Health Law: Quality & Liability

Professor Thaddeus M. Pope

Reading Packet for Week 10 (Fall 2018)

Weekly Summary

We have completed our examination of the plaintiff's *prima facie* case for medical malpractice (duty, breach, causation, damages). The defendant can (and often will) argue that the plaintiff has failed to establish one or more of these necessary and essential *prima facie* elements. Instead or in addition, the defendant might contend that one or more affirmative defenses applies.

Affirmative Defenses

Some affirmative defenses (e.g. SOL, SOR, AR, contributory negligence) are complete and total defenses to liability. Others (e.g. comparative negligence) only reduce the exact amount of liability. Since you will have already seen generic tort defenses in your required 1L class, we will focus on those defenses that are more unique to the medical liability context. We will primarily focus on distinguishing statutes of limitation, statutes of repose, and the course of treatment doctrine.

Alternative Theories of Liability

In addition to defenses, we will look at some theories of liability other than traditional medical malpractice. Note that *res ipsa loquitor* is not really an alternative theory of liability. Instead, it is an alternative and expedited way to prove a medical malpractice theory in exceptional circumstances. Other theories really are distinct from medical malpractice. We will look at two of these: breach of contract and negligent infliction of emotional distress.

Other Theories of Liability from this Course

Note that these theories are cumulative to others we already examined. We already examined tortious abandonment early in the semester. Like informed consent, abandonment is technically a specific theory of medical malpractice, which is, in turn, a specific theory of medical liability. We also examined statutory claims based on federal non-discrimination statutes.

Reading

All the following materials are collected into a single PDF document:

- Antoon v. Cleveland Clinic (Ohio 2016) (SOR) (12 pages)
- Rock v. Warhank (Iowa 2008) (SOL) (5 pages)
- Gomez v. Katz (N.Y. Sup. 2009) (course of treatment) (10 pages)
- Burgos v. Lasalvia-Prisco (D.P.R. 2009) (assumption of risk) (7 pages)
- Breslin v. Liability Plan (Wis App. 2017) (comparative negligence) (8 pages)
- Kaplan v. Mayo Clinic (8th Cir. 2011) (breach of contract) (8 pages)
- Kaplan v. Mayo Clinic (8th Cir. 2017) (breach of contract) (4 pages)
- Keys v. Alta Bates (Cal. App. 2015) (NIED) (8 pages)

Objectives

By the end of this week, you will be able to:

- Analyze and apply legal principles concerning res ipsa loquitor, as an alternative method for establishing breach (4.7).
- Analyze and apply legal principles regarding key affirmative defenses (4.10).
- Distinguish statutes of limitations from statutes of repose (4.11).
- Distinguish assumption of risk from comparative negligence (4.12).
- Analyze and apply legal principles concerning breach of contract (4.14).
- Analyze and apply legal principles concerning negligent infliction of emotional distress and intentional infliction of emotional distress (4.15).

148 Ohio St.3d 483
2016-Ohio-7432

ANTOON et al., Appellees,

v.

CLEVELAND CLINIC FOUNDATION et al., ~~Appellants~~.

No. 2015–0467.

Supreme Court of Ohio.

Submitted April 5, 2016.

Decided Oct. 25, 2016.

Background: Patient brought medical-malpractice claims against health care providers in connection with prostatectomy. The Court of Common Pleas, Cuyahoga County, No. CV–13–817237, dismissed complaint for failure to state a claim. Patient appealed. The Court of Appeals, 2015 WL 501239, Kathleen Ann Keough, J., reversed and remanded. The Supreme Court granted discretionary review.

Holdings: The Supreme Court, O'Connor, C.J., held that:

Judgment of Court of Appeals reversed, and cause remanded.

Pfeifer, J., concurred in judgment only, with an opinion.

O'CONNOR, C.J.

483 {¶ 1} In this appeal, we consider whether Ohio's medical-malpractice statute of repose, R.C. 2305.113(C), applies to a cause of action that had vested for an act or 484 omission allegedly constituting medical malpractice that took place more than four years earlier. We hold that R.C. 2305.113(C) is a true statute of repose that applies to both vested and nonvested claims. Therefore, any medical-malpractice action [1] must be filed within four years of the occurrence of the act or omission alleged to have caused a plaintiff's injury. Appellees, David Antoon ("Antoon") and Linda Antoon (collectively, the "Antoons"), filed their lawsuit after the statute of repose expired. The complaint was not protected by R.C. 2305.19, Ohio's saving statute, or 28 U.S.C. 1367, the tolling statute for state claims over which a federal court has supplemental jurisdiction, because, as the Antoons admit in their merit brief to this court, the district court "declined to exercise supplemental jurisdiction" over the malpractice claims. The district court's action resulted in the Antoons never having the medical-malpractice claims pending in the federal court. Because neither the saving statute nor the tolling statute applies in this case, we decline to determine whether they extend the time for filing beyond the expiration of the statute of repose. We reverse the judgment of the Eighth District Court of Appeals, hold that the trial court appropriately dismissed the case pursuant to the motion by the appellants, Cleveland Clinic Foundation (doing business as the Cleveland Clinic), and Drs. Jihad Kaouk, Raj Goel, and Michael Lee (collectively, the "Clinic") and remand the cause to the trial court with instructions to enter judgment for the Clinic.

Relevant Background

The Alleged Malpractice

{¶ 2} The facts are not in dispute. On January 8, 2008, David Antoon underwent a prostatectomy at the Clinic. Drs. Kaouk, Goel, and Lee were involved in treating Antoon or performing the operation. Antoon did not experience the recovery he hoped for following surgery and spent nearly a year consulting with Dr.

1. R.C. 2305.113 contains sections that explicitly extend the statute of repose for a plaintiff bringing a medical-malpractice claim under certain circumstances—for instance, when the injury involves a foreign object left in the body. R.C. 2305.113(D)(2). We recognize these important protections for plaintiffs, but we do not specifically address them, as they are not relevant to this case.

Kaouk and other Clinic practitioners regarding side effects of the surgery. December 11, 2008, was Antoon's final appointment with Dr. Kaouk.

The First State-Court Complaint

{¶ 3} On December 9, 2009, Antoon timely notified the Clinic, pursuant to R.C. 2305.113(B), that he would be bringing medical-malpractice claims against them within 180 days. On June 6, 2010, the Antoons filed a complaint in the Cuyahoga County Common Pleas Court alleging medical malpractice and derivative claims against the Clinic and the doctors who provided care to Antoon. On June 13, 2011, the Antoons dismissed their claims without prejudice.

485 *The Federal Claims*

{¶ 4} Both before and after dismissal of their state case, the Antoons, acting pro se, filed a variety of actions in federal court and with federal agencies relating to Antoon's surgery. Relevant here is the qui tam action [2] that the Antoons filed without counsel in federal district court on January 31, 2012. The Antoons allege that the qui tam case, filed within one year of the dismissal of their common pleas court action, preserved their state claims pursuant to Ohio's saving statute, R.C. 2305.19(A). However, the Antoons' qui tam lawsuit did not allege medical malpractice and did not seek damages.

{¶ 5} On May 8, 2012, before the complaint was served, the Antoons, still acting pro se, amended their qui tam action. The amended complaint alleged that the Cleveland Clinic, its employees, and the manufacturer of equipment used during the surgery had violated the False Claims Act, 31 U.S.C. 3729. On December 21, 2012, the defendants moved to dismiss the amended action.

{¶ 6} On February 13, 2013, with the motion to dismiss pending, the Antoons, now having retained counsel, moved for leave to file a second amended complaint, which was attached to the filing. The offered second amended complaint named the Cleveland Clinic and manufacturing and government defendants. It included the claims asserted in the two previous complaints but added state law medical-malpractice claims. On October 16, 2013, the district court denied leave and granted the defendants' motion to dismiss the first amended complaint. That holding was affirmed on appeal. *United States ex rel. Antoon v. Cleveland Clinic Found.*, 788 F.3d 605, 620 (6th Cir.2015).

The Second State-Court Complaint

{¶ 7} Following dismissal of their complaint by the federal court, on November 14, 2013, the Antoons, through counsel, filed a complaint in the Cuyahoga County Court of Common Pleas alleging state malpractice claims. The Antoons argue that their complaint was timely pursuant to 28 U.S.C. 1367(d), which tolls the period of limitations for any state claim over which a federal court has supplemental jurisdiction if the claimant asserted the claim in a federal court case. The period of limitations "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. 1367(d).

{¶ 8} The Clinic moved to dismiss pursuant to Civ.R. 12(B)(6), asserting that the Antoons failed to state a claim upon which relief could be granted because 486 both the statute of limitations and statute of repose

2. A qui tam action allows whistleblowing private citizens to file suit under the False Claims Act, 31 U.S.C. 3729, when they allege that a party is perpetrating a fraud against the United States. 31 U.S.C. 3729(a)(1). Whistleblowers may obtain a reward for bringing the fraud to the government's attention. 31 U.S.C. 3730(d).

applicable to their claims had expired. The trial court granted the motion, finding that "the case was filed outside the applicable statute of limitations and outside the one year allowed by the Ohio saving statutes. Further, this filing is also outside the statute of repose, R.C. 2305.113(C) which requires that a medical claim be filed no more than four years after the alleged malpractice." The trial court determined the federal tolling statute, 28 U.S.C. 1367(d), applies only "to protect claims while pending in federal court." According to the trial court, because the Antoons' motion to amend the complaint to add the malpractice claims was denied, the state claims were never pending and were not protected.

{¶ 9} The Antoons appealed, and the Eighth District Court of Appeals reversed the trial court's judgment. The appellate court relied on this court's decision in *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, syllabus, and concluded that once a claim has vested, the statute of repose can no longer operate to bar litigation. The appellate court's opinion acknowledges that vesting had occurred by the time the Antoons filed their first lawsuit in the matter in 2010.

The Discretionary Appeal

{¶ 10} We granted the Clinic's request for discretionary review to address a single proposition of law:

> Ohio's medical malpractice statute of repose applies whenever the occurrence of the act or omission constituting the alleged medical malpractice takes place more than four years prior to when the lawsuit is filed. This statute of repose applies regardless of whether a cause of action has vested prior to the filing of a lawsuit.

See 143 Ohio St.3d 1463, 2015-Ohio-3733, 37 N.E.3d 1249.

Analysis

Statutes of Limitations and Statutes of Repose

[1] {¶ 11} Statutes of repose and statutes of limitation have distinct applications, though they are occasionally used interchangeably. Both share a common goal of limiting the time for which a putative wrongdoer must be prepared to defend a claim. *See CTS Corp. v. Waldburger*, ––– U.S. ––––, 134 S.Ct. 2175, 2182, 189 L.Ed.2d 62 (2014). The differences between statutes of repose and statutes of limitations have been recognized for nearly 40 years. *Id.* at 2186. A statute of limitations establishes "a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." 487 *Black's Law Dictionary* 1636 (10th Ed.2014). A statute of repose bars "any suit that is brought after a specified time since the defendant acted * * * even if this period ends before the plaintiff has suffered a resulting injury." *Id.* at 1637.

{¶ 12} Our decision today is also informed by the robust heritage of decisions from courts and legislatures sharing the common beliefs that plaintiffs should litigate their claims as swiftly as possible and that defendants should not face potential liability indefinitely. We begin with a brief discussion of statutes of repose and statutes of limitations to provide context.

{¶ 13} Statutes of repose have a long history in Western legal tradition. One of the first statutes of repose in England, the country from which our legal system descended, appeared in the Limitation Act (1623), 21 James I, Chapter 16. Parliament enacted the statute for the purposes

of "quieting * * * men's estates and avoiding * * * suits." *Id.*

{¶ 14} The Limitation Act set forth deadlines for bringing a variety of actions. The English Parliament fixed the time periods either to the end of the parliamentary session or the occurrence of the cause of action. *Id.* For instance, a plaintiff had to bring an "action upon the case for words," a suit similar to a present-day slander claim, "within one year after the end of this present session of Parliament, or within two years next after the words spoken, and not after." *Id.*

{¶ 15} Similarly, statutes of repose and statutes of limitations have long played a role in the legal systems of this country. In 1828, the United States Supreme Court acknowledged the benefits of statutes of repose and statutes of limitations, stating that it wished a statute of limitations, "instead of being viewed in an unfavourable light, as an unjust and discreditable defence, * * * had received such support, as would have made it, what it was intended to be, emphatically, a statute of repose." *Bell v. Morrison*, 26 U.S. 351, 360, 7 L.Ed. 174 (1828). In *Bell*, the court referred to a statute of limitations but, by modern standards, the law at issue was a statute of repose. The court recognized the statute as "a wise and beneficial law" that "afford[ed] security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses." *Id.* The high court observed: "It has a manifest tendency to produce speedy settlements of accounts, and to suppress those prejudices which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them." *Id.*

{¶ 16} Almost a hundred years ago, the United States Supreme Court held that a defendant may have a property interest in the protection offered by a statute of limitations that cannot be "deprive[d] * * * without due process of law." *William Danzer & Co., Inc. v. Gulf & Ship Island RR. Co.*, 268 U.S. 633, 637, 45 S.Ct. 612, 69 L.Ed. 1126 (1925). In a more recent case, the court recognized that 488a statute of repose is a legislative judgment that defendants should be free from liability after a determined amount of time, measured from the date of the defendant's last culpable act. *CTS Corp.*, —— U.S. ——, 134 S.Ct. at 2182–2183, 189 L.Ed.2d 62.

{¶ 17} This court has also undertaken a review of statutes of repose and statutes of limitations on numerous occasions. In one early examination, we held, "Our statute of limitations fixes a period in which every action, according to its class, must be commenced. It is a statute of repose, and not of presumption; and, unless the suit is commenced in the time limited, cannot be maintained. It is said to be barred." *Kerper v. Wood*, 48 Ohio St. 613, 620, 29 N.E. 501 (1891). Shortly thereafter, this court explained its role in enforcing such laws:

> It is not the province of the courts to make exceptions to meet cases not provided for by the legislature. It is no longer the habit of courts to view with disfavor the plea of the statutes of limitations. Being statutes of repose, designed to secure the peace of society, and protect the individual from being prosecuted upon stale claims, they are to be construed in the spirit of their enactment.

Townsend v. Eichelberger, 51 Ohio St. 213, 216, 38 N.E. 207 (1894).

{¶ 18} More recently, this court has continued to uphold the constitutionality of statutes of repose in some circumstances.

See Ruther, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, syllabus; *Groch v. Gen. Motors Corp.,* 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, paragraph two of the syllabus; *Opalko v. Marymount Hosp., Inc.,* 9 Ohio St.3d 63, 65, 458 N.E.2d 847 (1984). Specifically, we have recognized that statutes of repose do not automatically violate the Ohio Constitution's right-to-remedy provision, Article I, Section 16, because that right " 'applies only to existing, vested rights, and it is state law which determines what injuries are recognized and what remedies are available.' " *Groch* at ¶ 150, quoting *Sedar v. Knowlton Constr. Co.,* 49 Ohio St.3d 193, 202, 551 N.E.2d 938 (1990). And we, like the United States Supreme Court, have respected the public-policy choices embodied in statutes of repose:

> Many policy reasons support this legislation. Just as a plaintiff is entitled to a meaningful time and opportunity to pursue a claim, a defendant is entitled to a reasonable time after which he or she can be assured that a defense will not have to be mounted for actions occurring years before. The statute of repose exists to give medical providers certainty with respect to the time within which a claim can be brought and a time after which they may be free from the fear of litigation.
>
> [489]Forcing medical providers to defend against medical claims that occurred 10, 20, or 50 years before presents a host of litigation concerns, including the risk that evidence is unavailable through the death or unknown whereabouts of witnesses, the possibility that pertinent documents were not retained, the likelihood that evidence would be untrustworthy due to faded memories, the potential that technology may have changed to create a different and more stringent standard of care not applicable to the earlier time, the risk that the medical providers' financial circumstances may have changed—i.e., that practitioners have retired and no longer carry liability insurance, the possibility that a practitioner's insurer has become insolvent, and the risk that the institutional medical provider may have closed.
>
> Responding to these concerns, the General Assembly made a policy decision to grant Ohio medical providers the right to be free from litigation based on alleged acts of medical negligence occurring outside a specified time period.

Ruther, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶ 19–21.

{¶ 19} Therefore, this court and the United States Supreme Court agree that statutes of repose are to be read as enacted and not with an intent to circumvent legislatively imposed time limitations. While mindful of Ohioans' constitutional right to a remedy, we undertake our review cognizant that a statute of repose is not an unjust and discreditable defense but rather, a law designed to secure fairness to all parties.

Ohio's Medical–Malpractice Statute of Repose

[2–5] {¶ 20} The Clinic asks us to apply Ohio's medical-malpractice statute of repose to the Antoons' claim, which accrued and vested within the four-year statute-of-repose period. "The paramount goal in the interpretation or construction of a statute is to ascertain and give effect to the legislature's intent in enacting the statute." *Brooks v. Ohio State Univ.,* 111 Ohio App.3d 342, 349, 676 N.E.2d 162

(10th Dist.1996). To determine legislative intent, we must first examine the plain language of the statute. *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81, 676 N.E.2d 519 (1997). "[W]e must apply a statute as it is written when its meaning is unambiguous and definite." *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 52, citing *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545, 660 N.E.2d 463 (1996). "An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language * * *." *Burrows* at 81, 676 N.E.2d 519.

490 {¶ 21} R.C. 2305.113(C) provides that the time for bringing a medical-malpractice complaint has an absolute limit:

> (1) No action upon a medical, dental, optometric, or chiropractic claim shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim.
>
> (2) If an action upon a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim, then, any action upon that claim is barred.

