.

ARGUMENT

I. Introduction

Plaintiff's argument on appeal proceeds from the single premise that "a cause of action could accrue, at the earliest, when it was more probable than not that Mr. MacRae would not survive his cancer." (Plaintiff's br., p. 16). Although presented somewhat differently, the Minnesota Association for Justice ("MNAJ") proposes the same rule. The *amici* urge the court to reject this proposed rule for several reasons: (1) it proceeds from

the faulty premise that wrongful death is the only compensable damage in a case such as this; (2) it conflates the standards under Rule 12 and Rule 56; (3) it would unjustifiably change precedent from as recently as 2006; (4) it rejects, without any meaningful discussion, the legislature's role in creating and extending statutes of limitations and the legislature's intent in enacting Minn. Stat. § 541.06, in particular; and (5) the result would be an unwarranted extension of the medical-malpractice statute of limitations.

II. The court should reject plaintiff's argument because it requires the overruling of established precedent and would unjustifiably extend the medical-malpractice statute of limitations.

A cause of action accrues, and the statute of limitations begins to run, when an action would survive a Rule 12 motion to dismiss for failure to state a claim upon which relief can be granted. *Hermann v. McMenomy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999); *see also* Minn. R. Civ. P. 12.02. Accrual requires that an action be able to survive such a motion as to each element of the claim. *See, e.g., Noske v. Friedberg*, 670 N.W.2d 740, 743 and n.1, 744 (Minn. 2003) (ruling that plaintiff's legal malpractice cause of action did not accrue until time of post-conviction relief because *causation* element could not have survived Rule 12 motion before then). The most frequent point of contention, however, is the damage element. But this court resolved that issue less than two years ago, holding "that a cause of action accrues, and the statute of limitations begins to run, on the occurrence of *any* compensable damage, whether specifically identified in the complaint or not." *Antone v. Mirviss*, 720 N.W.2d 331, 336 (Minn. 2006) (emphasis added).

Plaintiff's central premise directly undermines this holding because it focuses exclusively on one type of damage – damages for wrongful death. She argues that a person only has "a cause of action against [a] physician for failure to diagnose cancer when the delay in diagnosis resulted in the *probability of his survival* dropping from above fifty percent . . . to below fifty percent . . . ." (Plaintiff's br., p. 12) (emphasis added). But *Antone* holds that *any* compensable damage is sufficient to trigger accrual of a cause of action. Because cancer is a progressive disease process, delay in diagnosis can cause many consequential damages other than death, like a need for additional or more intensive therapies, or a more invasive surgical outcome. Examples include increased radiation or chemotherapy (most cancers), a mastectomy (breast cancer), removal of an eye (choroidal melanoma), reduced lung capacity (lung cancer), and reduced cognitive function (brain cancer), among many, many others. Delayed diagnosis causes direct damages, too, like the inevitable medical expense one must incur for additional diagnostic workup and for treatment of a more advanced cancer. These outcomes also lead to larger claims for lost earnings. Plaintiff's argument that wrongful death is the only compensable damage leads her brief into a lengthy, and academic, discussion of the types of damage that *cannot* survive a Rule 12 motion – like loss-of-chance damages and aggravation damages – but that entire discussion is merely a red herring. (*See* Plaintiff's br., pp. 18-23) (discussing *Leubner v. Sterner*, 493 N.W.2d 119 (Minn. 1992)). Wrongful-death damages are not the only compensable damage that can trigger accrual of a cause of action based upon the alleged negligent failure to diagnose cancer.

