THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

[redacted] **Plaintiff,** **vs.** [redacted], **Defendants.**	**Case No.** [redacted] **ORDER GRANTING DEFENDANTS' PARTIAL MOTION FOR SUMMARY JUDGMENT ON COUNT III AS TO CLAIMS ON BEHALF OF** [redacted]

This case involves a claim of medical malpractice based on alleged negligence in failing to timely diagnose breast cancer. Count I asserts a claim of medical malpractice, Count II asserts a claim of loss of spousal consortium, Count III asserts a claim of loss of parental consortium for four children.

Now-dismissed Defendant [redacted], filed a motion for summary judgment asserting defenses of lack of vicarious liability and statute of limitations as to three of the four children identified in Count III. Defendants [redacted], [redacted] filed a motion for summary judgment asserting a statute of limitations defense to all claims filed against those two Defendants. Defendants [redacted] filed a joinder asserting Count III is time barred as to three of the four children.

After filing summary judgment, Defendant [redacted] reached a settlement and has since been dismissed. Defendants [redacted] have also reached a settlement, although a dismissal is not yet on file. Therefore, the only remaining issue at summary judgment is the joinder motion

filed by [redacted] raising a statute of limitations defense as to Count III with regard to three of the four children.

Hearing was held on June 11, 2021. Plaintiff was represented by [redacted].

I. UNDISPUTED FACTS AND PROCEDURAL POSTURE

According to her Petition, [redacted] felt a lump in her left breast upon self-exam in October 2016. (Petition at ¶5). On November 18, 2016, [redacted] underwent a Mammography Breast Digital Diagnostic examination. [redacted] made an assessment of "benign finding" and electronically signed the record on December 1, 2016. (SOF ¶27 – Ex. G).

On May 2, 2017, [redacted] was seen by [redacted] due to a lump in her left breast that she had noticed for approximately six months. (4/13/2021 SOF ¶29, 5/3/2021 Response to SOF ¶29). On May 10, 2017, [redacted] underwent a breast MRI, left diagnostic mammogram, breast ultrasound and biopsy at Iowa Radiology. The assessment by [redacted] was "BI-RADS 6 Known biopsy proven malignancy." (4/13/2021 SOF ¶30, 5/3/2021 Response to SOF ¶30). On May 11, 2017, [redacted] met with [redacted], who informed her she had breast cancer in her left breast and lymph node. (4/13/2021 SOF ¶32, 5/3/2021 Response to SOF ¶32).

On April 17, 2019, [redacted] filed a Petition against Defendants [redacted] alleging negligence in failing to timely diagnose and commence treatment of [redacted] breast cancer.[1] She also asserted a second count for loss of

[1] The original Petition was filed only against [redacted]. Later, on June 5, 2020, a Second Amended Petition added the claims against now-settled defendants [redacted].

spousal consortium on behalf of [redacted]. [redacted] had brain surgery on May 30, 2018. [redacted] died due to alleged complications of metastatic adenocarcinoma on June 7, 2019.

Prior to her death, [redacted] had investigated potential litigation and filed suit. In a letter dated September 14, 2017, the law firm [redacted] requested medical records from the [redacted] and identified [redacted] as a "potential client." (4/13/2021 SOF ¶35, 5/3/2021 Response to SOF ¶35). Prior to the brain surgery on May 30, 2018, [redacted], became aware she was going to file a lawsuit. (4/13/2021 SOF ¶36, 5/3/2021 Response to SOF ¶36). [redacted] other daughter, [redacted], knew that her mother was filing a lawsuit prior to the time of her death. (4/13/2021 SOF ¶37, 5/3/2021 Response to SOF ¶37).

On August 12, 2019, Plaintiff's First Amended Petition substituted [redacted] as Personal Representative of the Estate of [redacted] and added Count III, the claim for loss of parental consortium, on behalf of [redacted] two adult children ([redacted]) and two minor children ([redacted]). At the time of the August 12, 2019 Second Amended Petition, two of [redacted] children were adults ([redacted]), N.F.E. was thirteen, and Z.N.E. was under ten. (4/13/2021 SOF ¶39, 5/3/2021 Response to SOF ¶39). Z.N.E. turned 10 on December 12, 2019. (6/10/2021 SOF at ¶¶ 16, 17). As of [redacted] diagnosis on May 11, 2017, [redacted] were adults, N.F.E was eleven, and Z.N.E. was seven. (6/10/2021 SOF at ¶¶ 16, 17).

