THE STATUTE OF LIMITATIONS FOR MEDICAL MALPRACTICE ACTIONS IN IOWA: NO LONGER FORCING PATIENTS TO "PLAY DOCTOR"

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I. INTRODUCTION

Imagine a patient who discovers a lump in her breast. She seeks immediate medical attention from her physician, who conducts several diagnostic tests. He later assures her the lump is benign and "nothing to worry about." The patient remains concerned. So she diligently seeks a

second opinion. Followed by a third. And a fourth. And a fifth. In all, she consults nine doctors in five years, all of whom conclude she is fine—except the last one. The last doctor, after performing a biopsy, tells the patient that the lump is malignant. Devastated and angered, the patient files a lawsuit against the doctors who repeatedly misdiagnosed her condition. However, as the litigation moves forward, the case is dismissed. The court concludes the claim is barred by the two-year statute of limitations, and despite the assurances of eight doctors, the patient should have known five years earlier that she was suffering from breast cancer and had been misdiagnosed. It seems absurd to require a patient to diagnose a condition that eight doctors could not. Yet that was precisely the result under one court's interpretation of Iowa's medical malpractice statute of limitations.[1]

Under Iowa Code section 614.1(9), plaintiffs must file medical malpractice claims "within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known . . . [of] the injury or death for which damages are sought in the action, whichever of the dates occurs first . . . ."[2] This section of the Iowa Code codifies the "discovery rule" relating to medical malpractice actions.[3]

Until recently, Iowa courts held that the statute of limitations commenced with a patient's knowledge of his "injury" alone.[4] Knowledge of its cause was irrelevant.[5] Further, the Iowa Supreme Court defined "injury" as "physical harm," contrasting previous decisions holding that "injury" required knowledge of a wrongful act.[6]

While application of the statute of limitations under this

1. *See* Murtha v. Cahalan, No. CL 93629, at 10 (Iowa Dist. Ct. Oct. 13, 2004) (the trial court dismissed plaintiff's complaint and granted summary judgment for the defendants because plaintiff knew of her injury more than two years before she filed her complaint).

2. IOWA CODE § 614.1(9)(a) (2007).

3. Marshall-Lucas v. Goodwill, No. 04-1536, 2005 WL 2085952, at *3 (Iowa Ct. App. Aug. 31, 2005).

4. *See* Caswell v. Yost, No. 02-2051, 2003 WL 22096223, at *2–3 (Iowa Ct. App. Sept. 10, 2003) (quoting Langner v. Simpson, 533 N.W.2d 511, 517 (Iowa 1995)) (holding that the statute of limitations begins to run "when a patient knew, or through the use of reasonable diligence should have known, of the injury for which damages are sought").

5. *See, e.g.*, Kline v. McGuire, No. 99-1534, 2000 WL 1827215, at *4 (Iowa Ct. App. Dec. 13, 2000) (holding that the statute of limitations commenced regardless of "whether or not plaintiffs then knew or should have known the symptoms were causally related to the medical care provided by the defendants.").

6. Schlote v. Dawson, 676 N.W.2d 187, 193 (Iowa 2004).

interpretation was reasonably straightforward in cases when the physical harm was obvious and caused by a single affirmative act of negligence,[7] application was far more challenging in misdiagnosis claims when the injury was not immediately apparent or was caused by a progressive condition.[8] Confusion over these types of cases resulted in sometimes absurd results: courts requiring patients to recognize and diagnose an injury even when trained professionals had failed to do so.[9] Further, the lack of consistency with which the statute was applied proved particularly devastating to "unsuspecting" victims of medical misdiagnosis, whose claims became increasingly susceptible to dismissals for failing to satisfy the statutory deadline.[10]

This Note will examine the history and evolution of the medical malpractice statute of limitations in Iowa. Further, it will highlight

7. *See, e.g.*, *id.* at 194 (holding that the plaintiff's injury was the removal of his voice box and that the statute of limitations began to run on that date).

8. *See generally* Murtha v. Cahalan, 745 N.W.2d 711, 715–17 (Iowa 2008) (explaining the difficulty of determining the date of plaintiff's breast cancer and the application of the statute of limitations); Rathje v. Mercy Hosp., 745 N.W.2d 443, 457–63 (Iowa 2008) (explaining the application of the statute of limitations to an injury of "drug induced hepatitis secondary to Antabuse"); Rock v. Warhank, No. 05-1753, 2006 WL 2872499, at *3 (Iowa Ct. App. Oct. 11, 2006) (holding plaintiff's petition untimely filed because the injury was the cancer remaining in plaintiff's body and not the misdiagnosis).

