

Tips for New Lawyers

No Harm, No Foul, No Accrual?

By Teresa Fariss McClaim

Introduction

In Minnesota, medical malpractice actions must be commenced within four years from the date the cause of action accrues.¹ Sounds simple enough, however, recent inconsistencies in Minnesota appellate jurisprudence regarding the date of accrual in negligence actions has complicated this calculation.

Accrual

Minnesota does not recognize the date of discovery rule² for purposes of determining the date of accrual. A cause of action *generally* accrues when there is negligence, combined with resultant damage. In *Dalton v. Dow Chemical Inc.*, 158 N.W.2d 580, 584 (Minn. 1968) the Supreme Court held that “[a]n action accrues at such time as it could be brought in a court of law without dismissal for failure to state a claim.” The Court reasoned that it was the synergy of the negligence combined with damage that determined the date on which the cause of action accrued. In 1999, the Supreme Court applied the holding of *Dalton* in a medical malpractice context, holding, “[a]lleged negligence coupled with the alleged resulting damage is the gravamen in deciding the date when the cause of action accrues. *Offerdahl v. Univ. of Minn. Hosp.*, 426 N.W.2d 425 (Minn. 1988).

Termination of Treatment Rule

Minnesota has long recognized the “termination of treatment” rule, which provides that where there has been a continuing course of treatment between a physician and patient, the statute of limitations for medical negligence will not begin to run until treatment ceases.³ The rationale underlying this rule “is to foster the physician-patient relationship by allowing the patient to seek corrective treatment while maintaining her legal remedy, thus affirming the trust and confidence a patient has in her doctor.”⁴

¹ Minn. Stat. § 541.076(b) provides, “An action by a patient or former patient against a health care provider alleging malpractice, error, mistake, or failure to cure, whether based on a contract or tort, must be commenced within four years from the date the cause of action accrued.” Actions commenced prior to August 1, 1999 were governed by Minn. Stat. § 541.07, which provided a two year statute of limitations.

² A majority of states recognize the date of discovery rule, which acts to toll the limitations period until a patient discovered, or should have discovered their injury.

³ The Supreme Court adopted the termination of treatment rule in *Schmitt v. Esser*, 226 N.W.196 (Minn. 1929), holding, “[w]e think the treatment and employment should be considered as a whole, and, if there occurred therein malpractice the statute of limitations, begins to run when the treatment ceases.”

⁴ *Fabio v. Bellomo*, 504 N.W.2d 758,764-65 (Minn. 1993)(Gardebring, J., dissenting).

The Minnesota Supreme Court has set forth three factors to consider in determining when treatment ceases:

1. Whether there is a relationship between physician and patient with regard to the illness;
2. Whether the physician is attending and examining the patient;
3. Whether there is something more to be done.

Grondahl v. Bulluck, 318 N.W.2d 240, 243 (Minn. 1982).⁵

Although the termination of treatment rule has been longstanding law in Minnesota, the 1993 *Fabio v. Bellomo* decision significantly narrowed application of the rule as set forth in *Schmitt* and *Grondahl*.

Fabio concerned a plaintiff who was treated by her primary care physician, Dr. Bellomo, from 1977 to his retirement in 1986. Fabio alleged that on one occasion between 1982 and 1984 and on another occasion in 1986, she complained to Dr. Bellomo of a lump in her left breast. On both occasions, without conducting any diagnostic testing, Dr. Bellomo told her not to worry about it because it was a fibrous mass. After Dr. Bellomo's retirement, Fabio saw a different doctor, who diagnosed her with breast cancer. By that time, the cancer had metastasized to four lymph nodes. Ms. Fabio subsequently brought a medical malpractice action against Dr. Bellomo for failing to properly diagnose and treat her breast cancer. Plaintiff offered expert testimony that Dr. Bellomo had departed from accepted standards of practice in failing to offer mammography at the time plaintiff complained of a lump prior to 1984 and in 1986. In addition, expert testimony was offered to establish that it was more likely than not that the cancer had spread from the breast to the lymph nodes between 1984 and 1987. However, the plaintiff failed to present evidence that her cancer would recur, or that she had a diminished life expectancy as a result, therefore failing to establish a causal link between the alleged negligence and damage.