{¶ 22} In *Ruther*, we held that R.C. 2305.113(C) is "a true statute of repose." 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶ 18. We explained that "[t]he statute of repose exists to give medical providers certainty with respect to the time within which a claim can be brought and a time after which they may be free from the fear of litigation," *id.* at ¶ 19, and emphasized that "if the General Assembly cannot legislate a statute of repose, medical providers are left with the possibility of unlimited liability indefinitely," *id.* at ¶ 29.

[6] {¶ 23} Today, we affirm that R.C. 2305.113(C) is a statute of repose because the time for bringing a suit under the section begins running from the occurrence of the act or omission constituting the alleged basis of the claim. And we find that the plain language of the statute is clear, unambiguous, and means what it says. If a lawsuit bringing a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the basis for the claim, then any action on that claim is barred.

[7] {¶ 24} We reject the Antoons' assertion that filing then dismissing a claim will indefinitely suspend the statute of repose by "commencing" the suit on the date of the first filing. The law is clear that once a complaint has been dismissed without prejudice, legally, that action is deemed to never have existed. *DeVille Photography, Inc. v. Bowers*, 169 Ohio St. 267, 272, 159 N.E.2d 443 (1959). Accordingly, in this case, no action on the medical-malpractice claims "commenced" until the second state-court complaint was filed in November 2013. By that time, more than four years had passed since the act or omission constituting the alleged basis of the medical claim. Because the action was plainly commenced outside the four-year statute-of-repose period, the trial court correctly granted the Clinic's motion to dismiss.

491 *Distinguishing* Ruther

{¶ 25} The appellate court cited *Ruther* in holding that because the Antoons' malpractice claim had vested, the timeliness of either complaint depends on "the statute

of limitations and any tolling provisions." 2015-Ohio-421, 2015 WL 501239, ¶ 10. The Antoons similarly quoted *Ruther*'s holding that the "medical-malpractice statute of repose found in R.C. 2305.113(C) does not extinguish a vested right and thus does not violate the Ohio Constitution, Article I, Section 16," *Ruther*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, at Syllabus, to support their argument that this court must necessarily overturn that case in order to find that the statute can extinguish a vested right. Not so.

{¶ 26} Both the Antoons in their argument and the Eighth District Court of Appeals in its analysis rely on an impermissibly narrow reading of *Ruther*. The circumstance in *Ruther*, involving an unvested cause of action, was central to our holding in that case. The appellant in *Ruther* had made an as-applied constitutional challenge to R.C. 2305.113(C) regarding a claim that had not vested before the expiration of the statute of repose. In that circumstance, it was reasonable for the court to refer to the statute as "not extinguish[ing] a vested right." *Ruther*, at syllabus. The facts in the Antoons' case are materially divergent from those presented in *Ruther*, and while today we clarify *Ruther*, our holding in this case is consistent with our holdings therein, concluding that the statute of repose does not violate the Ohio Constitution: "A plain reading of Article I, Section 16 reveals that it does not provide for remedies without limitation * * *. [T]he right-to-remedy clause provides that the court shall be open for those to seek remedy 'by *due course of law.*' (Emphasis added.) Article I, Section 16 does not prevent the General Assembly from defining a cause of action." *Id.* at ¶ 12. We observed, "[T]he General Assembly has the right to * * * plac[e] a time limit after which an injury is no longer a legal injury." *Id.* at ¶ 14. These holdings support the constitutionality of the medical-malpractice statute of repose and our determination that our holding today does not conflict with *Ruther*. Because consideration of a vested claim was not before us in *Ruther*, our discussion of vested causes of action was made solely in the context of addressing a claim that accrued *after* the statute of repose had expired. That is not the situation here.

The Antoons' Constitutional Challenge

[8, 9] {¶ 27} Relying on *Ruther*'s syllabus, the Antoons assert that if R.C. 2305.113(C) extinguishes a vested right, then it violates the Ohio Constitution's right to remedy. The right-to-remedy clause provides, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law * * *." Article 1, Section 16, Ohio Constitution. It is well settled that "there is no property or vested right in any of the rules of the common law," so a vested right to a remedy devolves only from [492] the legislature. *Leis v. Cleveland Ry. Co.*, 101 Ohio St. 162, 128 N.E. 73 (1920), syllabus. Consequently, the right to a remedy protects only those causes of action that the General Assembly identifies and for the period of time it determines. *Ruther*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, at ¶ 12.

{¶ 28} A medical-malpractice claim vests "when a patient discovers or in the exercise of reasonable care and diligence should have discovered the resulting injury." *Ruther* at ¶ 17. This court has defined a vested right as one that is "fixed, settled, absolute, and not contingent upon anything." *Rehor v. Case W. Res. Univ.*, 43 Ohio St.2d 224, 229, 331 N.E.2d 416 (1975). But this court has, in multiple cases, recognized that a party need not be granted an unlimited amount of time to

bring a vested cause of action, but must receive only a "reasonable" amount of time in order for a law to pass constitutional muster. *Taylor v. First Resolution Invest. Corp.*, 148 Ohio St.3d 627, 2016-Ohio-3444, 72 N.E.3d 573, ¶ 57; *Oaktree Condominium Assn., Inc. v. Hallmark Bldg. Co.*, 139 Ohio St.3d 264, 2014-Ohio-1937, 11 N.E.3d 266, ¶ 1; *Cook v. Matvejs*, 56 Ohio St.2d 234, 237, 383 N.E.2d 601 (1978). *See also Gregory v. Flowers*, 32 Ohio St.2d 48, 54, 290 N.E.2d 181 (1972) ("On the theory that a right to sue once existing becomes a vested right, and cannot be taken away altogether, it does not conclusively follow that the time within which the right may be asserted and maintained may not be limited to a shorter period than that which prevailed at the time the right arose, provided such limitation still leaves the claimant a reasonable time within which to enforce the right").

[10, 11] {¶ 29} For the statute to be constitutional, the General Assembly must have a rational basis for determining the period of time during which a party may bring suit based on a vested cause of action. *Ruther* at ¶ 21. The presumption in favor of constitutionality is strong. "[E]nactments of the General Assembly [are] constitutional unless such enactments are clearly unconstitutional beyond a reasonable doubt." *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 147, 128 N.E.2d 59 (1955). The statute here, in compliance with the right-to-remedy clause, does not "completely foreclose a cause of action for injured plaintiffs or otherwise eliminate their ability to receive a meaningful remedy." *Flagstar Bank, F.S.B. v. Airline Union's Mtge. Co.*, 128 Ohio St.3d 529, 2011-Ohio-1961, 947 N.E.2d 672, ¶ 29. Accordingly, R.C. 2305.113(C) is constitutional both when it extinguishes a vested and a nonvested cause of action.

Ohio's Saving Statute and 28 U.S.C. 1367

{¶ 30} We do not decide today whether Ohio's saving statute, R.C. 2305.19, or the federal tolling statute, 28 U.S.C. 1367, properly invoked, may allow actions to survive beyond expiration of the statute of repose.

[12] {¶ 31} The Ohio saving statute applies only if a party files a substantially similar action within one year of the dismissal without prejudice. *Children's* [493] *Hosp. v. Ohio Dept. of Pub. Welfare*, 69 Ohio St.2d 523, 525, 433 N.E.2d 187 (1982) ("The savings statute applies when the original suit and the new action are substantially the same"); R.C. 2305.19(A). In this case, although the federal qui tam action was filed approximately seven months after the state claim was dismissed, it was pleaded solely as a qui tam action and included more than a dozen additional parties. Moreover, as the Antoons acknowledge, the complaints filed in federal court did not expressly assert malpractice claims. Therefore, they were not "substantially the same" as the state-court action, and the saving statute is inapplicable.

[13] {¶ 32} The federal tolling statute that the Antoons seek to invoke applies only to state-law claims over which a federal court has exercised supplemental jurisdiction. 28 U.S.C. 1367. In the Antoons' case, the federal court declined to exercise supplemental jurisdiction over the malpractice claims asserted in the proposed second amended complaint. Therefore, the medical-malpractice claims were never "pending" in federal court, so the tolling statute is also inapplicable.[3] 28 U.S.C. 1367.

3. The Antoons' reference to *Singleton v. Pittsburgh Bd. of Edn.*, W.D.Pa. No. 2:11–cv–1431,

Conclusion

[14] {¶ 33} Our role in reviewing a statute is not to express agreement or disagreement with the public policy that led to its enactment. "The only judicial inquiry into the constitutionality of a statute involves the question of legislative power, not legislative wisdom." *State ex rel. Bowman v. Allen Cty. Bd. of Commrs.*, 124 Ohio St. 174, 196, 177 N.E. 271 (1931).

{¶ 34} We hold that Ohio's medical-malpractice statute of repose, R.C. 2305.113(C), is constitutional even to the extent that it prohibits bringing suit on a cause of action that has vested. Significant public-policy considerations support granting repose to defendants, and the General Assembly has determined that four years is a reasonable length of time to bring a medical-malpractice claim.

{¶ 35} Accordingly, R.C. 2305.113(C) is a true statute of repose that applies to both vested and nonvested claims. The Antoons brought their accrued claims more than four years after the alleged malpractice; the claims were therefore |494barred by the statute of repose. We reverse the judgment of the court of appeals and remand the cause to the trial court to enter judgment for the Clinic.

Judgment reversed, and cause remanded.

O'DONNELL, LANZINGER, KENNEDY, and FRENCH, JJ., concur.

PFEIFER, J., concurs in judgment only, with an opinion.

O'NEILL, J., not participating.

PFEIFER, J., concurring in judgment only.

{¶ 36} All the glories of statutes of repose as described by the majority opinion point in one direction: toward protecting people who harm the despised proletariat, who are daring to remedy the wrong done them. Our original Constitution took a different stance. Even before Ohio's statehood, the Constitutional Convention of 1802 guaranteed the right to a remedy for the portion of the Northwest Territory that would become Ohio. Article VIII, Section 7, Constitution of 1802. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U.L.Rev. 1309, 1316 (2003), fn. 30. *See also E.W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 171, 125 N.E.2d 896 (8th Dist.1955) (Hurd, J., concurring). Today, Article I, Section 16 of the Ohio Constitution still guarantees that "every person, for an injury done him * * * shall have remedy by due course of law." What once was a mighty constitutional oak is left to wither and die at the whim of the General Assembly.

{¶ 37} This case is quite simple. The complaint was filed too late by pro se plaintiffs. They attempted to avail themselves of Ohio's saving statute, R.C. 2305.19(A), but that attempt was ill considered because the federal action relied upon did not allege medical malpractice or seek damages. We should have reversed the judgment of the court of appeals summarily and the story should have ended. Alas, this court saw an opportunity to further assault the fundamental constitutional right to a remedy.

2012 WL 4068381 (Aug. 24, 2012), is unavailing. In that case, the federal magistrate recommended dismissal of all claims against a certain defendant, including state claims, but those claims were actually pending before the court prior to dismissal. *Id.* at *12–14. Here, because the district court denied the Antoons leave to amend their complaint a second time and the medical-malpractice claims were not raised in the original or first amended complaints, the federal court never had supplemental jurisdiction over those claims.

{¶ 38} The majority opinion lauds statutes of repose for having "a long history in Western legal tradition." Majority opinion at ¶ 13. Fair enough—so did slavery.

{¶ 39} Access to courts and the opportunity to redress a wrong have long been sacrosanct in Ohio. *See* Article VIII, Section 7, Ohio Constitution of 1802, and Article I, Section 16, Ohio Constitution of 1851. These constitutional rights have been under assault for decades—since at least the 1970s, when the General Assembly enacted former R.C. 2305.11, 1975 Am.Sub.H.B. No. 682, 136 Ohio Laws, Part II, 2809, 2810–2811. This statute prohibited minors from bringing [495]medical-malpractice claims more than four years after the negligent act occurred, even if they had not yet reached the age at which the law allowed them to bring suit. *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 273, 503 N.E.2d 717 (1986).

{¶ 40} *Mominee* involved a statute of repose, like today's case. In that case, this court rightly concluded that the Ohio Constitution as ratified by the people of Ohio trumped a contrary statute. *Id.* at syllabus. The court today allows the statute of repose to swallow the right-to-a-remedy clause. This should not surprise anyone who has been paying attention. The previously inviolate right to a jury trial of Article VIII, Section 8 of the Ohio Constitution of 1802, now part of Article I, Section 5 of the Ohio Constitution, has likewise been eviscerated. *See Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 163–174 (Pfeifer, J., dissenting).

{¶ 41} *Mominee* was seminal and rightly repudiated a statute of repose. *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 639 N.E.2d 425 (1994), paragraph two of the syllabus, also repudiated a statute of repose. So did *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 475–476, 715 N.E.2d 1062 (1999). These cases remain good law or, in any event, they have not been overruled. Nevertheless, the court today rebukes the holdings and reasoning of these cases without so much as a passing reference.

{¶ 42} I have written extensively about statutes of repose and how they undermine constitutional protections. *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 227–246 (Pfeifer, J., concurring in part and dissenting part). Instead of restating the obvious, I have decided to quote extensively from *Mominee*. That case is so relevant in substance and significance that despite having been written 30 years ago, the concurring opinion still resonates:

> Section 16, Article I of the Ohio Constitution states: "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law * * *."
>
> Having roots in the Magna Carta, "access to the courts" provisions, found in many state constitutions, were designed to place some limitation on governmental power. As early as 1882 in *Lafferty v. Shinn* (1882), 38 Ohio St. 46, 48, this court said "[t]hat 'all courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law,' is ordained in the constitution (art. 1, § 16); *and it is not within the power of the legislature to abridge the period within which an existing right may be so asserted as that there shall not remain a reasonable time within which an action may be com-*

menced. * * * " (Emphasis added.)

[496] * * *

The effect of a statute of repose, at least in the medical malpractice area, is to reduce the doctor's exposure to liability by granting to him immunity from suit after the limitations period has run. Such protection may be justified on strong claims of public policy, and, therefore, not constitutionally infirm under either the equal protection or due process clauses. See, generally, Redish, Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications (1977), 55 Tex.L.Rev. 759. The same would not hold true, however, when measured against the "access-to-the-courts" provision of Section 16, Article I of the Ohio Constitution.

It will be argued that in striking down this statute of repose, we will be usurping the prerogatives of the legislature and that no statute of limitations will be safe from our review. Nothing could be further from the truth. The establishment of time limitations on various causes of action is a policy matter within the particular purview and competence of the legislature, but any such legislation must fall if it interferes with a person's constitutionally guaranteed right of access to the courts when that person is asserting a right of action arising at common law.

The action for negligence, upon which today's medical malpractice actions are founded, was well-established in the common law (trespass of the case). Where a right or action existed at common law at the time the Constitution was adopted, that right is constitutionally protected, by the access-to-the-courts provision, from subsequent legislative action which abrogates or impairs that right without affording a reasonable substitute. See, generally, *Gentile v. Altermatt* (1975), 169 Conn. 267, 363 A.2d 1. Cf. *Haskins v. Bias* (1981), 2 Ohio App.3d 297, 441 N.E.2d 842. Thus, through the theory of "constitutional incorporation," one of construction, legislation which serves to abolish or severely impair common-law remedies existing at the time the Constitution was adopted is invalid unless a reasonable substitute is provided for the remedy which is lost. Conversely, where a party would not have had a right to bring an action at common law, either because no cause of action existed or because some bar prevented its assertion, the cause of action is not constitutionally incorporated by the adoption of the access-to-the-courts provision. If a party received a subsequent right of action, not recognized at common law, either through legislative enactment or judicial pronouncement, that right could properly be abrogated by the legislature even without affording a reasonable substitute. Any right of action created subsequent to the [497] access-to-the-courts provision exists only as a matter of judicial or legislative grace and may be withdrawn at any time.

It is within this context that we must consider the statute of repose set forth in R.C. 2305.11(B). We have already seen that the statute provides for an *absolute* bar of a cause of action for medical malpractice after a four-year period of time

has elapsed from the date of the *occurrence*—that is, the date on which the alleged malpractice took place. It can readily be seen that where the injury is not discovered within the prescriptive period, the effect of the repose is to abolish the party's right of action altogether. A person so situated is literally given no opportunity to bring his action because the right to proceed is obliterated before it even *accrues.* In actual effect, this abolition grants the negligent doctor an area of absolute immunity from suit at the expense of the patient's constitutionally guaranteed right to access to the courts. This is especially true of those suffering from some disability such as we have in the cases before us, to wit: not having reached the statutory age of an adult.

Since the bottom-line effect of this statute of repose, R.C. 2305.11(B), is to abolish a common-law right or action which existed at the time the Constitution was adopted, and since the legislature provided no reasonable alternative remedy or substitute for the one which it has abrogated, this court must hold that R.C. 2305.11(B) is violative of Section 16, Article I of the Ohio Constitution and is, therefore, unconstitutional. "These rights the legislature did not give * * * and the legislature can not take them away. * * *" *Byers v. Meridian Printing Co.* (1911), 84 Ohio St. 408, 422, 95 N.E. 917.

(Emphasis sic and footnotes omitted.) *Mominee,* 28 Ohio St.3d at 290–293, 503 N.E.2d 717 (Douglas, J., concurring).