True, many lawyers wouldn't agree to represent a plaintiff in a claim to recover damages such as increased medical expenses, because it is difficult and often expensive to prevail in a claim for medical malpractice. But that is merely a practical barrier to the commencement of suit, not a legal one. *Antone* discusses legal barriers – like the existence of the unvacated criminal conviction in *Noske* – that prevent a plaintiff from stating a claim for relief. Under the statute of limitations, however, it matters not that practical barriers could cause a plaintiff to forego seeking recovery for a less-drastic result than death. Indeed, one expects a plaintiff to pursue the theory that will result in the greatest recovery. But *Antone* applies without regard to whether the plaintiff ultimately decides to specifically seek a given damage. 720 N.W.2d at 336. A cause of action accrues with any damage, great or small. That has been the law in Minnesota for decades, and plaintiff has provided no basis for the court to adopt a new rule premised on limiting accrual to the existence of a claim for wrongful-death damages.

Plaintiff's exclusive focus on wrongful death has the added problem of conflating Rules 12 and 56. For accrual to occur, a plaintiff need be able to allege only that "'some' damage has occurred as a result of the alleged malpractice" sufficient to withstand a Rule 12 motion to dismiss for failure to state a claim upon which relief can be granted. *Hermann*, 590 N.W.2d at 643. As discussed above, Minnesota law follows a broad interpretation of the concept of "some damage." *Antone*, 720 N.W.2d at 336 (identifying Minnesota's view of some-damage concept as broad and stating that accrual occurs with any compensable damage, whether ultimately pursued in litigation or not). Not only is the concept of "some damage" broad, but "[t]he showing a plaintiff must make in order to

survive a motion to dismiss [under Rule 12] is minimal." *Noske*, 670 N.W.2d at 742. That minimal showing, in turn, requires only that it be "*possible* on any evidence which *might be* produced" to grant relief for some compensable damage. *Id.* at 743 (emphasis added) (citation omitted). Nor must a plaintiff know of the damage, *or even be able to know of it*, because "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.*, 280 Minn.147, 150, 158 N.W.2d 580, 585 (1968). Indeed, the damages need not even be capable of calculation for the cause of action to accrue. *Noske*, 670 N.W.2d at 743. Under this standard, it would be extraordinary, and wrong, for a court to order the dismissal of a complaint that alleges negligent failure to diagnose cancer and some causal damage.

Given the broad concept of "some damage," and the minimal standard applicable in a Rule 12 setting, it is apparent that plaintiff's argument confuses the correct standard under Rule 12 with the summary-judgment standard under Rule 56. Plaintiff's argument depends on affidavit testimony and focuses on particular case details, all in an effort to convince the court that there is no *factual dispute* that *wrongful-death damages* did not exist on the date of misdiagnosis. Plaintiff's argument would be appropriate only if the law of accrual required a plaintiff to be able to survive a motion for *summary judgment* in a claim for *wrongful death*. But the proper standard is *some damage*, not just the type of damage the plaintiff later chooses to pursue. And it is not the factual details, but the possibility of proof, that controls under Rule 12. Accepting plaintiff's argument would unduly narrow the "some damage" standard and unjustifiably change the procedural

prism through which courts must look to determine whether a cause of action has accrued.

Moreover, if plaintiff's argument were accepted, a cause of action for failure to diagnose cancer could *never* accrue on the date of alleged misdiagnosis. This is so because the rule plaintiff proposes: (1) limits damages to a plaintiff's wrongful death; and (2) requires that a plaintiff have a greater than 50% chance of survival on the date of misdiagnosis. (Compare plaintiff's br., p. 12 (stating that cause of action for failure to diagnose cancer accrues only when patient's chance of survival starts above 50% at misdiagnosis and drops to below 50% thereafter); with plaintiff's br., p. 14 (stating that person whose preexisting chance of survival is below 50% has no cause of action)).[2] Under plaintiff's reasoning, *every* cause of action for misdiagnosis of cancer must wait to accrue until some undetermined time after the alleged misdiagnosis, when the plaintiff's condition worsens to less than a 50% chance of survival. An established line of cases contradicts plaintiff's reasoning.