Prior to trial the plaintiff sought to amend her complaint to include an allegation of negligence for the misdiagnosis that occurred prior to 1984. The district court denied plaintiff's motion, ruling that any negligence occurring between 1982 and 1984 was barred by the two year statute of limitations.⁶ These rulings were affirmed by the Court of Appeals and the Minnesota Supreme Court stating, "[w]hen Dr. Bellomo examined Fabio's breast between 1982 and 1984, he did not recommend any further treatment. His treatment of her condition ceased at the time he told her not to worry about it."⁷ In

⁵ An exception to the termination of treatment rule exists where there is a "single act" of negligence, complete at the time it occurred, and "no continued course of treatment could either cure or relieve it." *Swang v. Hauser*, 180 N.W.2d 187, 190 (Minn. 1970).

⁶ Actions commenced prior to August 1, 1999 were governed by Minn. Stat. § 541.07, which provided a two year statute of limitations.

⁷ *Fabio*, 504 N.w.2d at 762.

addition, the Court held that plaintiff's motion to amend should be denied because more than two years had passed.

How much damage is "enough"

Minnesota law has consistently held that a cause of action accrues when there is negligence, combined with resultant damage. Recent inconsistent appellate decisions have created uncertainty regarding the amount of damage necessary. It seems illogical that based on the same set of facts, damages could be sufficient to trigger accrual, yet be insufficient to survive a motion to dismiss for failure to state a claim. In misdiagnosis of cancer cases, this is often the case.

In *Leubner v. Sterner*, 493 N.W.2d 119, 121 (Minn. 1992), the Court held that a cancerous tumor's "unchecked growth" did not rise to the level of "legal damage," until there was proof that it was more probable than not the plaintiff would not survive her cancer due to the "unchecked growth." The *Leubner* holding was clear that in a case involving a misdiagnosis of cancer, no "legal" damage occurs until a patient's prognosis changes from a probability of survival (with timely treatment) to a probability of death (with delayed treatment).⁸ The *Leubner* Court held that even though the presence of cancerous cells in the patient's body on the date of misdiagnosis may cause some harm, a cause of action for negligent failure to diagnose does not arise until legal damage occurs. *Id.*

Last year, in *Molloy v. Meier*, 679 N.W.2d 711, 721 (Minn. 2004) the Supreme Court addressed the issue of accrual in a medical negligence case where a physician failed to diagnose a genetic condition in a child. The Court held that the cause of action accrues on the date of conception of a subsequent child because, until that time, no damage has occurred. The Court's opinion was consistent with the earlier *Leubner* decision, however, the Court took pains to distinguish its holding from that in *Fabio*, stating:

The misdiagnosis in *Fabio* caused the plaintiff immediate injury in the form of a continually growing cancer, which became more dangerous to the plaintiff each day it was left untreated. The action accrued at the time of misdiagnosis because some damage occurred immediately. In the case of failure to diagnose Fragile X, however, the error does not directly damage the patient and but for the fact that she conceived another child, Molloy would have suffered no damage . . .

Id. at 722.

The concern shown by the Court in distinguishing *Molloy* from *Fabio* was unnecessary, since the *Fabio* Court never reached the issue of sufficiency of damages for the purpose of determining accrual. In *Fabio* the plaintiff argued that Dr. Bellomo's negligence caused her three forms of damage: chemotherapy, loss of a chance, and negligent aggravation of a preexisting condition. The Court rejected all three theories, reasoning that chemotherapy would have been necessary even if the cancer had been diagnosed in 1986, and holding that the other two theories of recovery had been

⁸ *Id.* at 121.

previously rejected by the Court. Additionally, the Court affirmed the district court's grant of summary judgment, rejecting the plaintiff's argument that a continuing course of treatment by Dr. Bellomo existed with regard to treating the breast lump, therefore excluding the misdiagnosis in 1984 based on the statute of limitations. *Molloy* cites *Fabio* for the proposition that in misdiagnosis of cancer cases the cause of action accrues on the date of misdiagnosis due to immediate damage inherent in the presence of cancer cells. To the contrary, the Court in *Fabio* never reached the issue of whether legal damage occurred. There was no discussion in the *Fabio* opinion of whether "some damage," the presence of cancer cells, was enough for the cause of action to accrue.

In most cancer misdiagnosis cases "legal damage" does not occur until, over time, a patient's prognosis changes from a probability of survival, with treatment, to a probability of death, with delayed treatment. By the time this prognostic change happens, the statute of limitations may bar the plaintiff's claim.