{¶ 43} Article I, Section 16 is not some trivial add-on to the Constitution of this great state. It is part of the Bill of Rights and has been since our first Constitution was ratified in 1802. It currently states, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law * * *." Today the majority opinion modifies this fundamental constitutional provision. Unfortunately, by implication, Article 1, Section 16 now reads thus: All courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law *unless the General Assembly decides that the courts are not open.*

{¶ 44} The import of the majority opinion is that negligent medical providers are more important than the people they injure. Any person suffering an injury
498 due to medical negligence must now discover the injury within four years or be foreclosed from recovery, even if the injury is not reasonably discoverable. In the short term, this is not a particularly important case. Not many Ohioans are unable to determine that they have been negligently injured by a medical provider within four years. But the long-term impact of this case is incalculably bad: some toxins are long acting, with unforeseeable consequences.

{¶ 45} The Toomer's Corner oak trees in Auburn, Georgia, were intentionally poisoned, but the damage wasn't immediately noticeable. The impact was irredeemable, however, and the trees were eventually removed. http://www.al.com/news/index.ssf/2015/11/harvey_updyke_poisoned_toomers.html. This court's acceptance of the position that the General Assembly can undermine constitutional provisions is poisonous, though not yet irreparable. This case moves us one step closer to the time when

the common law will be completely obliterated in Ohio. Today, this court countenances the intolerable concept that Ohioans' right to a remedy exists only through the good graces of the General Assembly. This court is wrong. The right to a remedy is a power reserved to the people by the people in Ohio's Constitution, and it cannot be diminished by statute. I trust that this court will eventually realize its mistake and find the will to protect Ohioans from future encroachments on their constitutional rights.

{¶ 46} I concur in judgment only, which is a minor point indeed. I dissent from everything else in the majority opinion.

Pamela G. ROCK and Keith A. Rock, Appellants,

v.

Rose WARHANK, Blue Grass Family Medical Center a/k/a Family Medical Center of Blue Grass, Robert W. Hartung, Center for Breast Health, and Genesis Medical Center, Appellees.

No. 05–1753.

Supreme Court of Iowa.

Nov. 21, 2008.

Background: Patient brought a medical-malpractice action against two doctors and

Charles E. Miller and Diane Reinsch of Lane & Waterman, L.L.P., Davenport, for appellees Genesis Medical Center and Center for Breast Health.

STREIT, Justice.

Pamela Rock sued her doctors for failing to diagnose her breast cancer. She alleged their negligence caused her cancer to spread to her lymph nodes. The district court granted the doctors' motion for summary judgment holding the statute of limitations barred Rock's claim. The court of appeals affirmed. Because Rock could not have known, and would not have known through reasonable diligence, of her injury and its cause, as a matter of law, more than two years prior to filing her claim, we vacate the decision of the court of appeals and reverse the judgment of the district court.

I. Facts and Prior Proceedings.

Pamela Rock noticed a lump in her left breast in May 2002. She called Dr. Warhank at the Family Medical Center in Blue Grass to have it examined. Rock was referred to the Center for Breast Health for a bilateral mammogram, which was performed on May 28. Rock had a follow-up appointment with Dr. Warhank on June 3. Dr. Warhank palpated Rock's left breast and located the lump. Dr. Warhank told Rock the mammogram was normal and not to worry about the lump.

Sometime on June 3 or 4, Rock received a call requesting she come in for additional views of her right breast. Rock went to the Center for Breast Health on June 4 and had additional views of the right breast taken. A technician told Rock an ultrasound was not necessary because what was seen in the earlier mammogram was no longer present. Rock reminded the technician she had a lump in her left breast and not her right breast. The technician assured Rock nothing was seen on the earlier mammogram of her left breast so she should not worry about the lump anymore. Dr. Hartung reviewed the radiology report of the right breast and advised Rock in a letter dated June 5 that the additional views of the right breast showed no sign of cancer.

In September 2002, Rock was still concerned about the lump in her left breast. She made an appointment with Dr. Kelly at the Family Medical Center. Dr. Kelly told Rock the lump was "probably benign." Nevertheless, Dr. Kelly recommended a surgical consult and referred Rock to Dr. Congreve.

Dr. Congreve performed a fine-needle aspiration on September 25. Two days later, Dr. Congreve called Rock and told her the test was not normal and she needed to have a biopsy of her left breast. On October 8, 2002, Dr. Congreve performed the biopsy and diagnosed Rock with breast cancer. Rock met with Dr. Congreve on October 11. He informed her additional tissue in her left breast needed to be removed because he did not believe he got all of the cancer. On October 18, Dr. Congreve removed the additional tissue and six lymph nodes. Five of the six nodes were cancerous. Rock had an additional surgery to remove another six nodes, one of which was cancerous. Rock was also treated with chemotherapy.

Rock filed suit against Dr. Warhank and Dr. Hartung and their employers on October 5, 2004. She claims Dr. Warhank and Dr. Hartung failed to properly examine, diagnose, and treat the cancer in her left breast. As a result of this alleged negligence, Rock claims the cancer spread to six of her twelve lymph nodes causing additional medical treatment and expense and decreasing her life span.

The defendants filed a motion for summary judgment alleging Rock's lawsuit was barred by the statute of limitations. *See* Iowa Code § 614.1(9) (2003). The district court agreed and granted the motion. Rock appealed. We transferred the case to the court of appeals, which affirmed the district court. We granted further review and now reverse.

II. Standard of Review.

[1–3] A summary judgment ruling is reviewed for correction of errors at law. *James Enter., Inc. v. City of Ames,* 661 N.W.2d 150, 152 (Iowa 2003). Summary judgment is appropriate

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Iowa R. Civ. P. 1.981(3). A question of fact exists "if reasonable minds can differ on how the issue should be resolved." *Walker v. Gribble,* 689 N.W.2d 104, 108 (Iowa 2004). The party resisting the motion for summary judgment should be afforded every legitimate inference that can reasonably be deduced from the evidence. *Clinkscales v. Nelson Secs., Inc.,* 697 N.W.2d 836, 841 (Iowa 2005).

III. Merits.

[4, 5] The issue before us is whether Rock's lawsuit was untimely. This case requires us to revisit the language of our statute of limitations for medical malpractice. Our goal is to ascertain legislative intent, which is determined by the words chosen by the legislature. *Iowa Ass'n of Sch. Bds. v. Iowa Dep't of Educ.,* 739 N.W.2d 303, 309 (Iowa 2007). When the language of a statute is plain and its meaning clear, the rules of statutory construction do not permit us to search for meaning beyond the statute's express terms. *City of Waterloo v. Bainbridge,* 749 N.W.2d 245, 248 (Iowa 2008).

[6] Under Iowa Code section 614.1(9), medical malpractice claims must be brought "within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known ... of the existence of, the injury ... for which damages are sought." "Injury" within the context of the statute is the physical or mental harm incurred by the plaintiff. *Langner v. Simpson,* 533 N.W.2d 511, 517 (Iowa 1995).

Previously, we held the statute of limitations begins to run as soon as the plaintiff knew or should have known of the physical or mental harm for which damages are sought. *Schlote v. Dawson,* 676 N.W.2d 187, 194 (Iowa 2004); *Langner,* 533 N.W.2d at 517. In *Rathje v. Mercy Hospital,* 745 N.W.2d 443 (Iowa 2008), we acknowledged our past cases may not have correctly captured the intent of the legislature. *Rathje,* 745 N.W.2d at 447. After reviewing over a hundred years of jurisprudence and the history of the tort reform movement, we came to the conclusion the statute of limitations for medical malpractice claims does not begin to run until the plaintiff knew, or should have known through reasonable diligence, of both the physical or mental harm *and its cause in fact. Id.* at 460–61. We held the plaintiff must have known, or should have known through reasonable diligence, the medical care caused or may have caused the injury. *Id.* at 461. However, it is not necessary for the plaintiff to discover the medical professional was negligent in order to trigger the statute of limitations. *Id.* at 462–63. The standard for summary judgment then is whether a reasonable fact finder could conclude Rock filed her claim within two years of when she first knew or should have known of her injury and its cause. *See Murtha v. Cahalan,* 745 N.W.2d 711, 718 (Iowa 2008) (stating "[e]ven if a fact finder concludes that [the plaintiff's] lump developed into cancer or her cancer progressed, i.e., she sustained an 'injury' for section 614.1(9) purposes, prior to the two-year period preceding the filing of her lawsuit, it is still a fact question under this record as to when she knew, or should have known, of that injury and its cause in fact"); *Rathje,* 745 N.W.2d at 463 (holding "a reasonable jury could find [the plaintiffs] did not know the cause of the harm until, at the earliest, April 27, 1999, the date the gastroenterologist made a diagnosis of 'drug-induced hepatitis secondary to antabuse' ").

[7] We filed *Murtha* on the same day as *Rathje. Murtha* provided an occasion to further refine our definition of "injury" when a plaintiff, as in this case, alleges

negligent misdiagnosis. *See Murtha*, 745 N.W.2d at 715. In *Murtha*, we said

> the "injury" does not occur merely upon the existence of a continuing undiagnosed condition. Rather, the "injury" for section 614.1(9) purposes occurs when "the problem grows into a more serious condition which poses greater danger to the patient or which requires more extensive treatment."

Id. at 717 (quoting *DeBoer v. Brown*, 138 Ariz. 168, 673 P.2d 912, 914 (1983)). Thus, two questions must be answered to determine when the statute of limitations begins to run under section 614.1(9) in a negligent misdiagnosis case. First, one must determine at what stage a plaintiff's condition became an "injury," i.e., when did the problem worsen so that it posed a greater danger to the plaintiff or required more extensive treatment. *Id.* Second, one must determine when the plaintiff knew, or should have known through reasonable diligence, of the injury and its cause in fact. *Id.* In *Murtha*, we said both of these inquiries are "highly fact-specific." *Id.* Consequently, as we said in *Murtha*, they cannot be resolved as a matter of law unless no reasonable fact finder could conclude the lawsuit was filed within two years of when the plaintiff knew or should have known of the injury and its cause.

Here, Rock alleges Drs. Warhank and Hartung's failure to properly diagnose her cancer in May and June 2002 when she reported a lump in her left breast caused her cancer to worsen and spread into her lymph nodes. *When* Rock's injury occurred must be determined by expert testimony. Since the parties in this action did not have the benefit of our *Murtha* and *Rathje* opinions when the motion for summary judgment was argued before the district court, the record is absent of any such testimony. The record does not reveal when Rock's injury occurred. Thus, we are unable to answer the first *Murtha* question—when did the injury occur—as a matter of law.

[8] However, we are able to partly answer the second *Murtha* question—when did Rock know of her injury and its cause, or when should Rock have known of her injury and its cause through reasonable diligence—as a matter of law. Rock could not have known, and should not have known, of her injury and its factual cause until the day she was diagnosed with cancer *at the earliest.* The defendants contend Rock knew or should have known of her injury and its cause no later than June 3 when Rock discussed the lump with Dr. Warhank. However, we rejected a similar contention in *Rathje.*[1] *Rathje*, 745 N.W.2d at 463. They alternatively claim Rock knew or should have known of her injury and its cause no later than September 27, 2002, when Dr. Congreve (the doctor providing the second opinion) told her the fine-needle aspiration was not normal. Under both of these theories, defendants claim her action is time barred because that date is more than two years before she filed suit.

1. *Rathje* stands for the proposition that, at a minimum, a fact question exists as to when the plaintiff knew or should have known of her injury and its cause when her treating physician offers a reasonable—albeit incorrect—explanation for her symptoms. *Rathje,* 745 N.W.2d at 463. Rathje sued her physicians for negligently prescribing a drug which ultimately caused her liver to fail. *Id.* at 446. Although she was suffering physical harm (nausea, cramping, and acid reflux) more than two years before she filed suit, we held a reasonable fact finder could conclude no facts were available prior to the diagnosis of liver failure that would have alerted a reasonably diligent person her symptoms were caused by the drug. *Id.* at 463. This determination was based on the fact her doctor diagnosed her with peptic disease and duodenitis when she complained of her symptoms. *Id.* at 445.

Rock, on the other hand, contends she neither knew nor should have known of her injury and its cause until she was diagnosed with cancer on October 8, which is within two years of when she filed suit. We agree. In answer to the second *Murtha* question, Rock could not have known, and would not have known through reasonable diligence, of her injury, the worsening of her cancer, or its cause in fact, the misdiagnosis, until she had been properly diagnosed with cancer at the earliest.

Murtha does not contradict the proposition that an individual in a misdiagnosis case could not have known, and would not have known through reasonable diligence, of her injury or its cause in fact until proper diagnosis. Although we rejected Murtha's argument "that she did not suffer an 'injury' until she was diagnosed with cancer," we did not foreclose the possibility a reasonable fact finder could conclude she neither knew nor should have known of her injury—the spread of cancer—until diagnosed with cancer.[2] *Murtha,* 745 N.W.2d at 714–15.

[9] Common law notions of inquiry notice should not be incorporated into the statute.[3] Although our dicta in *Rathje* implies the statute of limitations is triggered as a matter of law at the start of an investigation into the existence of the injury,[4] the plain language of the statute, that the claimant "knew, or through the use of reasonable diligence should have known," does not support charging the claimant with common law inquiry notice. Iowa Code § 614.1(9). Under the statute, the clock begins ticking when the claimant has actual knowledge of her injury and its cause or "*through* the use of reasonable diligence should have known" of the injury and its cause. *Id.* (emphasis added). The latter provision simply prevents the tolling of the statute of limitations if a claimant *fails* to use reasonable diligence. In other words, the "reasonable diligence" component adds an objective standard of knowledge to the statute to prevent a plaintiff

2. Like Rock, Murtha had a fine-needle aspiration that was "[n]ot within normal limits." *Murtha,* 745 N.W.2d at 712. Murtha's doctor recommended returning in six months for a follow-up mammogram. *Id.* That mammogram revealed "no definite abnormality," but "the radiologist recommended an ultrasound or biopsy be performed to ensure the lump was not malignant." *Id.* Murtha's doctor also "suggested the option of surgically removing the lump to alleviate any concerns Murtha may have about it in the future." *Id.* at 713. Murtha declined to have the lump removed at that time. *Id.*

3. In interpreting Iowa Code section 614.4 (2008), the statute of limitations for fraud, mistake, and trespass, we have held the term "knowledge" includes not only actual knowledge but also knowledge that has been imputed from the date of inquiry regardless of whether there is a diligent investigation. *Anderson v. King,* 250 Iowa 208, 214–15, 93 N.W.2d 762, 766 (1958); *Van Wechel v. Van Wechel,* 178 Iowa 491, 496, 159 N.W. 1039, 1041 (1916); *E.B. Piekenbrock & Sons v. Knoer,* 136 Iowa 534, 538, 114 N.W. 200, 202 (1907).

4. It was undisputed Rathje "knew she was suffering from physical harm" more than two years before filing suit. *Rathje,* 745 N.W.2d at 463. The case turned on whether she knew or should have known of the *cause* of her injury. *Id.* It was not necessary in *Rathje* to determine as a matter of law that the statute of limitations is triggered when a plaintiff begins an investigation into a potential injury and its cause. In *Rathje* we said "a reasonable jury could find [the Rathjes] did not know the cause of the harm until, at the earliest, April 27, 1999, the date the gastroenterologist made a diagnosis of 'drug-induced hepatitis secondary to Antabuse.'" *Id.* Applying common law notions of inquiry notice, the statute of limitations would have been triggered as a matter of law on the previous day, when blood tests revealed "abnormal results" because that is the date that began her investigation into the cause of her injury. *See id.* at 446.

from benefiting from willful or reckless ignorance.[5] The word "through" in the context of the statute means "by way of," "by means of," or "because of." Merriam–Webster's Collegiate Dictionary 1226 (10th ed. 2002). It could also mean "to completion, conclusion, or accomplishment." *Id.* Replacing the word "through" in section 614.1(9) with the clause "at the beginning of" as *Rathje* suggests makes the statute nonsensical because it is not until the conclusion of an investigation that a plaintiff "should have known" of her injury and cause.[6]

It is inconsistent with the plain language of the statute to charge Rock—a layperson—with knowledge of facts before Dr. Congreve—an expert—knows these facts or conveys them to her. If we were to hold the statute of limitations begins to run at the start of an investigation into the existence of a possible injury, then the statute would always be triggered prior to the date the plaintiff gained actual knowledge of the injury unless the injury was immediately apparent. Such a holding would eliminate any reasonable application of the discovery rule in medical malpractice claims. Moreover, the cases relied upon in *Rathje—United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979); *Franzen v. Deere & Co.*, 377 N.W.2d 660 (Iowa 1985)—do not stand for the proposition that the statute of limitations begins to run at the start of an investigation into a possible injury. Instead, both cases hold the statute is triggered once the plaintiff knows of her injury and its cause. *See Kubrick*, 444 U.S. at 122, 100 S.Ct. at 359, 62 L.Ed.2d at 269 (stating the statute of limitations is triggered once the plaintiff is "in possession of the critical facts that he has been hurt and who has inflicted the injury"); *Franzen*, 377 N.W.2d at 663 (stating the statute of limitations began to run on the date of the injury because the plaintiff "knew the instrumentality that caused the injury at the time it occurred" and "knew the injury was caused when [plaintiff] became entangled in the beaters of the forage wagon"). Thus, the clause "through the use of reasonable diligence should have known" does not charge a patient with knowledge that could not have been reasonably discovered at the time. Iowa Code § 614.1(9).