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[2] The latter statement is correct under Minnesota law *for a claim of wrongful death*. This is so because a plaintiff's burden of proof in such a case requires evidence that the physician's negligence, not the cancer itself, more probably than not was the cause of death. *See, e.g., CIVJIG* 14.15 (defining a plaintiff's burden of proof). When the patient's existing condition already makes his or her death probable at the time the physician fails to make a diagnosis – i.e., his or her chance of survival is already below 50% – the plaintiff's proof of causation will fail as a matter of law. And because plaintiff's argument would always limit recovery to wrongful-death damages, a cause of action under the described circumstances can never even accrue. *See, e.g., Noske*, 670 N.W.2d at 743 (holding that cause of action does not accrue until facts supporting causation are in existence). Given the many compensable damages other than wrongful-death damages, ultimately plaintiff's argument makes no legal sense.

Prominent among those cases is *Fabio v. Bellomo*, 504 N.W.2d 758 (Minn. 1993). In that case, this court rejected the contention that a failure to diagnose becomes part of a continuing course of treatment. *Id.* at 762 (holding that doctor's treatment of plaintiff's undiagnosed cancer ceased at the time he examined her and told her it was nothing to worry about). Had the court ruled to the contrary, Minnesota law provides that accrual of Fabio's failure-to-diagnose-cancer cause of action would have waited until that "continuing" course of treatment had ceased. *Id.* After the court rejected the notion of a continuing course of treatment, it went on to hold that "the trial court was correct to rule that Dr. Bellomo's examinations of Fabio's breast that occurred between 1982 and 1984 *are barred by the statute of limitations.*" *Id.* at 762 (emphasis added). In short, the court ruled that Fabio's claim was for a discrete act of alleged malpractice that occurred and was completed upon the doctor's failed breast examination, thus triggering accrual. Because Minnesota law, then as now, requires that a single act of malpractice be combined with some damage before the cause of action accrues, necessary to the *Fabio* holding is the conclusion that some damage occurred to Mrs. Fabio at the time her doctor failed to diagnose her breast cancer.

This court's application of *Fabio* in *Molloy v. Meier* confirms that. 679 N.W. 2d 711, 722 (Minn. 2004) (stating that "[t]he misdiagnosis in *Fabio* caused the plaintiff immediate injury .... The action accrued at the time of misdiagnosis because some damage occurred immediately"). Granted, the *Molloy* court discussed *Fabio* as a point of distinction between the cases, but the court's statement in *Molloy* is absolutely correct in

describing the legal prerequisite to the *Fabio* holding. To reject the statement in *Molloy* is to reject the holding in *Fabio*.

In other words, plaintiff's argument not only requires the court to override the some-damage rule in *Antone* – so that only wrongful-death damages would trigger accrual in failure-to-diagnose-cancer cases – it also requires the court to overrule *Fabio* entirely. But there's no justification for such a sweeping change in the law. The court developed the some-damage rule as a middle ground between the "occurrence" rule and the "discovery" rule. *Antone*, 720 N.W.2d at 335-36. Accepting plaintiff's argument in this case would move Minnesota's law of accrual beyond "some damage" and toward a discovery rule, a result this court has consistently rejected for decades. *See, e.g., Johnson v. Winthrop Lab. Div. of Sterling Drug, Inc.*, 291 Minn. 145, 190 N.W.2d 77, 80 (1971) (stating that "[t]his argument [for a discovery rule] has been made before, but we have consistently rejected it"). The *amici* urge the court to uphold the existing broad standard of "some damage" and the minimal standard of a Rule 12 motion.

III. The medical malpractice statute of limitations reflects important legislative decisions that implement public policy.

Neither the plaintiff nor the MNAJ discuss the relevant legislative history and how it applies to the court's decision in this case. Indeed, MNAJ asserts not only that the legislature has "appropriately deferred to the Courts the responsibility" for determining accrual, but also claims that the legislature "has not provided any guidance" on accrual of medical negligence actions. (MNAJ Br. at 2.) Both assertions are incorrect.