The Supreme Court clearly held in *Leubner* that a certain level of damage, legal damage, was required to establish a negligent misdiagnosis claim, sufficient to survive a motion to dismiss for failure to state a claim.⁹ In contrast, without reference to the holding of *Leubner*, *Molloy* announced that "some damage," was sufficient for purposes of accrual in misdiagnosis of cancer cases.¹⁰ There is now an inconsistency in the definition of accrual in a misdiagnosis of cancer case. A plaintiff must establish legal harm, that is, provide evidence that the patient's prognosis has changed as a result of the misdiagnosis, in order to survive a motion to dismiss for failure to state a claim. The standard is different for the defendant. A defendant, bringing a motion for summary judgment based on the statute of limitations, would have only to establish "some damage," the presence of cancer cells, to trigger the statute of limitations.

The Minnesota Court of Appeals as well as the Minnesota Supreme Court had an opportunity to clarify and harmonize the conflicting jurisprudence on this issue earlier this year in *Zenzen v. Eiser, et al.*¹¹ Mr. Zenzen sought treatment for a prostate condition. As part of his workup for prostate surgery, a chest x-ray was obtained. The radiologist interpreting the x-ray negligently failed to identify a lesion, which was later diagnosed as cancerous tumor. Mr. Zenzen's cancer went undetected and undiagnosed until a date when it was too late to successfully treat or cure.

The district court granted summary judgment for defendant based on their statute of limitations argument. Plaintiff appealed, arguing that the cause of action did not accrue until legal damage occurred. The plaintiff cited *Luebner* for the proposition that a cause of action does not accrue until legal damage occurs, arguing that the cause of action did not accrue until Mr. Zenzen's prognosis changed from a probability of survival with timely diagnosis and treatment, to a probability of death. Plaintiff pointed out the inconsistency and raised by the *Molloy* case, and the resultant uncertainty with regards to

⁹ *Leubner*, 493N.W.2d at 121.

¹⁰ *Molloy*, 679 N.W.2d at 721.

¹¹ *Zenzen v. Eiser, et al.*, No. A04-905, 2005 WL 89436 (Minn.App. Jan.18, 2005), *rev. denied*, March 15, 2005.

accrual. Although these issues, including the holding in *Molloy*, were fully explored during oral argument, the written opinion affirmed the district court without discussing the inconsistencies in jurisprudence. The same issues were raised by plaintiff on petition for review to the Minnesota Supreme Court, but review was denied.

Although the Court had the opportunity in *Zenzen* to resolve the issue, it chose not to act. The result is that the inconsistency remains, and plaintiff claims based on delay in diagnosis of cancer cases will continue to be barred.

Accrual in the Context of Legal Malpractice

In a recent legal malpractice case, *Antone v. Mirviss*, the Minnesota Court of Appeals considered the issue of accrual.¹² The case concerned an attorney who allegedly was negligent in drafting an antenuptial agreement. The claim was brought approximately twelve years after the attorney's alleged negligent act. The court held that the statute of limitations did not begin to run until the plaintiff's ex-wife was awarded property the plaintiff intended to be protected by the agreement. The defendant argued that the plaintiff suffered "some damage" when he and his spouse signed the antenuptial agreement, because the plaintiff then lost the right to prevent his spouse from obtaining an interest in the assets in question if the parties subsequently dissolved their marriage. The court disagreed, holding that the plaintiff's claim did not accrue until it was "possible on any evidence which might be produced . . . to grant *the relief demanded*."¹³ The court reasoned that the defendant's contention that the plaintiff had sustained "some damage" at the time the agreement was signed was tenable only if that loss was ascertainable as money damages. In other words, the court held that although there may have been "some damage" at the time the agreement was drafted, there was not sufficient damage (legal damage), until the claim could survive a motion to dismiss for failure to state a claim.

Conclusion

The holding of *Antone*, requiring legal damage to trigger accrual, is consistent with the holding of *Molloy*. There now exists a different standard for determining the date of accrual in misdiagnosis of cancer cases versus misdiagnosis of genetic conditions or negligence in drafting a contract. Reconciling these cases with misdiagnosis of cancer cases would require that the court adopt a consistent rule, holding that a cause of action for negligence would not accrue until the patient or client sustains legal damages. Until the court announces a rule that will harmonize these decisions, uncertainty with regard to determining date of accrual in will continue to exist.

¹² *Antone v. Mirviss*, 694 N.W.2d 564, 569 (Minn. Ct. App. 2005).

¹³ *Id.*