[10] Finally, we must adhere to the bedrock principle we use when interpreting statutes of limitations: "When two interpretations of a limitations statute are possible, the one giving the longer period to a litigant seeking relief is to be preferred and applied." *Orr v. Lewis Cent. Sch. Dist.*, 298 N.W.2d 256, 261 (Iowa 1980). We rely on this principle because statutes of limitations are disfavored. *Id.*

Notwithstanding the lack of evidence in the record regarding when Rock's injury occurred, we conclude the record does establish as a matter of law that Rock could not have known, and would not have known through reasonable diligence, of her injury (the spread of cancer) and its cause (the misdiagnosis) more than two years prior to filing this action. Summary judgment was improperly granted.

IV. Conclusion.

We conclude summary judgment was not appropriate in this case because as a matter of law Rock filed suit within two

5. No one disputes Rock used "reasonable diligence" to determine her injury and its cause in fact.

6. Here is *Rathje's* modified version of the statute: "after the date on which the claimant knew, or [at the beginning of] the use of reasonable diligence should have known ... of the existence of, the injury" and its cause. Iowa Code § 614.1(9).

years of when she knew or should have known of her injury and its cause in fact. We reverse and remand for further proceedings.

DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT REVERSED AND REMANDED.

All justices concur except TERNUS, C.J., and CADY, J., who concur specially and BAKER, J., who takes no part.

TERNUS, Chief Justice (concurring specially).

I concur in the court's conclusion that Rock neither "knew, [nor] through the use of reasonable diligence should have known . . . of the existence of, [her] injury" until, at the earliest, she was informed she had cancer. Iowa Code § 614.1(9). I do not concur in the gratuitous and inconsistent discussion regarding inquiry notice.

CADY, J., joins this special concurrence.

Gomez v Katz

2009 NY Slip Op 01082

Decided on February 10, 2009

Appellate Division, Second Department

Dillon, J., J.

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Decided on February 10, 2009

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

ROBERT A. SPOLZINO, J.P.
MARK C. DILLON
DAVID S. RITTER
THOMAS A. DICKERSON, JJ.

2007-08828
(Index No. 9994/04)

[*1]Maria Gomez, respondent, et al., plaintiff,

v

Neil Katz, et al., appellants.

APPEAL by the defendants, as limited by their brief, in an action, inter alia, to recover damages for medical malpractice, etc., from so much of an order of the Supreme Court (Gerald E. Loehr, J.), entered August 17, 2007, in Westchester County, as denied that branch of their motion which was for summary judgment dismissing as time-barred the causes of action asserted by the plaintiff Maria Gomez.

Rende, Ryan & Downes, LLP, White Plains, N.Y. (Roland T.

Koke of counsel), for appellants.
Meagher & Meagher, P.C., White Plains, N.Y. (Christopher B.
Meagher of counsel), for respondent.

OPINION & ORDER

DILLON, J.We are asked on this appeal to consider whether a patient's consultation with a new physician severs the patient's relationship with her initial physician for purposes of the "continuous treatment" toll of the statute of limitations. We also consider whether, under the circumstances of this case, a 24-month gap in the patient's treatment with her initial physician requires a finding that the physician's treatment is not continuous.

I. *Relevant Facts*

On June 29, 1999, the defendant, Dr. Neil Katz, a member of the defendant Westchester Eye Associates (hereinafter together the defendants), performed LASIK surgery upon the eyes of the plaintiff Maria Gomez, to correct her vision. Dr. Katz and Gomez discussed the risks of the procedure prior to the surgery. Such risks included discomfort, visualizing halos, glare and distortion, infection, scarring, loss of best corrected visual acuity, the need for enhancement surgery, and the need for a cornea transplant.

Medical records and deposition testimony provided by Dr. Katz revealed post-operative visits [*2]on June 30, 1999, July 9, 1999, July 19, 1999, November 24, 1999, May 10, 2000, and 24 months later on May 16, 2002. Dr. Katz's chart also notes an undated post-operative telephone call from Gomez regarding her eyes. During many of these visits and during the undated phone call, Gomez complained of eye conditions that were consistent with some of the disclosed risks of LASIK surgery, such as glare in her visual field, dry eyes, and blurry vision. Dr. Katz conducted two cornea topographic studies during the July 19, 1999, and November 24, 1999, post-operative consultations. Gomez's presentation on May 16, 2002, when she again complained of deteriorating vision, was the last time Dr. Katz examined her eyes.

On April 4, 11, and 18, 2002, Gomez presented to a nonparty ophthalmologist, Dr. Jay Lippman of the Eye Care Center in New Rochelle. Gomez complained to Dr. Lippman of dry eyes, blurry vision, and difficulties with reading fine print. She received a full eye examination and new prescription contact lenses.

Dr. Katz testified at his deposition that Gomez had been diagnosed with myopic and retinal degeneration prior to the LASIK surgery. He had pre-operatively discussed this diagnosis with Gomez as potentially worsening over time regardless of whether the LASIK procedure was performed. In Dr. Katz's opinion, Gomez's post-operative complaints were attributable to her preexisting condition of central myopic and retinal degeneration. In contrast, Gomez maintains that she never experienced halos, glare, and dry eyes until after the LASIK procedure had been performed.

Gomez commenced this action by the filing of a summons and complaint on July 2, 2004, more than 2 ½ years after the performance of the LASIK surgery and the early post-operative visits. Gomez seeks to recover damages for significant permanent loss of vision sustained as a result of the alleged medical malpractice of the defendants. The defendants' answer contained an affirmative defense that the action was barred by the applicable statute of limitations.

The defendants moved for summary judgment on the ground that Gomez's action was time-barred under CPLR 214-a. In support of their motion, the defendants raised three specific points, which they reiterate on appeal. First, the defendants contend that continuous treatment ended with the post-operative follow-up visit on November 24, 1999, as the May 10, 2000, visit did not involve post-operative care, thus rendering the action untimely by more than two years. Second and alternatively, the defendants contend that the 24-month gap between Gomez's consultations with Dr. Katz on May 10, 2000, and May 16, 2002, is too attenuated to constitute "continuous treatment" under CPLR 214-a. Third, the defendants contend that Gomez's treatment with Dr. Lippman in April 2002 severed the continuity of Dr. Katz's treatment between May 2000 and May 2002.

In the order appealed from, the Supreme Court, inter alia, denied that branch of the defendants' motion which was for summary judgment dismissing the causes of action asserted by

Gomez. The Supreme Court found a triable issue of fact as to whether Gomez received continuous treatment from the defendants for the same complaints giving rise to the medical malpractice claim. For reasons discussed below, and under the circumstances of this case, we affirm.

II. *The Continuous Treatment Doctrine*

Pursuant to CPLR 214-a, "[a]n action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of" (*see generally Davis v City of New York*, 38 NY2d 257, 259). However, the statute has a built-in toll that delays the running of the limitations period "where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure" (CPLR 214-a). Under the continuous treatment doctrine, the 2½ year period does not begin to run until the end of the course of treatment, "when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint" (*Nykorchuck v Henriques*, 78 NY2d 255, 258; *see also Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 295; *[*3]Allende v New York City Health & Hosps. Corp.*, 90 NY2d 333, 337; *McDermott v Torre*, 56 NY2d 399, 405).

The underlying premise of the continuous treatment doctrine is that the doctor-patient relationship is marked by continuing trust and confidence and that the patient should not be put to the disadvantage of questioning the doctor's skill in the midst of treatment, since the commencement of litigation during ongoing treatment necessarily interrupts the course of treatment itself (*see Massie v Crawford*, 78 NY2d 516, 519; *see also Coyne v Bersani*, 61 NY2d 939, 940; *Siegel v Kranis*, 29 AD2d 477, 480). Implicitly, the doctrine also recognizes that treating physicians are in the best position to identify their own malpractice and to rectify their negligent acts or omissions (*see Allende v New York City Health & Hosps. Corp.*, 90 NY2d at 338; *Ganess v City of New York*, 85 NY2d 733, 735; *Cooper v Kaplan*, 78 NY2d 1103, 1104; *McDermott v Torre*, 56 NY2d at 408).

The continuous treatment doctrine contains three principal elements. The first is that the plaintiff continued to seek, and in fact obtained, an actual course of treatment from the defendant physician during the relevant period (*see Nykorchuck v Henriques*, 78 NY2d at 259; *Stahl v*

Smud, 210 AD2d 770, 771; *Polizzano v Weiner*, 179 AD2d 803, 804). The term "course of treatment" speaks to affirmative and ongoing conduct by the physician such as surgery, therapy, or the prescription of medications (*see Marabello v City of New York*, 99 AD2d 133, 146). A mere continuation of a general doctor-patient relationship does not qualify as a course of treatment for purposes of the statutory toll (*see Nykorchuck v Henriques*, 78 NY2d at 259; *McDermott v Torre*, 56 NY2d at 405; *Nespola v Strang Cancer Prevention Ctr.*, 36 AD3d 774; *Norum v Landau*, 22 AD3d 650, 652). Similarly, continuing efforts to arrive at a diagnosis fall short of a course of treatment (*see Nykorchuck v Henriques*, 78 NY2d at 259; *McDermott v Torre*, 56 NY2d at 406), as does a physician's failure to properly diagnose a condition that prevents treatment altogether (*see Young v New York City Health & Hosps. Corp.*, 91 NY2d at 297; *Nykorchuck v Henriques*, 78 NY2d at 259; *McDermott v Torre*, 56 NY2d at 406).

A second element of the doctrine is that the course of treatment provided by the physician be for the same conditions or complaints underlying the plaintiff's medical malpractice claim (*see Nykorchuck v Henriques*, 78 NY2d at 259; *Borgia v City of New York*, 12 NY2d 151, 157; *Couch v County of Suffolk*, 296 AD2d 194, 197; *Lane v Feinberg*, 293 AD2d 654; *Grassman v Slovin*, 206 AD2d 504; *see e.g. Massie v Crawford*, 78 NY2d at 516 [continuous treatment doctrine inapplicable where routine periodic gynecological examinations were not related to the pelvic inflammatory disease allegedly caused by the intrauterine device installed by the physician fourteen years earlier]; *Davis v City of New York*, 38 NY2d at 257 [contacts by telephone and mail nearly two years after the alleged malpractice insufficient to constitute medical services]).

The third element of the doctrine is that the physician's treatment be deemed "continuous." Continuity of treatment is often found to exist "when further treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during the last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past" (*Richardson v Orentreich*, 64 NY2d 896, 898-899; *see Allende v New York City Health & Hosps. Corp.*, 90 NY2d at 338; *Cox v Kingsboro Med. Group*, 88 NY2d 904, 906-907; *Roca v Perel*, 51 AD3d 757; *Kaufmann v Fulop*, 47 AD3d 682, 684; *Monello v Sottile, Megna*, 281 AD2d 463, 464; *McInnis v Block*, 268 AD2d 509). The law recognizes, however, that a discharge by a physician does not preclude

application of the continuous treatment toll if the patient timely initiates a return visit to complain about and seek further treatment for conditions related to the earlier treatment (*see McDermott v Torre*, 56 NY2d at 406; *Ramos v Rakhmanchik*, 48 AD3d 657, 658; *Shifrina v City of New York*, 5 AD3d 660, 662; *Couch v County of Suffolk*, 296 AD2d at 197).

Here, the defendants established their prima facie entitlement to judgment as a matter of law [*4]by demonstrating that this action was commenced more than two years and six months after November 24, 1999 (*see* CPLR 214-a), which is the date of the last post-operative visit which the defendants concede represents a continuation of the LASIK surgery treatment (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Marks v Model*, 53 AD3d 533; *Batiste v Brooklyn Hosp. Ctr.*, 255 AD2d 474, 475; *see generally LaRocca v DeRicco*, 39 AD3d 486). At issue here, in the context of summary judgment, is whether Gomez's papers in opposition raised a triable issue of fact as to further continuing treatment, requiring trial (*see Lane v Feinberg*, 293 AD2d at 655; *Weber v Bay Ridge Med. Group*, 220 AD2d 408, 409; *Kasten v Blaustein*, 214 AD2d 539; *Grassman v Slovin*, 206 AD2d at 504; *Washington v Elahi*, 192 AD2d 704).

III. *The May 10, 2000, Visit as Continuous Treatment*

The defendants maintain that the last continuing treatment, by which the 2½ year statute of limitations should be measured, was provided on November 24, 1999, rendering the action time-barred. They argue that the office visit which followed on May 10, 2000, does not qualify as continuous treatment, as Dr. Katz's medical chart for that date expressly notes that for the purpose of insurance coverage, it was not post-operative care. If the defendants are correct that Gomez's presentation on May 10, 2000, does not qualify as continuous treatment, then that date cannot act as a bridge to her last visit on May 16, 2002, against which the commencement of Gomez's action would be timely.

We find that, notwithstanding Dr. Katz's chart notation that the visit on May 10, 2000, did not involve post-operative care, a question of fact exists under the circumstances of this case as to whether it actually did constitute post-operative care. Dr. Katz's chart entry, which conceivably could have been self-serving in light of Gomez's ongoing complaints, cannot be viewed as dispositive (*cf. Lawyer v Albany Med. Ctr. Hosp.*, 246 AD2d 800, 802). The chart notation was made, according to Dr. Katz's deposition testimony, to assure Gomez coverage

under a new policy of insurance. Further, Gomez's own self-serving statement in her opposing affidavit that all of her visits with Dr. Katz after November 24, 1999, were for treatment of post-operative complications and complaints secondary to the LASIK surgery is not dispositive, as continuing treatment must be anticipated by both the physician and the patient (*see Allende v New York City Health & Hosps. Corp.*, 90 NY2d at 338; *Cox v Kingsboro Med. Group*, 88 NY2d at 906; *Richardson v Orentreich*, 64 NY2d at 898-890; *Sarjoo v New York City Health & Hosps. Corp.*, 309 AD2d 34, 41; *McInnis v Block*, 268 AD2d at 509).

Instead, an examination of the objective facts demonstrates that during the visit on May 10, 2000, Gomez complained of glare, blurred vision, the complete fogging of her right eye, and an impaired ability to read. Her complaints of glare and blurred vision on May 10, 2000, mimicked some of the complaints she made during the earlier visit on November 24, 1999. The documented complaints of glare and blurred vision are among the specific risk factors of LASIK surgery which Dr. Katz conceded at deposition had been discussed with Gomez prior to the procedure. Thus, there is an objective continuity from November 24, 1999, to May 10, 2000, of the ophthalmological complaints expressed to Dr. Katz, and a correlation of those complaints with the risk factors of the LASIK surgery Gomez had received (*cf. Klotz v Rabinowitz*, 252 AD2d 542; *DiFilippi v Huntington Hosp.*, 203 AD2d 321; *Winant v Freund*, 162 AD2d 681). While the visit on May 10, 2000, might not have been scheduled at the conclusion of the visit on November 24, 1999, we recognize that, as a practical matter, it is not always possible to know at the conclusion of one visit with a physician whether a further visit with the physician may become indicated for the same condition within a reasonable time thereafter. Accordingly, Gomez's return visit to Dr. Katz on May 10, 2000, raises a triable issue of fact as to whether the services rendered by Dr. Katz represent continuous treatment within the scope of CPLR 214-a (*see Ramos v Rakhamanchik*, 48 AD3d at 658; *Shifrina v City of New York*, 5 AD3d at 662).

[*5]IV. *Treatment with Dr. Lippman in April 2002 Did Not as a Matter of Law Sever Continuous Treatment with Dr. Katz*

The defendants maintain that any continuous treatment with Dr. Katz was severed when Gomez made three visits to another ophthalmologist, Dr. Lippman, on April 4, April 11, and April 18, 2002. The defendants further argue that Gomez's office visit with Dr. Katz on May 16,

2002, after her visits with Dr. Lippman, constitute, at best, a "renewal" of treatment, not encompassed by the continuous treatment doctrine (*see Rizk v Cohen*, 73 NY2d 98, 100; *Spear v Rish*, 161 AD2d 197, 198).

Whether or not a patient's consultation with a new physician constitutes a severance of continuous treatment with an earlier physician depends upon the reasons underlying the new consultation. The continuing "trust and confidence" of a patient in the physician is, by nature, a question of fact requiring an examination of the unique facts and circumstances of each case (*see Colodner v Columbia Presbyt. Med. Ctr*., 223 AD2d 429).

In some actions, courts have found that a patient's consultation with new medical providers severs the continuing trust and confidence in the original health care providers that underly the continuous treatment doctrine. Thus, in *Allende v New York City Health & Hosps. Corp*. (90 NY2d 333), the plaintiff therein saw several different physicians after her discharge from Lincoln Hospital Center, explaining in testimony that she "did not have any faith any more" in the hospital. The Court of Appeals logically determined that the plaintiff had lost continuing trust and confidence in the hospital, as a result of which the continuous treatment toll would be inapplicable (*see Allende v New York City Health & Hosps. Corp*., 90 NY2d at 339).

The defendants rely upon, for a similar conclusion, *Kennedy v Decker* (237 AD2d 576) from this Court and *Hall v Luthra* (206 AD2d 890) from the Appellate Division, Fourth Department. Neither case is particularly helpful to the defendant since each is readily distinguishable on its facts. In *Kennedy*, the plaintiff sought to impute to her original physician the subsequent treatment she received from other physicians (*Kennedy v Decker*, 237 AD2d at 577), which is not at issue here. In *Hall*, the plaintiff ignored her physician's direction to return for further treatment and instead sought treatment from other physicians in the interim (*see Hall v Luthra*, 206 AD2d at 891). Here, Gomez did not refuse any direction by Dr. Katz to return to him for additional treatment.