A. The legislature establishes statutes of limitation based on public policy.

At their most fundamental level, the limitations statutes reflect the legislature's decision to provide an end to liability after a reasonable amount of time has passed. *Bachertz v. Hayes–Lucas Lumber Co.*, 275 N.W. 694, 697 (Minn. 1937) (stating "it would be inequitable...to assert [a] claim after an unreasonable lapse of time, during which such other has been permitted to rest in the belief that no such claim existed"). Two important policies are served by statutes of limitations – "repose of the defendant and the fair and effective administration of justice." *Dalton v. Dow Chemical Co.*, 280 Minn. 147, 158 N.W.2d 580, 584 n. 2 (1968).

This court has explained these policies in some detail, for instance, as preventing "fraud, oppression, and interminable litigation," and ensuring parties do not delay filing suit "until it is probable that papers may be lost, facts forgotten, or witnesses dead." *Bachertz*, 275 N.W. at 697 (Minn. 1937). *See also Johnson v. Soo Line R.R.*, 463 N.W.2d 894, 896 (Minn. 1990) (holding that "statutes of limitations eliminate stale claims, grant repose to liability that otherwise would linger on indefinitely, and permit the judicial system to husband its limited resources"). The closure provided by limitations statutes is essential. Without it, potential plaintiffs may sit on their rights and health-care providers could face liability based on stale claims long after recollections have faded or witnesses have become unavailable.

It is the legislature's prerogative, not the courts', to provide the statute of limitations. "Statutes of limitations are within the legislative domain, and '[c]ourts have no authority to extend or modify statutory limitation periods.'" *Hermeling v. Minnesota*

Fire & Cas. Co. 548 N.W.2d 270, 276 (Minn. 1996) (quoting *Johnson*, 291 Minn. at 151, 190 N.W.2d at 81. What may be a reasonable time "depends upon the sound discretion of the legislature in the light of the nature of the subject and the purpose of the enactment." *DeMars v. Robinson King Floors, Inc.*, 256 N.W.2d 501, 505 (Minn. 1977) (citing *Wichelman v. Messner*, 250 Minn. 88, 83 N.W.2d 800 (1957)).

In certain circumstances, the statutes of limitations may seem to work harsh results for plaintiffs or defendants. The most-often cited harsh result is when a statute bars a plaintiff's action as untimely, in some instances, even before the plaintiff has discovered that injury has occurred. *Dalton*, 158 N.W.2d at 583. Similarly, harsh results have befallen the defense where the legislature has extended the limitations period, but also given that extension retroactive application and revived actions that, under the prior statute, were untimely. *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 418 (Minn. 2002) (holding amendment to medical malpractice statute of limitations applied retroactively to revive action time-barred before effective date of new statute). Although this legislative decision must be explicit, "there can be no doubt that the legislature has the power." *Id.*

The legislature has chosen to recognize that discovery will toll the statute of limitation where fraudulent concealment is involved. *Dalton*, 158 N.W.2d at 584; Minn. Stat. § 541.05(6) (providing six year limitations for various actions "for relief on the ground of fraud, in which case the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud"), *see also Cohen v. Appert*, 463 N.W.2d 787 (Minn. App. 1990) (tolling limitations due to

concealment in legal malpractice). However, the general rule is that ignorance of the statute or of the cause of action provides no excuse. *Dalton*, 158 N.W.2d at 584.

More than once, this court has held that discovery of injury or damage as the trigger for accrual is the legislature's prerogative and not a decision for the courts. This court has held that "where the legislature intended the limitation period to be contingent upon the knowledge of the aggrieved party, it has so provided." *Murphy v. Country House, Inc.*, 307 Minn. 344, 348, 240 N.W.2d 507, 510 (1976) (rejecting argument accrual was tolled until discovery). *See also Johnson*, 190 N.W.2d at 81 ("The legislature has not seen fit to provide a statutory tolling period to protect plaintiffs from their own ignorance although we held many years ago that such ignorance does not toll statute of limitations.")