II. SCOPE AND STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact,

and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3). "The summary judgment procedure seeks to expedite litigation when there is no factual issue and to forestall delaying tactics when defendant has no meritorious defense." Nagle Lumber Co. v. Better Built Homes, 160 N.W.2d 446, 447 (Iowa 1968). A fact question arises if reasonable minds can differ on how the issues should be resolved. Walderbach, 730 N.W.2d at 199. No fact question arises if the only conflict concerns legal consequences flowing from undisputed facts. Grinnell Mut. Reinsurance Co., v. Jungling, 654 N.W.2d 530, 535 (Iowa 2002). A fact issue is material only when the dispute surrounding said issue concerns facts, which might affect the outcome of the case. Junkins v. Branstad, 421 N.W.2d 130, 132 (Iowa 1988). "The requirement of a 'genuine' issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

The moving party has the burden to show the nonexistence of a material fact, and the evidence must be viewed in the light most favorable to the resisting party. Smith v. Shagnasty's Inc., 688 N.W.2d 67, 71 (Iowa 2004). A nonmoving party is entitled to all reasonable inferences in a motion for summary judgment. Green v. Racing Ass'n of Cent. Iowa, 713 N.W.2d 234, 246 (Iowa 2006). "An inference is legitimate if it is rational, reasonable, and otherwise permissible under the governing substantive law. On the other hand, an inference is not legitimate if it is based upon speculation or conjecture." Phillips v. Covenant Clinic, 625 N.W.2d 714, 718 (Iowa 2001) (citation omitted). If the motion is properly supported, however, the resisting party "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 1.981(5).

Defendants have the burden of establishing the statute of limitations defense and Plaintiff has the burden of demonstrating an exception. Benskin, Inc. v. W. Bank, 952 N.W.2d 292, 302 (Iowa 2020). "[W]hether a claim in a civil case is barred by the statute of limitations should be

determined by the fact finder, unless the issue is so clear it can be resolved as a matter of law." Shams v. Hassan, 905 N.W.2d 158, 163 (Iowa 2017) ("The determination of when a cause of action accrues, as affecting the running of the statute of limitations, is frequently a question of fact to be determined by the jury or trier of fact under the evidence.... The time of the accrual of the cause of action is properly a question of law to be determined by the court when the facts in the case are undisputed and only one conclusion can be drawn therefrom.") (citing 54 C.J.S. *Limitations of Actions* § 437, at 486-87 (2010)).

III. CONCLUSIONS OF LAW.

Iowa Code section 614.1(9) sets forth the statute of limitations for malpractice claims. For actions

> . . . founded on injuries to the person or wrongful death against any physician and surgeon, osteopathic physician and surgeon, dentist, podiatric physician, optometrist, pharmacist, chiropractor, physician assistant, or nurse, licensed under chapter 147, or a hospital licensed under chapter 135B, arising out of patient care, **within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of, the injury or death for which damages are sought in the action, whichever of the dates occurs first**, but in no event shall any action be brought more than six years after the date on which occurred the act or omission or occurrence alleged in the action to have been the cause of the injury or death unless a foreign object unintentionally left in the body caused the injury or death.

Iowa Code § 614.1(9)(a). Defendants assert this statute of limitations bars the loss of parental consortium claims asserted on behalf of [redacted]'s two adult children and N.F.E.

Iowa Code § 614.1(9)(b) sets forth a separate statute of limitations for minors under the age of eight. An action "brought on behalf of a minor who was under the age -of eight years when the act, omission, or occurrence alleged in the action occurred shall be commenced no later than the minor's tenth birthday or as provided in paragraph 'a', whichever is later." Iowa Code § 614.1(9)(b). Section 614.1(9)(b) applies to a minor's loss of consortium instead of Section

614.8(2), which is Iowa's general statute of limitations for minors and which extends the statute of limitations for one year form the attainment of majority. See Christy v. Miuli, 692 N.W.2d 694, 704 (Iowa 2005) (holding section 614.1(9)(b) applies to medical malpractice loss of consortium action instead of section 614.8(2)). Defendants have not moved for summary judgment on Z.N.E.'s claim. Z.N.E. was under eight when [redacted] was diagnosed and was under ten when the loss of parental consortium claim was filed.