At the other end of the interim treatment spectrum, there are cases which hold that a patient's consultation with a new physician does not necessarily evince an intention, in and of itself, to terminate a continuous treating relationship with the original physician (*see Rudolph v*

Jerry Lynn D.D.S., P.C., 16 AD3d 261, 262-263; *Marmol v Green*, 7 AD3d 682, 682-683; *Melup v Morrissey*, 3 AD3d 391, 392). In *Rudolph*, the defendant was sued for malpractice relative to the implantation of dental crowns. This Court held that continuous treatment was not interrupted by the plaintiff's interim checkup and teeth cleaning provided by another dentist, even though the plaintiff discussed her crowns with the interim dentist in furtherance of that checkup (*see Rudolph v Jerry Lynn D.D.S., P.C.*, 16 AD3d at 262-263). In *Marmol*, continuous treatment with the original physician was not interrupted where the plaintiff consulted with other physicians to obtain, inter alia, second opinions (*see Marmol v Green*, 7 AD3d at 682-683). Similarly, in *Melup*, continuous treatment was not severed where the plaintiff consulted with other internists who did not provide actual treatment to the precise part of the body that had been treated by the defendants (*see Melup v Morrissey*, 3 AD3d at 391-392).

Here, the plaintiff presented to Dr. Lippman to obtain new prescription contact lenses. Evidence in the record does not suggest an alternative basis for seeing Dr. Lippman. Necessarily, Dr. Lippman discussed with Gomez the condition of her eyes and performed a full eye examination. On this record, it cannot be determined as a matter of law that Gomez's visits to Dr. Lippman [*6]manifest a termination of her continuing trust and confidence in Dr. Katz with respect to her LASIK treatment and complications, particularly as Gomez consulted with Dr. Katz only one month later, on May 16, 2002 (*see Rudolph v Jerry Lynn D.D.S., P.C.*, 16 AD3d at 262-263; *Marmol v Green*, 7 AD3d at 682-683; *Melup v Morrissey*, 3 AD3d at 391-392). Thus, the Supreme Court correctly identified a triable issue of fact as to whether or not Gomez continued to seek treatment from the defendants for the same complaints which gave rise to the malpractice action or if her treatment with Dr. Lippman severed such a relationship and rendered the continuous treatment doctrine inapplicable.

V. *The May 16, 2002, Visit as Continuous Treatment*

We agree with the Supreme Court that a triable issue of fact exists as to whether Gomez's presentation to Dr. Katz on May 16, 2002, constituted continuous treatment, despite the 24-month gap that existed from the last office visit between Gomez and Dr. Katz.

As a threshold matter, Gomez complained on May 16, 2002, of symptoms similar to earlier complaints, such as frequent dry eyes, and there was a slight decrease in her visual acuity. These complaints arguably relate to earlier complaints and to the original LASIK surgery.

The more significant issue relative to the visit on May 16, 2002, is its delay measured from Gomez's previous visit to Dr. Katz on May 10, 2000. Decisional authorities do not draw a bright line between treatment that is sufficiently proximate in time as to be deemed "continuous," and treatment that is too chronologically remote to constitute a continuation of earlier treatment.

Here, 24 months elapsed between the office visits of May 10, 2000, and May 16, 2002. Triable issues of fact have been recognized in the context of continuous treatment for longer gaps in treatment than presented here (*e.g. Gehbauer v Baker*, 292 AD2d 255 [25- month gap]; *Klotz v Rabinowitz*, 252 AD2d at 542 [27-month gap]; *Edmonds v Getchonis*, 150 AD2d 879, 881 [27-month gap]; *Siegel v Wank*, 183 AD2d 158 [27-month gap]; *Levy v Schnader*, 96 AD2d 854, 854-855 [27-month gap]; *see also Rudolph v Jerry Lynn D.D.S., P.C.*, 16 AD3d at 261 [22-month gap]). While the treatment gap here extends to almost the outer reaches of continuous treatment case law, it does not exceed the limits of decisional authority, and we cannot, on the record before us, conclude as a matter of law that the continuous treatment doctrine is inapplicable.

In light of our determination, the parties' remaining contentions either are without merit or have been rendered academic.

Accordingly, the order is affirmed insofar as appealed from.
SPOLZINO, J.P., RITTER, and DICKERSON, JJ., concur.

ORDERED that the order is affirmed insofar as appealed from, with costs.

ENTER:
James Edward Pelzer
Clerk of the Court

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

ALBERT ANAYA BURGOS,

Plaintiff,

Civil No. 07-1053 (JAF)

v.

DR. EDUARDO M. LASALVIA-PRISCO, et al.,

Defendants.

OPINION AND ORDER

This is a diversity jurisdiction medical malpractice action filed by Albert Anaya Burgos for the death of his wife Juana Ramos. The Defendants are Dr. Eduardo Lasalvia-Prisco and Pharmablood, Inc., both Florida citizens. We adopt Defendants' arguments in favor of the entry of judgment as a matter of law setting aside the $500,000 verdict by the jury. Fed. R. Civ. P. 50.

Legal Standard

The district court may grant a Motion filed pursuant to Rule 50(b) of the Federal Rules of Civil Procedure if, after examining all the evidence and all reasonable inferences therefrom in the light most favorable to the non-movant, it determines that the evidence could lead a reasonable person to only one conclusion favorable to the movant. See, e.g., Caldwell Tank, Inc., v. Haley Ward Inc., 471 F.3d 210 (1st Cir. 2006); Aetna Casualty and Surety Company v. P.B. Auto Body, 43 F.3d 1546 (1st Cir. 1994); Gallagher v. Wilton Enterprises, Inc., 962 F.2d 120 (1st Cir. 1992). Nevertheless, a

verdict cannot be sustained based on a mere scintilla of evidence favoring the non-movants. Absent a finding by the court that the evidence before the jury was such that it could properly find against the movant, judgment in favor of the movant is required.

A Note on Defendant Dr. Lasalvia-Prisco

Dr. Eduardo Lasalvia-Prisco was, according to Plaintiff's expert, Dr. Fernando Cabanillas, a phony oncologist whose medical research, cancer vaccines, and treatments were not approved by the Federal Drug Administration. Although the court shares Dr. Cabanillas' views on this subject, we must address the issues in this case not as a punishment to Dr. Lasalvia-Prisco's unorthodox methods, but as a court searching for the reasons that indeed contributed to the tragic results in this case. That being said, the only logical conclusion is that Juana Ramos and her husband, Plaintiff Albert Anaya, knowingly elected to refuse conventional treatment for her diagnosed breast-cancer condition. Dr. Lasalvia's quackery was not the cause of Juana Ramos' demise. Only her own election of medical remedies and the devastating nature of the disease caused her death.

Facts Proven at Trial

The undisputed facts developed at trial conclusively established the following:

1. Both the Plaintiff, Mr. Albert Anaya Burgos, and the decedent, Juana Ramos, were educated people. Specifically, Mr. Anaya

had attended college and received an Associate's Degree, while Ms. Ramos, who also attended college, received a Bachelor's Degree and was working toward her Master's Degree in Business Administration.

2. Following a series of mammographies conducted at Guayama Diagnostics in July 2002 and September 2002, Ms. Ramos underwent a lumpectomy performed by Dr. Roque Nido in April of 2003. During that procedure, a tumor and surrounding breast tissue measuring 4 x 2.5 x 1.6 centimeters were resected and submitted to Southern Pathology Services for evaluation. On or about April 17, 2003, Southern Pathology Services issued a report indicating that Ms. Ramos was suffering from invasive duct carcinoma with a predominant cribiform type.

3. Upon learning of the cancer diagnosis on or about April 17, 2003, Ms. Ramos and Mr. Anaya forthwith discussed their options with a reputed surgeon, Dr. Roque Nido. Dr. Nido recommended that Ms. Ramos undergo a mastectomy. Ms. Ramos declined and began seeking other opinions.

4. In early May 2003, Ms. Ramos visited the Center for Advanced Oncology at Hospital Andrés Grillasca, in Ponce, Puerto Rico, looking for other options for her condition. At that institution, Ms. Ramos consulted with Dr. Felipe Sánchez. After Ms. Ramos' case was presented to the Hospital's tumor board, it was

recommended that Ms. Ramos undergo a radical mastectomy. Again, Ms. Ramos declined and sought further opinions.

5. On approximately May 23, 2003, Ms. Ramos and Mr. Anaya visited Dr. Rafael Rizek, who diagnosed Ms. Ramos with inflammatory cancer of the right breast. As plaintiff's expert, Dr. Fernando Cabanillas, conceded at trial, inflammatory cancer is a rare type of invasive duct carcinoma that spreads so rapidly that, if left untreated, will result in the death of the patient within six to twelve months. Dr. Rizek, after presenting Ms. Ramos' case to a tumor board, recommended that she undergo chemotherapy followed by surgery, followed by radiation therapy. On June 6, Ms. Ramos was scheduled to undergo or begin chemotherapy, but she did not begin the chemotherapy. She never returned to Dr. Rizek, and there is a note on documents generated by Dr. Rizek's intervention to the effect that Ms. Ramos even refused to sign the informed consent form for chemotherapy.

6. Ms. Ramos' medical insurance had paid for all previous treatments rendered by her various doctors and a letter from the insurance company in Dr. Rizek's file demonstrates that chemotherapy treatments were authorized by the insurance company effective June 6, 2003. Insurance coverage was never an issue.

7. At or about the time she consulted with Dr. Rizek, Ms. Ramos consulted with unidentified natural healers at their homes in Guayama, Puerto Rico. The healers recommended natural treatment for

her cancer and began her on a protocol of vitamins and other natural substances which she purchased at various stores.

8. According to Mr. Anaya's testimony, at some point Ms. Ramos decided to consult with Defendants, Dr. Lasalvia/Pharmablood, after hearing information on the radio concerning a new cancer vaccine.

9. Ms. Ramos initially visited Pharmablood on July 10, 2003, and again on July 21, 2003. The Pharmablood records concerning these early visits show not only that Ms. Ramos was treating her cancer via a natural diet, but also reflect that she was refusing and had refused chemotherapy, surgery, radiation, or other invasive treatments. Moreover, despite Mr. Anaya's contentions that she had been promised a cure by Dr. Lasalvia, the Pharmablood informed consent form that was signed by Ms. Ramos makes no such representation. Rather, that form makes clear that she was receiving the vaccine because, inter alia, she had rejected traditional treatments.

On this subject, Dr. Cabanillas testified that whatever information or literature he had seen concerning the vaccine made it clear that the vaccine was not promoted as a cure for cancer, but rather as a tool or weapon in the fight against cancer after traditional treatments had failed or were otherwise not an acceptable alternative.

10. In the middle of June 2004, Ms. Ramos was hospitalized due to difficulty in breathing. Tests conducted at that time suggested

that her cancer had spread to her lungs and she went to the cancer center at Hospital Auxilio Mutuo in San Juan for treatment under Dr. Cabanillas and his associates. Mr. Anaya conceded in his testimony that at that point Ms. Ramos was in bad condition, needed help, and they were going to be accurate, truthful, and complete in disclosing the specifics of her condition and prior course of treatment to her new doctor. Following that admission, Mr. Anaya confirmed that they (Ms. Ramos and Mr. Anaya) told Dr. Jorge Perdomo Medrano at Hospital Auxilio Mutuo that "the patient refused to be under standard treatment and she went for alternative treatment under Dr. Lasalvia." That information is reflected in Dr. Perdomo's report dated July 1, 2004.

11. Dr. Fernando Cabanillas affirmed the content of his expert report prepared on December 3, 2007, where he stated,

> [T]he patient apparently started on a naturopathic treatment according to the history she and her husband provided to us on 6/29/04 and decided not to take the neoadjuvent chemotherapy recommended by her oncologists and decided not to have the mastectomy recommended by her surgeon. Subsequently, she visited Dr. Lasalvia at San Juan Batista Medical Center.

12. Dr. Cabanillas conceded that if in fact Ms. Ramos had rejected the treatment recommended by her doctors, i.e., chemotherapy, surgery, and radiation therapy, then there was nothing that Dr. Lasalvia did to cause or to contribute to her death.

Conclusion

Medical malpractice is based on principles of negligence under the Puerto Rico Civil Code, 31 L.P.R.A. § 5141. Here, the only plausible finding to be made is that the unfortunate event that led to the death of Juana Ramos is that Ms. Ramos refused recommended conventional medical treatment. Neither Dr. Lasalvia-Prisco nor the cancer vaccine he offered caused the death of the patient.

The favorable verdict returned by the jury in favor of Plaintiff must be set aside and judgment as a matter of law shall enter in favor of Defendants.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 13th day of November, 2008.

S/José Antonio Fusté
JOSE ANTONIO FUSTE
Chief U. S. District Judge

COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1051 **Cir. Ct. No. 2014CV116**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

LUANN BRESLIN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CODY L. REINDAHL AND RICHARD L. REINDAHL,

PLAINTIFFS-APPELLANTS,

V.

WISCONSIN HEALTH CARE LIABILITY INSURANCE PLAN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed*.

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Luann Breslin's son, Cody Reindahl, committed suicide while in the care of Trempealeau County Health Care Center (TCHCC)

under a voluntary WIS. STAT. ch. 51 (2015-16)[1] commitment. Breslin sued TCHCC and its insurer, Wisconsin Health Care Liability Insurance Plan, alleging that TCHCC was negligent in caring for Reindahl, resulting in Reindahl's suicide. As an affirmative defense, TCHCC alleged that Reindahl was contributorily negligent for failing to avoid committing suicide although Reindahl appreciated the risk of doing so. The case was tried to a jury, and the jury returned a verdict finding TCHCC 20% negligent in caring for Reindahl and Reindahl 80% contributorily negligent.

¶2 This appeal involves two questions included in the special verdict. The sole issue on appeal is whether the court erroneously exercised its discretion by including the two questions on the special verdict relating to Reindahl's ability to appreciate the risk of harm from committing suicide and the duty to avoid taking his own life, and whether he was negligent with respect to his safety. Breslin argues that we should expunge these questions as a matter of law, which would result in TCHCC being the only negligent party in Reindahl's death. We conclude that under controlling law the court properly exercised its discretion in including those questions on the special verdict, and therefore, we affirm.

BACKGROUND

¶3 The following facts are taken from the record. This case involves changes in Reindahl's behavior beginning in July 2011 until he died several months later.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶4 While Reindahl was in high school and after he graduated from high school in 2005, Reindahl was highly accomplished in sports, he graduated from high school with honors, and he was generally known in the community as being a high-spirited, nice, and polite young man.

¶5 During the summer of 2011, however, Reindahl's mood and behavior changed significantly and within the next two months he twice attempted suicide. On August 26, 2011, Reindahl agreed to a WIS. STAT. ch. 51 commitment, and he was transferred to TCHCC. TCHCC is a facility that provides mental health care and treatment to help people suffering from mental health issues reintegrate in to the community.

¶6 Upon being placed at TCHCC Reindahl underwent an initial assessment to determine the mental health issues with which he presented. Based on the initial assessment, Reindahl was diagnosed as being psychotic and presenting a suicide risk. Reindahl was placed in the facility's most secure unit, in which patients are not allowed to have items that may be used to commit suicide, such as shoelaces. A week later, Reindahl was transferred to a less restrictive unit because his health care providers determined that his mental health had improved. While Reindahl was in the less restrictive unit, TCHCC staff conducted safety checks on Reindahl every fifteen minutes. Despite these safety checks, Reindahl committed suicide on September 10, 2011.

¶7 Reindahl's mother, Breslin, sued TCHCC and its liability insurer alleging medical negligence. TCHCC alleged the affirmative defense of contributory negligence on Reindahl's part. The case was tried to a jury. The jury was given a special verdict form, which asked seven questions. The first two

special verdict questions asked whether TCHCC was negligent and whether this negligence was a cause in Reindahl's death. The jury answered "yes" to both.

¶8 The third question asked: "Was Cody L. Reindahl totally unable to appreciate the risk of harm that led to his death and his duty to avoid that risk?" The jury answered "no" to Question 3. Question 4 asked: "Was Cody L. Reindahl negligent with respect to his own safety?" The jury answered "yes" to Question 4. Question 5 asked: "Was Cody L. Reindahl's negligence a cause of his own death?" The jury answered "yes" to Question 5.

¶9 At the conclusion of trial, Breslin moved for judgment notwithstanding the verdict asking the circuit court to strike the jury's answers to Questions 3 and 4. The court denied Breslin's motion and entered judgment on the verdict. Breslin appeals.

STANDARD OF REVIEW

¶10 A circuit court has "wide discretion" to determine special verdict questions, and its determination will not be disturbed on appeal "unless the court has erroneously exercised its discretion." ***Gumz v. Northern States Power Co.***, 2007 WI 135, ¶23, 305 Wis. 2d 263, 742 N.W.2d 271. An erroneous exercise of discretion occurs if the special verdict does not "cover all issues of fact" or if the questions are "inconsistent with the law." ***Id***. at ¶24. "Whether a special verdict reflects an accurate statement of the law applicable to the issues of fact in a given case presents a question of law," which we review de novo. ***Id.***

DISCUSSION

¶11 Breslin contends that the circuit court erroneously exercised its discretion in the formulation of the special verdict by including two questions

concerning Reindahl's contributory negligence, specifically Questions 3 and 4.[2] When designing the special verdict, the circuit court followed the legal principles outlined by the Wisconsin Supreme Court in ***Hofflander v. St. Catherine's Hosp., Inc.***, 2003 WI 77, 262 Wis. 2d 539, 664 N.W.2d 545. Breslin argues that ***Hofflander*** does not apply to the facts of this case. We pause to briefly discuss the pertinent legal principles established in ***Hofflander***.