From start to finish, statutes of limitations express policy decisions of the legislature. In its opinions, this court has consistently respected not only the limitations period set by the legislature, but also the legislature's prerogative to change the usual rule of accrual and toll statutes to allow discovery of injury by plaintiff. This court's position that it will respect and apply legislative policy decisions as reflected in the statute of limitations is important in the particular instance of the medical malpractice statute of limitation. In 1999, the legislature carefully chose to extend the limitations period, but also chose to reject triggering the period by discovery of injury.

B. The legislative history of Minn. Stat. § 541.076 indicates the legislature's intent and should be heeded when construing accrual.

The Minnesota legislature has had many opportunities over the years to change the provisions for the length of time and accrual of the medical negligence statute of limitations. The decisions it has made are instructive. As always, the court's "goal in statutory interpretation is to give effect to the intention of the legislature in drafting the statute." *Education Minnesota-Chisholm v. Independent School Dist. No. 695,* 662 N.W.2d 139, 143 (Minn. 2003) (citing *State v. Orsello*, 554 N.W.2d 70, 74 (Minn. 1996)); *see also* Minn. Stat. § 645.16 (2002) ("The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature."). This court has often discerned legislative intent by examining legislative history. Minn. Stat. § 645.16 (7); *see, e.g., Medica Primary v. Central States, Southeast and Southwest Areas Health and Welfare Fund*, 505 N.W.2d 589, 592 (Minn. 1993) ("In construing the statute, we may look to its purpose and legislative history.")

Before 1999, the statute of limitations for medical malpractice claims was governed by Minn. Stat. § 541.07, which imposed a two-year limitation period:

> for liable, slander, assault, battery, false imprisonment, or other tort, resulting in personal injury, and all actions against physicians, surgeons, dentists, occupational therapists, other healthcare professionals as defined in § 145.61, and veterinarians as defined in chapter 156, hospitals, sanitariums, for malpractice, error, mistake or failure to cure, whether based on contract or tort . . . .

Minn. Stat. § 541.07 (1998).

In 1999, Representative Henry Todd VanDellen introduced a bill, H.F. No. 56, that proposed modifying the statute of limitations for medical malpractice claims by allowing claims to be brought within two years from the discovery of the malpractice, with a six-year limit from the occurrence of the malpractice. As introduced, the bill would have accomplished this by enacting a new section, 541.076, which stated:

> An action by a patient or former patient against healthcare provider alleging malpractice, error, mistake, or failure to cure, whether based on a contract or tort, must be commenced within 2 years *after the patient or former patient discovers or reasonably should have discovered the injury, cause, and alleged malpractice, error, mistake, or failure to cure.* In no event shall an action under this section be brought more than 6 years after the date on which the limitations, would have begun to run under § 541.07, clause (1), had the action been subject to that provision.

H.F. No. 56 as introduced – 81st Legislative Session (1999-2000) (emphasis added), http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H0056.0&session=ls81.

Seeking to reach a compromise that would remove the objections of those who opposed a discovery trigger, Rep. Dave Bishop offered an amendment that would simply extend the then-current two-year limitation period to four years. Several medical organizations that originally opposed the bill said they would accept the compromise, and the House Civil Law Committee accepted it. Session Weekly, Vol. 16 No. 5, at 12 (Feb. 5, 1999). The first and second engrossments of H.F. No. 56 that followed reflected that compromise, as each contained the following new language for § 541.076:

> 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.*

H.F. No. 56, 1st Engrossment – 81st Legislative Session (1999-2000) (emphasis added), H.F. No. 56, 2nd Engrossment – 81st Legislative Session (1999-2000) (emphasis added), http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H0056.1&session=ls81.