With regard to the three other children, the Parties dispute whether Count III began to run on May 11, 2017 (the date of [redacted] diagnosis with breast cancer) or June 7, 2019 (the date of [redacted] death). Defendants contend Plaintiff's claim of loss of parental consortium is untimely as May 11, 2019 because she had actual or imputed knowledge of her injury and the cause in fact of her injury as of her diagnosis on May 11, 2017. Plaintiff contends the statute of limitations begins to run on [redacted]death, June 7, 2019.

The medical malpractice statute of limitations commences upon actual or imputed knowledge of both the injury and its cause in fact. Rathje v. Mercy Hospital, 745 N.W.2d 443, 461 (Iowa 2008). Rathje separates two concepts: knowledge or imputed knowledge of the physical injury and the cause in fact of that injury. Id. at 463.

Plaintiff had actual or imputed knowledge of the injury and its cause in fact prior to Ms. [redacted] death. [redacted] alleges she felt a lump in her left breast upon self-exam in October 2016. (Petition at ¶5). On November 18, 2016 [redacted] underwent a Mammography Breast Digital Diagnostic examination. [redacted] made an assessment of "benign finding." (4/13/2021 SOF ¶ 27). Believing that the lump continued to enlarge on her self-examination, in May 2017, [redacted] sought further treatment. On May 11, 2017, [redacted] was informed that she had breast cancer. She met with [redacted] on May 11, 2017, who

informed her that she had triple negative breast cancer in her left breast and a positive lymph node. (SOF at ¶¶ 31-32).

As of May 11, 2017, [redacted] was aware of her physical injury—the progression of the cancer—and the alleged medical cause—that [redacted] had failed to diagnose it during his prior medical care of [redacted]. In Crow v. Jabbari, 949 N.W.2d 444 (Table), 2020 WL 4201688, at *4 (Iowa Ct. App. July 22, 2020), the Iowa Court of Appeals affirmed dismissal of a claim for failure to diagnose based on the Court's determination that the plaintiff was on inquiry notice as of the date she was actually diagnosed. In Crow, the defendant doctor had ignored the plaintiff's complaints of pain and discharged her. Eventually she was diagnosed by a different doctor. The Court of Appeals held the statute of limitations had been triggered as of the date of the actual diagnosis.

[redacted] filed a lawsuit within two years of her diagnosis. The only issue here is the August 12, 2019 First Amended Petition adding Count III, which was added more than two years after the May 11, 2017 diagnosis. Plaintiff argues Count III is distinguishable because the parental consortium claim is a claim for wrongful death and, therefore, the statute of limitations could not begin to run until [redacted]'s death. Plaintiff argues the statutory reference to "injury or death" indicates that the statute of limitations for a parental consortium claim for wrongful death will begin to run on the date of the death regardless of whether it had already begun to run for an injury stemming from the same allegedly negligent conduct.

Under the undisputed facts here, [redacted]'s death was a degree of harm from the injury of progressed cancer due to the alleged failure to diagnose breast cancer. Rathje rejects the proposition that an injury is separable into different degrees of harm or different categories of harm that give rise to differing triggering events. Rathje, 745 N.W.2d at 461 ("This approach rejects the

claim made by the Rathjes that 'the injury' that will trigger the statute can be separated into different degrees of harm or different categories of harm that separately give rise to different triggering dates."). A plaintiff does not need to know the full extent of the injury before the statute of limitations begins to run. LeBeau v. Dimig, 446 N.W.2d 800, 803 (Iowa 1989). Therefore, the statute of limitations began to run on May 11, 2017.