¶12 ***Hofflander*** established a "custody and control" rule for apportioning negligence when a plaintiff with mental health issues suffers a self-inflicted injury while in the care of a defendant mental health care facility. ***Id.***, ¶35. The "custody and control" rule is an exception to the ordinary negligence standard, which "contemplates the possibility of a heightened duty of care for a defendant and a lowered duty of self-care for a plaintiff" if certain threshold facts establish a special custodial relationship between the plaintiff and defendant. ***Id.***, ¶¶46, 48. Important here, if the fact finder determines that the plaintiff "was totally unable to appreciate the risk of harm and the duty to avoid it" then the plaintiff's contributory negligence is expunged, but if not, "the finder of fact should compare the defendant's negligence to the plaintiff's contributory negligence using a subjective standard to evaluate the mentally disabled plaintiff's duty of self care." ***Id.***, ¶36.

¶13 Breslin argues that the two special verdict questions should not have been submitted to the jury because the "custody and control" rule enunciated in

[2] Breslin mentions that the circuit court erred in formulating the jury instructions pertaining to the challenged special verdict questions. However, Breslin does not develop an argument that focuses on the jury instructions. Thus, we will not consider this issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to address inadequately developed arguments).

Hofflander is dictum, or alternatively, because ***Hofflander*** does not apply to the facts of this case such that the special verdict questions should not have been asked as a matter of law. We reject Breslin's arguments.

¶14 Breslin first argues that the "custody and control" rule established by ***Hofflander*** is "dictum" to the extent it "goes beyond the holding necessary to decide the particular case." This argument fails on its face because the court of appeals cannot dismiss a statement from an opinion by the supreme court on the ground that the statement is dictum. *See* ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682. The supreme court in ***Zarder*** explained that by doing so "the court of appeals necessarily withdraws or modifies language from that opinion, contrary to our directive in [***Cook v.***] ***Cook***."[3] ***Id.***, ¶57.

¶15 In the alternative, Breslin argues that the ***Hofflander*** rule should not be applied here because the rule "makes no sense on the facts of Cody Reindahl's case."

¶16 Breslin is correct that there are obvious factual differences between ***Hofflander*** and the instant case. The plaintiff in ***Hofflander*** was diagnosed with depression and borderline personality disorder and was injured while attempting to escape from a third-floor window. *See* ***Hofflander***, 262 Wis. 2d 539, ¶¶12, 22. According to Breslin, the ***Hofflander*** plaintiff's mental illnesses "d[id] not involve [the] loss of contact with reality." Thus, according to Breslin, it could reasonably be found that the plaintiff had some ability to exercise reasonable care for her own

[3] ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

safety with respect to the risk of harm from trying to escape from a third-floor window. Here, Reindahl was diagnosed with psychosis, and he died when he committed suicide. Breslin argues that "[t]here is no such thing as a reasonable psychotic person," and therefore, unlike the plaintiff in ***Hofflander***, Reindahl could not exercise reasonable care for his own safety with respect to the risk of harm from committing suicide.

¶17 What Breslin fails to understand is that ***Hofflander*** explicitly applies to any "mentally disabled person" who is injured while under the care of a mental health care facility, which includes Reindahl. ***Id.***, ¶35. Under ***Hofflander***, whether a mentally disabled person is "totally unable" to appreciate a risk and whether that person was negligent are questions of fact. ***Id.***, ¶36. Breslin points to nothing in ***Hofflander*** that limits its holding to certain diagnoses or certain acts.

¶18 Instead, Breslin asks this court to determine that, as a matter of law, a person such as Reindahl who has a psychosis diagnosis and clearly exhibits suicidal ideation, is, to use the words of the last element of the "custody and control" rule, "totally unable to appreciate the risk of harm and the duty to avoid it." *See* ***id.***, ¶36. But Breslin fails to support her argument by citation to case law, and nothing in ***Hofflander*** suggests this limitation of its holding. Not only does ***Hofflander*** apply to all mentally ill plaintiffs, but the ***Hofflander*** court also used an illustration of a mentally disabled person with suicidal ideation as an example in explaining the foreseeability element in the "custody and control" rule. ***Id.***, ¶53. Logically speaking, if the court in ***Hofflander*** intended for the "custody and control" rule to not apply to circumstances where a mentally disabled person in the care of a mental health care facility exhibits suicidal ideation, the court would not have used the above illustration to explain the foreseeable element of the rule.

¶19 Breslin's argument is really about her disagreement with the jury's findings, based on the evidence that it heard, that Reindahl was able to understand the risk of harm and that he was negligent in failing to care for his own safety. The record establishes sufficient facts to support giving Question 3 in the special verdict, and Breslin does not argue otherwise.

¶20 The defense presented expert testimony that Reindahl was able to appreciate the risk of harm from committing suicide and had the mental capacity to understand that a reasonable person with his diagnosis should avoid attempting to commit suicide. Dr. Gregory VanRybroek, the director of Mendota Mental Health Institute, testified that Reindahl was psychotic, but that Reindahl was not "totally unable to appreciate the risk of harm to himself" by committing suicide. While Breslin presented her own expert testimony to the contrary, a circuit court properly exercises its discretion in formulating a special verdict where the record contains facts that necessitate particular verdict questions. *See* ***Gumz***, 305 Wis. 2d 263, ¶24. To clarify, because Dr. VanRybroek opined, based on his training and experience, that Reindahl was able to appreciate the risk of harm from committing suicide, under the rule established in ***Hofflander***, the court was left with no discretion but to include the contributory negligent questions in the special verdict.

¶21 Essentially, Breslin's argument boils down to a disagreement with the rule established in ***Hofflander*** and with the jury's answers to the special verdict questions, which were presented to it pursuant to the ***Hofflander*** rule based on the evidence presented at trial. We lack authority to deviate from the ***Hofflander*** rule, and the evidence presented at trial both warrants the special verdict questions and supports the jury's findings.

¶22 In sum, based on the evidence presented at trial, the circuit court was obligated by the ***Hofflander*** "custody and control" rule to present the disputed special verdict questions to the jury. The special verdict questions communicated an accurate statement of the law and covered all issues of fact, and thus, the circuit court appropriately exercised its discretion. Accordingly, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).

Elliot KAPLAN; Jeanne Kaplan, Appellants,

v.

MAYO CLINIC; Mayo Foundation; Mayo Foundation for Medical Education and Research; Mayo Rochester, Inc.; Mayo Clinic Rochester, Inc.; Lawrence J. Burgart; David Nagorney, Appellees.

Nos. 09–2493, 10–2290.

United States Court of Appeals, Eighth Circuit.

Submitted: March 16, 2011.

Filed: Sept. 2, 2011.

Rehearing and Rehearing En Banc Denied Oct. 20, 2011.

Background: Patient and his wife brought action in state court against medical clinic and two doctors arising out of patient's erroneous diagnosis of pancreatic cancer and his surgery based on that diagnosis. Following removal, the United States District Court for the District of Minnesota, John R. Tunheim, J., 2008 WL 4755797, granted summary judgment in favor of one doctor, granted judgment as a matter of law (JAML) against plaintiffs on their breach of contract claim, and entered judgment following jury verdict in favor of defendants on negligent failure to diagnose claim. Plaintiffs appealed.

Holdings: The Court of Appeals, Arnold, Circuit Judge, held that:

(1) any error in admitting patient's entire medical file did not affect patient's substantial rights;

(2) plaintiffs' rank speculation that slides might have been tampered with did not establish that district court erred in admitting certain photographs of slides;

(3) jury instruction which not mention doctor by name did not amount to plain error;

Before SMITH, ARNOLD, and SHEPHERD, Circuit Judges.

ARNOLD, Circuit Judge.

Elliot and Jeanne Kaplan, husband and wife, filed suit against Mayo Clinic Rochester, Inc., other Mayo entities (referred to collectively as Mayo), and Mayo doctors David Nagorney and Lawrence Burgart, making a number of claims arising out of Mr. Kaplan's erroneous diagnosis of pancreatic cancer and his surgery based on that diagnosis. The district court granted summary judgment in favor of Dr. Nagorney, and the case proceeded to trial against the other defendants on claims of breach of contract and negligent failure to diagnose. At the close of the Kaplans' case-in-chief, the district court granted judgment as a matter of law (JAML) against them on their breach-of-contract claim. The jury then returned a verdict for Mayo and Dr. Burgart on the plaintiffs' claim for negligent failure to diagnose, and the district court entered judgment on that verdict.

The Kaplans appeal the judgments in favor of Mayo and Dr. Burgart on their

negligent-failure-to-diagnose and contract claims. We affirm the judgment on the claim for negligent failure to diagnose and the judgment in favor of Dr. Burgart on the contract claim, but we vacate the judgment in favor of Mayo on the contract claim and remand for further proceedings.

I.

After Mr. Kaplan complained of severe abdominal pain, he was taken from his home to a nearby hospital in a suburb of Kansas City, Missouri. Dr. John Dunlap, his long-time family physician, ordered a CT scan, which showed that Mr. Kaplan's pancreas was enlarged and that a "mass could not be excluded." (The pancreas is a large organ behind the stomach and close to the beginning of the small intestine.) Based on a needle biopsy that the hospital performed at Dr. Dunlap's request, a pathologist at the hospital prepared a report stating, "Ductal carcinoma is favored as being the changes noted in the ducts. There was agreement with two other members of the department." Dr. Dunlap told the Kaplans about the report and referred Mr. Kaplan to Mayo and, specifically, to Dr. Nagorney, a Mayo surgeon. Dr. Dunlap also wrote to Dr. Nagorney, asking him to "evaluate" Mr. Kaplan for "probable ductal carcinoma of the head of the pancreas and for consideration of resective surgery." When Mr. Kaplan called to ask Dr. Nagorney to treat him, he told the doctor that he had "concerns" about the cancer diagnosis and that his father, who was the chief of cardiology at a Los Angeles hospital, had described the diagnosis as "pretty weak."

Dr. Nagorney agreed to treat Mr. Kaplan and asked him for the hospital records and the biopsy slides that the pathologists had examined. After the hospital removed tissue by inserting a needle into Mr. Kaplan's pancreas, the tissue was embedded in paraffin wax that was formed into a block; the hospital then used thin slices of the block to make the slides that the pathologist examined. After the slides arrived at Mayo, Dr. Burgart reviewed them and provided a written "diagnosis": "Pancreas, head, needle biopsy. Infiltrating grade 2 (of four) adenocarcinoma." In accordance with Dr. Burgart's custom, he had another Mayo pathologist, Dr. Thomas Smyrk, review the slides without knowing Dr. Burgart's diagnosis; Dr. Smyrk also diagnosed pancreatic cancer.

Dr. Nagorney reviewed Dr. Burgart's report before the Kaplans arrived at Mayo. When the Kaplans came to his office, Dr. Nagorney immediately told them that Mr. Kaplan had pancreatic cancer, that it was deadly and aggressive, and that he (Dr. Nagorney) could do surgery the next morning. He recommended the so-called "Whipple procedure," which entails removing part of the pancreas and stomach, as well as the duodenum; he performed the procedure on Mr. Kaplan three days later. But after Dr. Burgart and other Mayo pathologists examined the excised pancreatic tissue, they concluded that Mr. Kaplan had never had cancer at all. The pathology report stated that the tissue had features of pancreatitis. The Kaplans first brought suit in Missouri state court against the Kansas City medical care providers, as well as the defendants in this case. After the state court dismissed the Mayo defendants for lack of personal jurisdiction, the Kaplans brought the present action.

At trial, the parties presented conflicting expert testimony as to whether the biopsy slides that Dr. Burgart relied on supported his diagnosis of pancreatic cancer. The Kaplans also presented evidence that the Whipple procedure caused Mr. Kaplan pain that prevented him from working regularly or engaging in activities that he had previously enjoyed. Dr. Dunlap, who continued to treat Mr. Kaplan, testified to the

ongoing difficulty managing Mr. Kaplan's pain. During direct testimony, the doctor attributed the pain to a condition that sometimes occurs after the Whipple procedure and causes food to be trapped in the intestinal tract. On cross-examination, the defendants' counsel referred to documents in Dr. Dunlap's medical file for Mr. Kaplan in which the doctor had diagnosed Mr. Kaplan with pancreatitis and identified pancreatitis as the cause of his pain; and Dr. Dunlap agreed that the Whipple procedure did not cause pancreatitis. Dr. Dunlap testified that he based his diagnosis of pancreatitis on Mayo's post-surgery pathology report stating that the excised pancreatic tissue had features of pancreatitis; but he attributed Mr. Kaplan's chronic (or "background") pain to pancreatitis and stated that Mr. Kaplan had intermittent bouts of severe pain during which he was unable to function that were likely caused by the Whipple procedure. Dr. Dunlap explained that he had not included the Whipple-related diagnosis in his medical reports because he "could not prove it."

The parties also offered conflicting evidence as to whether Dr. Nagorney promised the plaintiffs that he would do an intraoperative biopsy to determine whether Mr. Kaplan had cancer and abandon the procedure if the biopsy showed that he did not.

II.

The Kaplans assert that they are entitled to a new trial on their claim for negligent failure to diagnose for several reasons. We address each of those reasons in turn.

[1] 1. The Kaplans first contend that the district court committed reversible error by admitting Dr. Dunlap's entire medical file on Mr. Kaplan into evidence. They assert that the file included 54 documents that referred to insurance and were therefore inadmissible under Minn.Stat. § 548.251, which prohibits informing the jury "of the existence of collateral sources or any future benefits which may or may not be payable to the plaintiffs." The court admitted the exhibit; it agreed with the defendants' interpretation of the statute and expressed doubt that they would use all 54 documents.

Dr. Dunlap mentioned insurance only twice during his trial testimony, both times during direct examination. The first time, after the Kaplans' attorney handed him a binder and asked him to look for a particular exhibit in it, the doctor asked whether he should look in a section titled "Insurance Information." Later, the Kaplans' attorney asked Dr. Dunlap whether he had had "occasion to write to various people and tell them" that Mr. Kaplan had pancreatitis. In response, Dr. Dunlap testified that a Mayo pathologist had reported that the pancreatic tissue removed during Mr. Kaplan's surgery had "elements of chronic pancreatitis. And when I have reported to his insurance company, we've included that diagnosis."

During cross-examination, neither Dr. Dunlap nor the defendants' attorney spoke of insurance or other potential third-party payors. Counsel asked Dr. Dunlap about his statements diagnosing Mr. Kaplan with pancreatitis and attributing his post-surgery symptoms to that condition rather than to the surgery. Some of these entries appeared in Dr. Dunlap's office notes, in hospital records, and in correspondence with other doctors. Although the defendants' attorney asked Dr. Dunlap about an entry that appeared on an insurance form, counsel questioned him only about his having written "pancreatitis" as Mr. Kaplan's diagnosis and did not mention insurance.

With so little mention of insurance during the trial and no mention by the defendants, we conclude that the error, if any, in admitting the documents into evidence, did

not affect the Kaplans' substantial rights. Fed.R.Civ.P. 61; *Williams v. Kansas City, Mo.,* 223 F.3d 749, 755 (8th Cir.2000). Nor can the court's refusal to give a limiting instruction be the basis for reversal. The court stated that it would not give the instruction because it was likely to draw attention to insurance. We question whether a court should refuse an instruction because it concludes that it may prejudice the party requesting it. But we understand why the court may have believed that the instruction would unduly highlight insurance where nothing during the trial would have drawn the jury's attention to potential collateral sources. In any event, we conclude that the Kaplans were not prejudiced by the court's decision not to give the instruction.

[2] 2. The Kaplans also maintain that the district court erred in admitting certain photographs that the defendants' witnesses testified they had taken of the biopsy slides from which Dr. Burgart diagnosed cancer. When the defendants sought to use the photographs during direct examination of Dr. Burgart, the Kaplans objected based on lack of foundation. They first argued that the court should, at a minimum, exclude the photos that Dr. Burgart had not taken, since the defendants' expert, Dr. Joel Greenson, who had taken some of the photos, had not yet testified. The court denied the objection, allowing the defendants to use the photos based on counsel's representation that Dr. Greenson would later identify them.

The Kaplans then argued that the defendants could not authenticate the photos because they had broken the "chain of custody" for the slides that the photos purportedly depicted. In particular, they asserted that the defendants had once given the slides to the Kaplans' "adversaries" in the Missouri action, who had "every incentive to ensure that the tissue on these slides by the time it came back looked cancerous." The court doubted the need for a chain of custody and said that counsel's assertions about their Missouri adversaries was "speculation"; the court ruled that unless it found something "amiss in the slides," it would permit the defendants to lay as much foundation as they could with Dr. Burgart and "tie it up" with other witnesses. After the court concluded, "If there is a problem, we will instruct the jury accordingly," the defendants' attorney said that the defendants would "provide an affidavit from Missouri counsel that there was nothing done to these." The jury then returned to the courtroom and Dr. Burgart resumed his testimony. The defendants later presented the testimony of Dr. Greenson, who identified his photographs and provided the date that they were taken, a date before the defendants purportedly transferred the slides to the Kaplans' Missouri adversaries. Dr. Smyrk, moreover, compared the photographs taken by the Kaplans' expert, Dr. Barry Shmookler, and those taken by Dr. Greenson and Dr. Burgart, and testified that they were taken of "essentially the same area" of pancreatic tissue and were of the same original biopsy slides.