The legislative history is instructive on several key points. First, the legislature specifically considered and rejected a discovery trigger for the limitations period. Second, the legislature stated the date the cause of action "accrued" was the trigger for the limitation period. The legislature is presumed to have deliberately chosen this term and to be aware of this court's extensive precedent on when a cause of action accrues. *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412 (Minn. 2005) (holding legislature must be presumed to have understood the effect of its words). In particular, this court had previously held that medical malpractice actions accrue when some damage is sustained and, in particular, at the time of misdiagnosis in a cancer misdiagnosis claim. *See, e.g., Offerdahl v. Univ. of Minn. Hosp.*, 426 N.W.2d 425, 429 (Minn. 1988); *Fabio*, 504 N.W.2d at 702. Because the legislature chose "accrued," which had already been interpreted by the court, the statutory language must be given the same construction here. *See* Minn. Stat. § 645.17(4) ("when a court of last resort has construed the language of the law, the legislature in subsequent laws on the same subject matter intends same construction to be placed upon such language"); *see, e.g., Minnesota Wood Specialties, Inc. v. Mattson,* 274 N.W.2d 116, 119 (Minn. 1978) ("Words and phrases which have acquired an established meaning by judicial construction are deemed to be used in the same sense in a subsequent statute relating to the same subject matter.")

Importantly, negligent diagnosis of cancer was one type of medical malpractice claim the Legislature considered in enacting the 1999 statute. Just before it approved the compromise legislation, a summary of testimony to the House Civil Law Committee shows:

> Michael Miller of Minnetonka told the committee that if doctors had caught his wife's breast cancer in time she might still be alive.
>
> His wife had a malignant lump removed in 1992. Doctors misread a lab report, and didn't prescribe further radiation or chemotherapy treatment. When the cancer returned in 1996, Miller and his wife sought a second opinion about a prescribed bone marrow transplant, and discovered the error made in 1992. She passed away last year.

Session Weekly, Vol. 16, No. 5, at 12 (February 5, 1999). The legislature's response was not to adopt a discovery trigger, but to extend the limitations period from two to four years.

It is not the prerogative of this court to construe the statute in a manner considered and rejected by the legislature. At the very least, plaintiff and Amicus MNAJ are asking this Court to modify how accrual is determined in the context of a claim alleging negligent diagnosis of cancer. Specifically, plaintiff asks for the special rule that this type of claim does not accrue until it is more probable than not that a plaintiff will not survive the cancer. (App. Br. at 25.) This court has never defined accrual in this manner and should not accept the invitation to do so here, particularly where the legislature rejected a similar invitation long after *Fabio* had been decided.

C. The rule of law advanced by plaintiff and Amicus MNAJ is defective for the same reasons the discovery trigger is defective.

Plaintiff and Amicus MNAJ have either argued or implied that their position should be distinguished from a discovery trigger for the statute of limitations, although

that distinction is at best debatable,[3] and certainly not meaningful. By asking this court to hold that "some damage" occurs *only* when a plaintiff can establish that it was more probable than not that he would survive cancer, plaintiff and MNAJ are applying the same type of "after the fact" trigger that advocates used at the legislature when they proposed the initial bill. The discovery trigger, as proposed and rejected in 1999, began "after the patient or former patient discovers or reasonably should have discovered the injury, cause, and alleged malpractice, error, mistake, or failure to cure." Similarly, the fatal diagnosis that plaintiff urges this court to adopt as a trigger would begin after medical experts determine, in hindsight, when the misdiagnosed cancer may have become fatal.

This court previously has rejected a similar "look back" analysis as applied to the statute of limitations. First, discovery – whether by the plaintiff or the plaintiff's experts

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[3] The plaintiff's brief focuses on what her experts know and when. Plaintiff argues that her cause of action should accrue when the cancer misdiagnosis "alter[ed] the course" of the patent's condition resulting in "compensable" damage (Br. at 11); similarly, plaintiff argues that expert testimony should be used to discover the point in time "when it was more probable than not that Mr. MacRae would not have survived his cancer, here, after December 2002" (Br. at 16). Making a more direct reference to lack of discovery as one reason this court should change the law, plaintiff contends that "A tumor can grow for years with no awareness." (App. Br. at 23).