Plaintiff argues Iowa Code 614.1(9)(a) treats injury and death separately, with separate statute of limitations for each. Plaintiff argues "whichever of the dates occurs first" modifies the mechanism of knowing—i.e., "the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of"—and not the phrase "injury or death." The language of section 614.1(9)(a) does not support this reading. The statute refers to "whichever of the dates occurs first." There are many different factual scenarios under section 614.1(9)(a) that could "occur first" to trigger the statute of limitations in any particular case. Here, as addressed above, [redacted] knew or should have known of the injury as of the date of her diagnosis on May 11, 2017. Therefore, May 11, 2017 was the date that occurred first.

Plaintiff also argues caselaw treats injury and death differently. Plaintiff cites to Hammen v. Iles, No. LALA00215, 2012 WL 12114092 at *4 (Washington Co. Dist. Ct. May 18, 2012), upheld by Hammen v. Iles, 834 N.W.2d 872, 2013 WL 2368810 (Iowa Ct. App. 2013) (Table). In Hammen, the District Court held the two year statute of limitations would commence on the "date of death, not the date of gaining knowledge of an injury." 2012 WL 12114092, at *4. However, the District Court opinion in Hammen does not cite to or consider the holding of Rathje that an injury is not separable into different degrees of harm and that different degrees of harm do not give rise to different triggering events. On appeal, the Court of Appeals also did not directly address

the question at issue in this case. Instead, the Court of Appeals applied Iowa Code section 614.1(2) (general two year statute of limitations for injuries to persons) and section 613.15A (claim for death of a minor child). There is no discussion of how Iowa Code section 614.1(9) would apply to a medical malpractice wrongful death claim where the injury and cause in fact was known prior to the death and, instead, the Court of Appeals focused on the statutes applicable to the death of a minor child. Hammen v. Iles, 834 N.W.2d 872 (Iowa Ct. App. 2013) ("The cases [defendants] cite, however, do not address the language in rule 1.206 and section 613.15A specifically authorizing damage claims based on either of two different causes—injury to a minor child *or* death of a minor child.").

In Schultze v. Landmark Hotel Corp., 463 N.W.2d 47, 50 (Iowa 1990), the Court held the statute of limitations began at the date of death and not later, when plaintiffs discovered the wrongful act that allegedly caused the death. Schultze does not control here. First, Schultze noted that generally "death from medical care is the type of event that should give rise to the duty to investigate a cause of action." Rathje, 745 N.W.2d at 456. Here, the facts are the opposite of Schultze: the knowledge was gained prior to the death. Further, Schultze was issued prior to Rathje and does not address the situation at issue here. Later caselaw has not yet addressed how Rathje would apply to death cases in light of Schultze. See Est. of Gray ex rel. Gray v. Baldi, 880 N.W.2d 451, 459 (Iowa 2016) ("We need not decide whether the Rathje rationale is also compelling in death cases because we conclude even if the discovery rule applies, Brenna knew or should have known of a possible causal connection between Baldi's medical care and Paul's death more than two years before she filed the petition in this case.")

[redacted] had knowledge of the injury and cause in fact for purposes of the statute of limitations in Iowa Code 614.1(9) as of May 11, 2017, and that knowledge is applicable to the

claims of parental consortium as to her three oldest children. Therefore, because the claims in Count III as to [redacted], and N.F.E. were not asserted until August 12, 2019 – more than 2 years after the knowledge – they are barred by the statute of limitations. Although N.F.E. was a minor, this child, unlike Z.N.E., was not young enough to take advantage of section 619(9)(b). See Christy v. Miuli, 692 N.W.2d 694, 704 (Iowa 2005) (holding section 614.1(9)(b) applies to medical malpractice loss of consortium action instead of section 614.8(2), which generally extends statutes of limitations for minors).

IV. RULING

IT IS THEREFORE ORDERED that Defendant [redacted]'s Motion for Summary Judgment as to Count III (as applied to children [redacted], and N.F.E. is **GRANTED**. Count III remains as to Z.N.E.

IT IS SO ORDERED.

State of Iowa Courts

[redacted] [redacted]

ET AL

Type: OTHER ORDER

So Ordered

Sarah Crane, District Court Judge
Fifth Judicial District of Iowa

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