[3, 4] On appeal, the Kaplans maintain that the defendants failed to authenticate the photos. They rely primarily on the contention that the defendants did not provide a chain of custody for the slides and should have kept their "promise" to provide a chain of custody from the Missouri defendants. We review the question of whether the district court erred by admitting improperly authenticated evidence for an abuse of discretion and disregard any error that does not affect a party's substantial rights. *See Jones v. National Am. Univ.,* 608 F.3d 1039, 1045 (8th Cir.2010). To authenticate an exhibit, a party "need only prove a rational basis for that party's claim that the document is what it is as-

serted to be," which may "be done with circumstantial evidence." *Id.* (internal quotation marks and citation omitted); *see* Fed.R.Evid. 901(a). Once the threshold requirement is met, and it clearly is here, any question as to whether the evidence is authentic is for the jury. *Banghart v. Origoverken, A.B.,* 49 F.3d 1302, 1304–05 (8th Cir.1995); *see Jones,* 608 F.3d at 1045.

We agree with the district court that the Kaplans' assertion that the slides might have been tampered with was based on rank speculation. They failed to present evidence that the slides had been changed in any way, and Dr. Smyrk testified that it would be physically impossible to alter the slides in the manner that the Kaplans suggested. There is no error here.

[5] **3.** The Kaplans assert next that the district court plainly erred by omitting Dr. Burgart's name from a jury instruction. We generally review jury instructions for an abuse of discretion and reverse only if, as a whole, they did not fairly and adequately submit the issues in the case to the jury. *PFS Dist. Co. v. Raduechel,* 574 F.3d 580, 594 (8th Cir.2009). But since the Kaplans did not raise their objection at trial, to succeed on it here they must establish plain error, a particularly stringent requirement. *See Csiszer v. Wren,* 614 F.3d 866, 871 (8th Cir.2010).

[6] The Kaplans challenge Instruction 13 because it did not mention Dr. Burgart by name. That instruction notified the jury that to prove their medical negligence claim the plaintiffs had to show by a preponderance of the evidence "that Mayo Clinic Rochester doctors" deviated from the standard of care. Although Dr. Burgart's name is absent, the undisputed evidence at trial left no doubt that he was a "Mayo Clinic Rochester doctor." In the immediately preceding instruction, jurors were told that Mayo, as a corporation, could act only through its doctors, nurses, and other employees. And Instruction 15 referred to Dr. Burgart by name, telling the jury that the fact that the Kaplans claimed that an injury occurred did not alone mean that Mayo "and/or Lawrence Burgart were negligent." We see no basis for the Kaplans' contention that the jurors, having received these instructions and heard the evidence, would have been confused when asked in a special verdict form whether "Mayo Clinic Rochester and/or Lawrence Burgart were negligent in the care and treatment of Elliot Kaplan as submitted in Instruction 13?" And the Kaplans certainly have not established that the error, if any, in omitting Dr. Burgart's name from the instruction, "seriously affected the integrity, fairness, or public reputation of judicial proceedings," a prerequisite for plain error relief, *Rahn v. Hawkins,* 464 F.3d 813, 819 (8th Cir.2006). This is an entirely meritless objection, and we reject it.

We conclude that the Kaplans have shown no basis for granting them a new trial on their claim for negligent failure to diagnose.

III.

[7, 8] The Kaplans also maintain that the district court erred in granting JAML to Mayo and Dr. Burgart on their contract claim. We review the grant of JAML *de novo* and will affirm only if "no reasonable jury" could have found in favor of the nonmoving party. *Mattis v. Carlon Elec. Prods.,* 295 F.3d 856, 860 (8th Cir.2002); *see* Fed.R.Civ.P. 50(a).

[9] To make out a claim for breach of contract, the plaintiffs had to show the formation of the contract, the defendants' breach, and resulting damages. *See Briggs Transp. Co. v. Ranzenberger,* 299 Minn. 127, 129, 217 N.W.2d 198, 200 (1974); *Costello v. Johnson,* 265 Minn. 204, 208, 121 N.W.2d 70, 74 (1963). The district court concluded that the Kaplans'

claim merely restated a medical negligence claim as a breach of contract, and held that the Kaplans therefore required expert testimony to show that Dr. Nagorney failed to meet the appropriate standard of care by not performing an intraoperative biopsy and that this failure caused Mr. Kaplan to undergo the Whipple surgery. *See* Minn. Stat. § 145.682. We disagree.

[10] In their amended complaint, the Kaplans alleged that after Mr. Kaplan told Dr. Nagorney that he was concerned about the accuracy of the cancer diagnosis, Dr. Nagorney, individually and on behalf of Mayo, made a "definitive agreement" with Mr. Kaplan that Dr. Nagorney and his Mayo colleagues "would insure that Mayo's pathology diagnosis would be exhaustive and precise," and that, as consideration, Mr. Kaplan authorized Dr. Nagorney and his colleagues to perform the Whipple procedure and paid them for that surgery. The plaintiffs further alleged that Dr. Nagorney breached the agreement by failing to tell his colleagues about Mr. Kaplan's concerns, failing to "insist that Mayo perform its own biopsy, or create it's [sic] own slides" from the tissue removed during the needle biopsy, and failing to "take any of the other steps that Mr. Kaplan was told that Dr. Nagorney and Mayo would take to insure that the diagnosis of his condition was correct."

As is apparent, the plaintiffs did not allege that Dr. Burgart entered into an agreement with them, nor did they present any evidence to that effect at trial. They relied instead on their interactions with Dr. Nagorney. We therefore conclude that the district court properly granted JAML to Dr. Burgart on the contract claim. Mayo, however, does not contend that any promise that Dr. Nagorney made was not on its behalf, or that it is not bound if it was, so we review the evidence to determine whether it will support a contract claim against Mayo.

We view the evidence in a light favorable to the Kaplans, as the context requires. When the Kaplans arrived at Mayo, Dr. Nagorney immediately told them that Mr. Kaplan had cancer. Mr. Kaplan responded by asking the doctor whether he was sure of the diagnosis. Dr. Nagorney said that he had no doubt that Mr. Kaplan had cancer because a Mayo pathologist, who was one of the best in the world, if not the best, had unequivocally diagnosed him with it. After Dr. Nagorney explained the Whipple procedure to the Kaplans, Mr. Kaplan asked him if they could verify that he had cancer after they opened him up for surgery. Dr. Nagorney said that they would do a biopsy of the "mass . . . to verify that it's cancer," and that "if they didn't find cancer, they'd just close [Mr. Kaplan] up and send [him] home." Dr. Nagorney outlined three possibilities to the Kaplans: In the third one, if the biopsy they performed showed no cancer, they would close him up. But Dr. Nagorney did not perform an intraoperative biopsy of Mr. Kaplan's pancreatic tissue to verify that he had cancer.

It is true that Dr. Nagorney testified that he had not promised to do such a biopsy. He testified that, "unfortunately," there was no intraoperative (or preoperative) procedure that could have confirmed Dr. Burgart's cancer diagnosis and that the only way to find out that Mr. Kaplan did not actually have cancer was to "proceed with the operation" (apparently the Whipple procedure). But this testimony merely raises factual questions for the jury as to whether there was an agreement. Dr. Nagorney acknowledged, moreover, that he had performed intraoperative biopsies of the pancreas in the past to determine whether to proceed with a Whipple surgery and that other surgeons still followed that protocol. This evidence lends some credibility to the testimony that Dr. Nagorney promised to do the procedure in

this case (perhaps to ease Mr. Kaplan's ongoing concerns about the accuracy of the diagnosis).

Dr. Nagorney's testimony also shows that it was commonplace for him to perform intraoperative biopsies during pancreatic cancer surgery. When he saw something "suspicious," he would send a piece of the tissue to the pathologist, who would report the result over a loudspeaker within ten minutes. In Mr. Kaplan's case, Dr. Nagorney had three pieces of tissue checked for cancer before doing the Whipple procedure. If the pathologist had found that cancer had spread to any of these areas, Dr. Nagorney said he would have stopped the operation. As he always did before closing, Dr. Nagorney had the pathologist examine the tissue removed during Mr. Kaplan's Whipple procedure for so-called "clean margins," *i.e.,* healthy tissue surrounding the excised cancer. Clean margins indicate that the surgeon has removed all the cancer, and, if the margins were not clean, Dr. Nagorney would remove additional tissue. Though he did not perform the promised biopsy, he repeatedly had the pathologist check for cancer during Mr. Kaplan's surgery.

The testimony of the Kaplans and Dr. Nagorney was quite evidently more than sufficient to support a finding of the formation of a contract, and the breach is undisputed. To prove damages, the plaintiffs would first have had to offer evidence to support a finding that the intraoperative biopsy results would have been negative for cancer. We think that they did that: It's undisputed that Mr. Kaplan did not have cancer, and the defendants presented evidence that, although a biopsy sometimes appears to show cancer where there is none, that occurs rarely. In addition, the intraoperative biopsy of pancreatic tissue removed during the Whipple showed no cancer. We therefore believe that a jury could reasonably find that, had Dr. Nagorney done the promised procedure, it would have shown that Mr. Kaplan did not have cancer.

The Kaplans also had to establish that Dr. Nagorney would not have performed the Whipple procedure if the promised biopsy was negative, and Mayo argues that the jury could not have made such a finding because Dr. Nagorney testified that he had to do the Whipple procedure once Dr. Burgart diagnosed cancer. We disagree. As we have already noted, Dr. Nagorney testified that he had used the intraoperative biopsy in the past to decide whether to do a Whipple procedure and that, though he had stopped, others still did so. The plaintiffs both testified that Dr. Nagorney told them that he would not proceed with the Whipple procedure if he could not verify the cancer diagnosis through an intraoperative biopsy. And we think that a jury could also believe that Dr. Nagorney would be more hesitant in Mr. Kaplan's case to proceed with the Whipple after a negative intraoperative biopsy because Mr. Kaplan repeatedly questioned the cancer diagnosis. Drawing all inferences in favor of the plaintiffs, as we must in the current context, we believe that the evidence would support a finding that Dr. Nagorney would not have done the Whipple procedure in the face of an intraoperative biopsy that showed no cancer. Dr. Nagorney admitted at trial that Mr. Kaplan did not need the Whipple procedure, and we believe that the plaintiffs provided sufficient evidence of economic damages resulting from that procedure—though the amount was greatly disputed—to meet the final requirement for making out their contract claim.

[11, 12] It is true that Minnesota law requires plaintiffs to file an expert-witness affidavit in any action against a health care provider for "malpractice, error, mistake, or failure to cure, whether based on

contract or tort," if "expert testimony is necessary to establish a prima facie case" in that action. Minn.Stat. § 145.682. But the statute says nothing about what kinds of cases require expert testimony. That is left to the general law of Minnesota. Under that law, expert testimony is not necessary to establish matters that lie within the general knowledge of lay people. *See Tousignant v. St. Louis County,* 615 N.W.2d 53, 58 (Minn.2000); *Dyson v. Schmidt,* 260 Minn. 129, 140, 109 N.W.2d 262, 269 (1961). No such testimony is necessary in this perfectly ordinary, garden-variety contract claim. The claim is straightforward and does not depend, for instance, on a showing that the defendants violated a standard of care that Minnesota doctors are required to adhere to. Here, the plaintiffs' claim is simply that a physician promised to perform a certain procedure and did not do it, resulting in damages to them. The plaintiffs therefore offered sufficient evidence in their case-in-chief to support a breach-of-contract claim against Mayo without offering the testimony of an expert.

VI.

We reverse the grant of JAML to Mayo on the Kaplans' claim for breach of contract and remand for further proceedings. We affirm the judgment in favor of Dr. Burgart on the contract claim and the judgment for Mayo and Dr. Burgart on the Kaplans' claim for negligent failure to diagnose.[1]

1. The parties' briefs do not discuss the question of whether Ms. Kaplan's loss-of-consortium damages are recoverable in a contract action. This is a matter for exploration on remand should it arise.

Elliot KAPLAN; Jeanne Kaplan, Plaintiffs–Appellants

v.

MAYO CLINIC; Mayo Foundation; Mayo Foundation for Medical Education and Research; Mayo Rochester, Inc.; Mayo Clinic Rochester, Inc.; Lawrence J. Burgart, Defendants–Appellees

No. 15–2855

United States Court of Appeals,
Eighth Circuit.

Submitted: October 18, 2016

Filed: February 13, 2017

Rehearing and Rehearing En Banc Denied March 23, 2017

Background: Patient brought action in state court against medical clinic and surgeon, arising out of erroneous diagnosis of pancreatic cancer based on needle biopsy, and surgeon's alleged promise to perform a biopsy of patient's pancreas during invasive surgery based on the diagnosis. Following removal, the United States District Court for the District of Minnesota, John R. Tunheim, J., 2008 WL 4755797, granted judgment as a matter of law (JAML) against patient on contract claim, and later entered judgment following jury verdict in favor of defendants on medical malpractice claim. Patient appealed. The Court of Appeals, 653 F.3d 720, affirmed in part, vacated in part, and remanded. After bench trial, the District Court, John R. Tunheim, Chief Judge, 2015 WL 4877559, entered judgment for defendants on breach of contract claim. Patient appealed.

Appeal from United States District Court for the District of Minnesota–Minneapolis

James F.B. Daniels, McDowell & Rice, Kansas City, MO, for Plaintiffs–Appellants.

Andrew B. Brantingham, William R. Stoeri, Dorsey & Whitney, Minneapolis, MN, Joshua B. Murphy, Mayo Clinic, Rochester, MN, for Defendants–Appellees.

Before LOKEN, SMITH, and COLLOTON, Circuit Judges.

SMITH, Circuit Judge.

Elliot and Jeanne Kaplan sued Dr. David Nagorney, Dr. Lawrence Burgart, and Mayo Clinic and its affiliates ("Mayo") for medical malpractice, breach of contract, lack of informed consent, and loss of consortium following a surgical procedure performed on Elliot after a misdiagnosis. The district court [1] dismissed all claims against Dr. Nagorney, the surgeon who performed the medical procedure, because

[1] District of Minnesota.

the Kaplans failed to produce expert testimony by the scheduled deadline. The case proceeded to trial against Mayo and Dr. Burgart on the breach-of-contract and malpractice claims. At the close of the plaintiffs' case-in-chief, the district court granted Mayo's motion for judgment as a matter of law on the breach-of-contract claim. Following trial, the jury returned a verdict in favor of the defendants on the malpractice claim.

On appeal, we upheld the jury verdict but vacated the judgment in favor of Mayo on the breach-of-contract claim. This court held that the district court erred by requiring expert testimony to establish a contract breach and remanded the claim to trial. *Kaplan v. Mayo Clinic (Kaplan I)*, 653 F.3d 720, 729 (8th Cir. 2011) ("The plaintiffs therefore offered sufficient evidence in their case-in-chief to support a breach-of-contract claim against Mayo without offering the testimony of an expert."). After a four-day bench trial, the district court entered judgment in favor of Mayo on the breach-of-contract claim. The Kaplans again appeal, and we affirm.

I. *Background*

Elliot Kaplan was hospitalized in Kansas City, Missouri, for intense abdominal pain. The hospital staff performed a computerized tomography (CT) scan and found a three-to-four centimeter mass on his pancreas. After a needle biopsy, hospital doctors diagnosed Elliot with pancreatic cancer. The hospital referred him to Dr. Nagorney at the Mayo Clinic in Rochester, Minnesota for surgery.

Before heading to the Mayo Clinic, Elliot's condition began improving. He became skeptical of his diagnosis. His father, a cardiologist, sent a letter to Dr. Nagorney expressing his concerns about whether Elliot had been properly diagnosed. In response, Dr. Nagorney had two pathologists at the Mayo Clinic perform independent analyses of Elliot's biopsy. Both pathologists confirmed the cancer diagnosis.

When the Kaplans met with Dr. Nagorney, he explained to the couple the need for immediate surgical intervention. Dr. Nagorney recommended the Whipple procedure, an invasive surgery that typically includes the removal of the wide part of the pancreas, the anterior intestine, the gallbladder, and part of the stomach. In explaining the procedure, Dr. Nagorney explained that during the surgery he would be testing the tissue surrounding the pancreas for cancerous cells to ensure complete removal. Elliot, still unconvinced of his diagnosis, wanted more proof. He testified that he asked Dr. Nagorney to do an additional biopsy of his pancreas during the procedure to ensure that he had cancer. Dr. Nagorney denied that Elliot made this request.

Dr. Nagorney successfully performed the Whipple procedure without doing a biopsy of the pancreas during the procedure as he had allegedly promised. When pathologists tested the removed tissue, they discovered that the tumor in Elliot's pancreas was benign. Elliot suffered not from cancer, but chronic pancreatitis. His initial biopsy resulted in a false positive. Since having the Whipple procedure, Elliot continues to suffer negative health complications that affect his daily life.

On remand from this court, the district court considered whether Elliot and Dr. Nagorney entered into a contract under Minnesota law to perform a biopsy of his pancreas during the Whipple procedure. Both parties consented to a bench trial, during which the district court heard evidence relating to the accuracy of needle biopsies. According to the evidence, the possibility of a false positive in a biopsy of pancreatic cancer is far less than one percent, but almost a ten-percent chance exists that such a biopsy would present a

false negative. Dr. Nagorney testified that Elliot's case presented the only false positive for pancreatic cancer in a needle biopsy that he had ever encountered in his decades-long career. Dr. Nagorney also testified that he trusted the accuracy of the biopsy and that doing another biopsy during surgery would have gone against his standard practices. Mayo presented expert testimony during trial demonstrating that a typical surgeon would not rely on the negative result of a biopsy during surgery because the likelihood of a false negative would far outweigh the likelihood of a false positive.