Amicus MNAJ more directly advocates that plaintiff's ignorance of the negligent act should factor into this court's decision. In explaining the termination of treatment rule, MNAJ inserts a quotation from a case implying that rule was adopted because "the patient could not know just when the initial trouble occurred that resulted from the alleged treatment." (MNAJ Br. at 3.) MNAJ also argues, without citing any authority, that "accrual" under Minnesota case law requires "that plaintiff have meaningful opportunity to have knowledge of the facts on which the claim is based." (MNAJ Br. at 6.) Last, the MNAJ says "the adoption of the discovery rule should not be considered" unless the court requests additional briefing. (MNAJ Br. at 13 n. 3.)

– involves a subjective determination and would virtually emasculate the statute of limitations. *Dalton* rejected extending the statute of limitations for injury by exposure to toxic chemicals until the plaintiff could "positively know of, not suspect" the casual relationship before the cause of action was deemed accrued. 158 N.W.2d at 585. This court held that "subjective determination" of accrual "is obviously without support in our decisions." *Id.* The fundamental flaw in waiting for subjective but "positive" determination was noted in *Antone*, 720 N.W.2d at 335: "[A] significant disadvantage of the discovery rule is that it provides 'open-ended liability.'" Under the rule proposed by plaintiff and MNAJ, liability remains open until the experts weigh in on the probability of death. This court should reject a rule of law that allows plaintiffs to delay filing medical malpractice actions until they – or their experts – "positively know of, not suspect" that the misdiagnosis of cancer was a fatal error.

The second reason this court has previously rejected a "look back" analysis is because it is inconsistent with general principles underlying the "some damage" rule of accrual. In *Dalton*, this court noted that "the applicable statute of limitation begins to run even though the ultimate damage is unknown or unpredictable." *Id.* at 585 (quoting *Brush Beryllium Co. v. Meckley*, 284 F.2d 797, 800 (6th Cir. 1960)). *See also Grimm v. O'Connor*, 392 N.W.2d 40, 43 (Minn. Ct. App. 1986) (in legal malpractice action, rejecting plaintiff's argument that statute was not triggered because damages were unascertainable); *cf. Broek v. Park Nicollet Health Serv.*, 660 N.W.2d 439, 443 (Minn. Ct. App. 2003) (in medical malpractice, holding plaintiff's action did not accrue at time of negligent act, because no damage to plaintiff's health occurred, but noting that "this

case differs from failure to diagnose or inform, in which plaintiff's illness or injury progressed during a time period after the alleged negligence occurred").

In short, this court has a number of reasons to reject the rule of law advocated by plaintiff and Amicus MNAJ based on legislative intent. The legislature recently revisited the medical malpractice statute of limitations, and even considered a case similar to the one before this court, yet elected to adopt an extended period of time in which to bring an action rather than revise when the limitations period began. Either in deference to the legislature's consideration of this issue, or because the rule of law proposed is defective for reasons considered previously by this court, this court should refuse to revise how accrual of a medical malpractice claim is determined.

CONCLUSION

The question of whether the four-year limitations period should be modified for the special case of misdiagnosis of cancer is not for this court to answer; it is a legislative decision. The legislature rejected a discovery trigger for the medical malpractice limitations in 1999 and instead extended the time period in which to bring an action. Moreover, the legislature presumably embraced this court's precedent on accrual when it inserted that word into the limitations statute. This court's precedent establishes that a cause of action for alleged misdiagnosis of cancer accrues when the patient suffers some damages, generally, at the time of misdiagnosis. Plaintiff and Amicus MNAJ's arguments to the contrary must be rejected.

Respectfully submitted,

Dated: 30 January '08

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CERTIFICATE OF COMPLIANCE

This brief was drafted using Word 2002. The font is Times New Roman, proportional 13 point type, which includes serifs. The word count total is 5,463.

Dated: 30 January 2008

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