According to the evidence, physicians in general—and specifically Dr. Nagorney—avoid making promises like the alleged promise made to the Kaplans. The district court concluded that Dr. Nagorney's explanation of the Whipple procedure likely confused the Kaplans, particularly Elliot. The court believed that Dr. Nagorney explained to them that he would be using biopsies during the surgery to ensure that the cancer had not spread to surrounding tissues. These results would determine how he would proceed with the Whipple procedure, not whether he would proceed in the first place. Finding Dr. Nagorney's version of the conversation more credible in light of the circumstances, the district court concluded that Dr. Nagorney did not promise to do a biopsy of Elliot's pancreas during the surgery and that no meeting of the minds occurred to form a contract. Because no contract existed, the breach-of-contract claim failed. The court therefore entered judgment in favor of Mayo.

II. *Discussion*

[1–4] The Kaplans appeal the district court's factual findings regarding contract formation and its ultimate judgment. "After a bench trial, this court reviews legal conclusions de novo and factual findings for clear error." *Urban Hotel Dev. Co. v. President Dev. Grp., L.C.*, 535 F.3d 874, 879 (8th Cir. 2008). In Minnesota, whether a contract has been formed is a question of fact. *Watkins Inc. v. Chilkoot Distrib., Inc.*, 655 F.3d 802, 805 (8th Cir. 2011) (applying Minnesota law). Factual findings are only overturned if: (1) the findings are not supported by substantial evidence in the record, (2) the findings are based on an erroneous view of the law, or (3) the court is left with the definite and firm conviction that an error has been made. *Tadlock v. Powell*, 291 F.3d 541, 546 (8th Cir. 2002). "We give due regard to the opportunity of the district court to judge the credibility of the witnesses." *Id.*

[5] The Kaplans argue that the district court committed clear error in finding that no contract was formed. First, they argue that we settled the contract formation issue in *Kaplan I*, and the district court was "bound to honor" this mandate as law of the case. *See United States v. Castellanos*, 608 F.3d 1010, 1016 (8th Cir. 2010). This assertion misconstrues our previous holding. In *Kaplan I*, we held that the evidence in the record, viewed in the light most favorable to the plaintiffs, was sufficient for a reasonable jury to find contract formation. 653 F.3d at 728. Our holding, however, did not concomitantly preclude the district court, as fact finder, from determining otherwise after weighing the evidence. The district court did not violate the law of the case by determining that no contract was formed between the Kaplans and Mayo.

[6] Second, the Kaplans argue that our mandate in *Kaplan I* required the district court to exclude all expert testimony on the contract-formation issue. The Kaplans contend that the district court erred by relying on expert testimony in finding that no contract was formed. They argue that without the aid of this expert testimony, the defendants failed to present sufficient evidence for a finding in their favor. We

disagree. In *Kaplan I*, we concluded that Minnesota law did not require the Kaplans to present expert affidavits to establish a prima facie case of medical malpractice. We did not, however, forbid the defendants' use of expert testimony to establish a defense to the claim of a special contract in the performance of the operation. Our mandate did not prohibit the defendants' use of expert testimony; therefore, the Kaplans' sufficiency-of-the-evidence argument necessarily fails. The district court's findings were supported by substantial evidence on the record.

[7–9] Third, the Kaplans assert that our review of the factual findings of the district court should leave us with a firm conviction that the district court made an error. To support this argument, they allege minor inconsistencies in the record regarding what was said during their meeting with Dr. Nagorney. These inconsistencies all point to one real question: Did Dr. Nagorney promise to do a biopsy of Elliot's pancreas during the Whipple procedure? The district court found that Dr. Nagorney did not make such a promise and that Elliot misunderstood the description of the procedure. If the district court's factual conclusions are plausible in light of the record, we will not reverse the decision even if we might disagree with its conclusion. *Story v. Norwood*, 659 F.3d 680, 685 (8th Cir. 2011).This factual finding does not provide us with the conviction that the district court committed clear error. "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *In re Nevel Props. Corp.*, 765 F.3d 846, 850 (8th Cir. 2014) (ellipsis in original) (quoting *In re Papio Keno Club, Inc.*, 262 F.3d 725, 729 (8th Cir. 2001)).

Finding no clear error, we uphold the district court's factual finding that the Kaplans and Dr. Nagorney did not form a contract. Without a contract, the questions of breach, damages, and all derivative claims become moot, and we decline to address them.

III. *Conclusion*

Accordingly, we affirm the judgment of the district court.

Filed 2/23/15 Certified for publication 3/25/15 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

PHYLLIS KEYS et al., Plaintiffs and Respondents, v. ALTA BATES SUMMIT MEDICAL CENTER, Defendant and Appellant.	A140038 (Alameda County Super. Ct. No. RG09478812)

Defendant Alta Bates Summit Medical Center (Alta Bates) appeals from the portion of a judgment awarding plaintiffs Phyllis Keys and Erma Smith damages on their claims for negligent infliction of emotional distress (NIED). Defendant contends there is no evidence to support the jury's finding that plaintiffs meaningfully comprehended the medical negligence that led to the death of their family member at the time the negligence was occurring. We disagree and affirm the judgment with respect to the emotional distress claims.

Factual History

Madeline Knox was the mother of plaintiff Phyllis Keys and the sister of plaintiff Erma Smith. On September 26, 2008, Keys and Smith accompanied Knox to Alta Bates where she underwent surgery on her thyroid. At approximately 6:45 p.m., Knox was transferred from a post-anesthesia care unit to a medical-surgical unit. At that time, a nurse noticed Knox's breathing was "noisy," and thought it was stridor, a sound that comes from the upper airway suggesting the airway is obstructed. Because of Knox's

respiratory difficulty, at 6:46 p.m., the nurse called the hospital's rapid assessment team to evaluate her. The rapid assessment team is composed of a respiratory therapist and a nurse from the intensive care unit (ICU). Notes taken by the ICU nurse indicated the rapid assessment team arrived at Knox's bedside at 6:48 p.m., and left her room at 6:57 p.m. While there, the respiratory therapist suctioned Knox's mouth, removing some secretions. Dr. Richard Kerbavaz, the surgeon who operated on Knox, was called at 6:50 p.m. and advised about Knox's breathing. Dr. Kerbavaz arrived sometime shortly after 7:00 p.m. At Knox's bedside, Dr. Kerbavaz tried to reposition her and suctioned her mouth and nose. As he removed the bandages and began removing the sutures on her incision to relieve pressure, Knox stopped breathing. Dr. Kerbavaz called a code blue at 7:23 p.m.[1] Knox was without a pulse for a number of minutes and as a result of her blocked airway, she suffered a permanent brain injury. Knox was transferred to the ICU. She died on October 5, 2008, after life support was withdrawn.

Keys saw her mother immediately after surgery while she was on a gurney waiting to be brought to her room. Keys testified that Knox "didn't look herself" and her skin appeared gray. Knox appeared to be very uncomfortable and in distress, and she was sweating. She could not speak and was making a gurgling sound when she breathed. Once they were in her room, the respiratory therapist suctioned Knox twice. Knox had nodded when asked if the suctioning made her feel better, but she still appeared to be uncomfortable. Keys asked the nurse to call Knox's doctor because her conditions was not improving. After Dr. Kerbavaz arrived, she watched him begin to examine the site of the surgery and then saw her mother's eyes roll back and her arm go up, and Dr. Kerbavaz call code blue. Smith immediately took Keys from the room. Keys was frustrated and upset because she felt there was no sense of urgency among the staff to determine why her mother was in distress; she thought that the nurses and others were not moving quickly enough.

[1]A code blue is called when a patient loses consciousness; it summons a team of doctors to deal with the emergency.

Smith too saw Knox near the nurse's station before she was moved into her room. Knox indicated to her that she had a breathing problem. Knox looked uncomfortable to Smith, and was panting, but she was alert and sitting up. Knox was perspiring and was clammy. The first suctioning performed by the respiratory therapist appeared to provide some relief; Smith asked Knox if she felt better and she nodded. The problem recurred and at Smith's request, the respiratory therapist suctioned Knox again. Smith asked that Dr. Kerbavaz be called. Her sister remained uncomfortable while they were awaiting Dr. Kerbavaz and was not breathing well. After Dr. Kerbavaz arrived, Smith saw him reach toward her sister's neck and her sister's arm go up, and then someone called code blue. Everybody was then moving, and she and Keys were pushed aside. When code blue was called, she left the room immediately but went back to get Keys, who had not moved. Smith believed somebody should have come to help her sister sooner than they did. The lack of a sense of urgency upset her.

Procedural History

Plaintiffs Keys and Smith, along with Key's sister Starlette Settles, filed a complaint for damages against defendant alleging causes of action for wrongful death and negligent infliction of emotional distress. Prior to trial, plaintiffs settled their claims against Dr. Kerbavaz, and the settlement was found to be in good faith. After trial, the jury awarded Keys and Settles $1 million on their wrongful death claims[2] and awarded Keys $175,000 and Smith $200,000 on their NIED claims.

Defendant filed a timely notice of appeal.

[2]This sum was subsequently reduced before entry of judgment to $220,000 pursuant to Civil Code section 3333.2, subdivision (b), and to reflect a set-off for settlement monies received. Defendant does not challenge the award on plaintiffs' wrongful death claim.

Discussion

I.

Defendant argues that the verdicts in favor of plaintiffs Keys and Smith on their NIED claims must be reversed because they were unsupported by substantial evidence. We disagree.

Under the substantial evidence standard of review, "[w]e must accept as true all evidence and all reasonable inferences from the evidence tending to establish the correctness of the trial court's findings and decision, resolving every conflict in favor of the judgment. [Citations.] [¶] … If this 'substantial' evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment must be upheld." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) It is not our role to "reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses." (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13.) That role is the "province of the trier of fact." (*Howard v. Owens Corning, supra,* at p. 630.)

In *Thing v. La Chusa* (1989) 48 Cal.3d 644, 667–68 (*Thing*), the California Supreme Court established three requirements that a plaintiff must satisfy to recover on a claim for negligent infliction of emotional distress to a bystander: (1) the plaintiff must be closely related to the injury victim; (2) the plaintiff must have been present at the scene of the injury-producing event at the time it occurred and then aware that it was causing injury to the victim; and (3) as a result, the plaintiff must have suffered serious emotional distress. In this case, there is no dispute that Keys and Smith are closely related to Knox and that they were with Knox from the time she began exhibiting difficulty breathing until her doctor called the code blue. Defendant argues that there is no substantial evidence, however, that Keys and Smith were aware at that time that defendant's negligence was causing injury to Knox.

In making this argument, defendant relies upon *Bird v. Saenz* (2002) 28 Cal.4th 910 (*Bird*). In that case, two events were identified by the California Supreme Court as potential injury-producing events: (1) the negligent transection of the victim's artery; and (2) the subsequent negligence by the defendants in failing to diagnose and treat the

damaged artery. (*Id*. at p. 917.) The court ruled that the plaintiffs could not recover for negligent infliction of emotional distress to a bystander for either event. With respect to the negligent transection, the plaintiffs were not present at, nor did they observe the injury-producing event. (*Ibid*.) As for the defendants' subsequent negligence in failing to diagnose and treat the victim's damaged artery, the plaintiffs did not, and could not, meaningfully perceive the defendants' negligence because "[e]xcept in the most obvious cases, a misdiagnosis is beyond the awareness of lay bystanders." (*Ibid*.) The court continued, "Even if plaintiffs believed, as they stated in their declarations, that their mother was bleeding to death, they had no reason to know that the care she was receiving to diagnose and correct the cause of the problem was inadequate. While they eventually became aware that one injury-producing event-the transected artery-had occurred, they had no basis for believing that another, subtler event was occurring in its wake." (*Ibid*.)

Plaintiffs also cite *Bird* in support of their position, but rely primarily upon *Ochoa v. Superior Court* (1985) 39 Cal.3d 159 (*Ochoa*), a case that the Supreme Court discussed extensively in *Bird*. "In [*Ochoa*], a boy confined in a juvenile detention facility died of pneumonia after authorities ignored his obviously serious symptoms, which included vomiting, coughing up blood, and excruciating pain. We permitted the mother, who observed the neglect and recognized it as harming her son, to sue as a bystander for NIED. Anticipating the formula we would later adopt in *Thing*, we explained that 'when there is observation of the defendant's conduct and the child's injury and contemporaneous awareness the defendant's conduct or lack thereof is causing harm to the child, recovery is permitted.' [Citation.] The injury-producing event was the failure of custodial authorities to respond significantly to symptoms obviously requiring immediate medical attention. Such a failure to provide medical assistance, as opposed to a misdiagnosis, unsuccessful treatment, or treatment that turns out to have been inappropriate only in retrospect, is not necessarily hidden from the understanding awareness of a layperson." (*Bird, supra,* 28 Cal.4th at pp. 919–920; see *Wright v. City of Los Angeles* (1990) 219 Cal.App.3d 318 [relative who watched a paramedic conduct a cursory medical examination that failed to detect signs of sickle cell shock was permitted

to sue for wrongful death but not for NIED because there was no evidence "he was then aware [that the decedent] was being injured by [the paramedic's] negligent conduct"].)

Accordingly, *Bird* does not categorically bar plaintiffs who witness acts of medical negligence from pursuing NIED claims. "This is not to say that a layperson can never perceive medical negligence or that one who does perceive it cannot assert a valid claim for NIED." (*Bird, supra*, 28 Cal.4th at p. 918.) Particularly, a NIED claim may arise when as in Ochoa caregivers fail "to respond significantly to symptoms obviously requiring immediate medical attention." (*Bird*, *supra*, 28 Cal.4th at p. 920.)

The evidence here showed that the plaintiffs were present when Knox, their mother and sister, had difficulty breathing following thyroid surgery. They observed inadequate efforts to assist her breathing, and called for help from the respiratory therapist, directing him at one point to suction her throat. They also directed hospital staff to call for the surgeon to return to Knox's bedside to treat her breathing problems. These facts could be properly considered by the jury to demonstrate that the plaintiffs were contemporaneously aware of Knox's injury and the inadequate treatment provided her by defendants.

Defendants say recovery here is not possible because under *Bird* it was incumbent upon plaintiffs to prove that Knox's inability to breathe was due to the hematoma in her throat. We disagree. There is no evidence that the hematoma was due to an act of medical negligence. The only evidence in the record is that the stridor presented by Knox is a well-known, post-operative complication of thyroid surgery. No evidence suggests that the hematoma resulted from substandard care. Rather, a hematoma was described by defendant's expert as a common risk of thyroid surgery that can occur without negligence. It would be erroneous for us to characterize a common surgical complication that may occur without any breach of the duty of care to be an injury producing event for a medical malpractice or NIED claim. (See, *Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 305 ["The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate

causal connection between the negligent conduct and the injury; and (4) resulting loss or damage."].) Moreover, the plaintiffs' expert did not characterize the hematoma as critical in warranting an urgent response on the part of defendants. Instead, he describes the critical factor as the failure of defendants to realize Knox had a compromised airway. The negligence in this case was the failure of defendants to intubate the decedent or otherwise treat her compromised airway, not a failure to diagnose her post-surgical hematoma. The injury producing event here was defendants lack of acuity and response to Knox's inability to breathe, a condition the plaintiffs observed and were aware was causing her injury.

The jury was instructed under CACI 1621 as it provided at the time of trial that in order to find defendants liable for NIED it had to find that the plaintiffs were present when the injury occurred and "aware that Madeline Knox was being injured." The dissent considers it material in this case that CACI 1621 has been modified since the time of trial to include a specific paragraph elaborating on the causation requirement for a NIED claim. We do not. As the dissent points out, CACI 1621 provides the jury is to determine: "That [name of plaintiff] was then aware that the [e.g. traffic accident was causing [injury to/the death of] [name of victim]." (CACI No. 1621 (2014) vol. 1, p. 984.) Here, if the court had this version of the instruction available, the jury would be told it had to determine: "That Ms. Keys and Ms. Smith were then were aware that the inadequate treatment of Ms. Knox's compromised airway was causing her injury." The evidence and the record in this case lead us to conclude that they were and that the jury made such a determination.

This case is more like *Ochoa* than *Bird.* A reasonable inference can be drawn from the evidence that Keys and Smith were present and observed Knox's acute respiratory distress and were aware that defendants' inadequate response caused her death. When " 'substantial' evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment must be upheld." (*Howard v. Owens Corning, supra*, 72 Cal.App.4th at p. 631.)

II.

We have no reason to question the jury's conclusion that Keys and Smith suffered serious emotional distress as a result of watching Knox's struggle to breathe that led to her death. The jury was properly instructed, as explained in *Thing*, that "[s]erious emotional distress exists if an ordinary, reasonable person would be unable to cope with it." (*Thing, supra*, 48 Cal.3d at p. 668 n.12.) The instructions clarify that "Emotional distress includes suffering, anguish, fright, . . . nervousness, grief, anxiety, worry, shock . . . ." Viewed through this lens there is no question that Smith and Keys's testimony provides sufficient proof of serious emotional distress.

Smith said she was scared and upset following her sister's code blue episode in the recovery room. She prayed for her recovery, would not agree to the characterization that she was able to cope with the mental and emotional stress of the events in the recovery room, and "went to pieces" when she learned her sister had died.

Keys was more descriptive of her feeling in the recovery room while her mother struggled to breathe. She testified, "I felt wow, whew. I felt very helpless because there was nothing—I couldn't do anything but stand there wishing something could be done—could be done to her. Nothing was done. She looked very—her face was just gray. She was perspiring a lot. Helpless. Looked in pain and there's nothing I could do but just stand there. And I was just—devastation, devastated that everything that happened to her." When the code blue was called, Keys described her reaction as "very emotional and shocked," and she was crying.