9. *See, e.g.*, *Murtha*, 745 N.W.2d at 714 (district court held that plaintiff's knowledge of the lump in her breast was notice of injury under the statute of limitations for the misdiagnosis of breast cancer); *Rathje*, 745 N.W.2d at 443, 446 (district court held plaintiff's claim was barred by the statute of limitations because her injury had manifested itself more than two years before the suit was filed); *Rock*, 2006 WL 2872499, at *3 (the plaintiff's injury was the cancer remaining in her body, even though it was not diagnosed).

10. *See, e.g.*, *Murtha*, 745 N.W.2d at 712 (district court granted summary judgment because the claim was barred by the statute of limitations); *Rathje*, 745 N.W.2d at 444 (same); *Rock*, 2006 WL 2872499, at *3 (cancer misdiagnosis claim dismissed as untimely under statute of limitations); Holdefer v. Keller, No. 05-1217, 2006 WL 1628146, at *2 (Iowa Ct. App. June 14, 2006) (unnecessary hysterectomy claim barred by statute of limitations); Muldoon v. Burgman, No. 05-0602, 2006 WL 1230004, at *2–3 (Iowa Ct. App. Apr. 26, 2006) (failure to diagnose oral cancer claim barred by statute of limitations); Kline v. McGuire, No. 99-1534, 2000 WL 1827215, at *4 (Iowa Ct. App. Dec. 13, 2000) (claim barred by statute of limitations because plaintiff was aware of symptoms before diagnosis); Maxfield v. Koslow, No. CL 94971, 2005 WL 4880747, at *7 (Iowa Dist. Aug. 22, 2005) (claim was time-barred because plaintiff was on inquiry notice and failed to commence the action within the time period).

examples of the "systemic problems"[11] plaguing past interpretations of section 614.1(9) and describe how the Iowa Supreme Court recently attempted to remedy these problems by providing doctors, patients, and lawyers alike much needed clarity as to the application of the statute.

II. BACKGROUND OF MEDICAL MALPRACTICE ACTIONS IN IOWA

Prior to 1975, medical malpractice actions in Iowa were governed by the same statute of limitations regulating general personal injury actions in tort.[12] The general rule was that the statute of limitations commenced when the tort was committed.[13] Under Iowa Code section 614.1(2), a plaintiff in a personal injury action had two years from that point to file his claim.[14] However, in *Chrischilles v. Griswold*, the Iowa Supreme Court formally recognized an important exception to this general rule—the "discovery rule."[15] Under the discovery rule, the statute of limitations in malpractice cases does not begin to run "until the date of discovery, or the date when, by the exercise of reasonable care, [a] plaintiff should have discovered the wrongful act."[16] Thus, in determining whether the discovery rule would toll the running of the statute of limitations, the focal point of a court's inquiry is whether the plaintiff knew or should have known of the wrongful or negligent act that caused the injury.[17]

In 1974, for the first time, the Iowa Supreme Court applied the discovery rule to a medical malpractice action.[18] In *Baines v. Blenderman*, the court held that the statute of limitations in medical malpractice actions commenced when the injured person "[knew] or [could] be charged with

11. *Rathje*, 745 N.W.2d at 463.

12. *See* Schlote v. Dawson, 676 N.W.2d 187, 190–91 (Iowa 2004); Langner v. Simpson, 533 N.W.2d 511, 516–17 (Iowa 1995); Schultze v. Landmark Hotel Corp., 463 N.W.2d 47, 50 (Iowa 1990); Baines v. Blenderman, 223 N.W.2d 199, 201 (Iowa 1974).

13. Schnebly v. Baker, 217 N.W.2d 708, 721 (Iowa 1974) (citing 51 AM. JUR. 2D *Limitation of Actions* § 146, at 715; 54 C.J.S. *Limitations of Actions* § 205, at 216).

14. *See* IOWA CODE § 614.1(2) (2007) (addressing "[claims] founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years").

15. Chrischilles v. Griswold, 150 N.W.2d 94, 100–01 (Iowa 1967); *see also Schnebly*, 217 N.W.2d at 722 (describing the discovery rule and recognizing it as a part of Iowa law).

16. *Chrischilles*, 150 N.W.2d at 100 (citing Johnson v. Caldwell, 123 N.W.2d 785, 791 (Mich. 1963)).

17. *See id.*; Baines v. Blenderman, 223 N.W.2d 199, 202 (Iowa 1974).

18. *Baines*, 223 N.W.2d at 201–03.

knowledge of the existence of his cause of action."[19] As in *Chrischilles*, the *Baines* court held that commencement of the statute of limitations was based on a plaintiff's knowledge of the defendant's wrongful act—not merely on the plaintiff's awareness of his physical injury.[20] The court squarely rejected the notion that a plaintiff's knowledge of a physical harm, without more, was enough to trigger the running of the statute:

> Defendants equate perception of physical harm with imputed knowledge of its origin in malpractice. That is not the meaning of the discovery rule. Knowledge of an injury may or may not be sufficient to alert a reasonable diligent person to the basis of his claim, depending on the circumstances of the case.[21]

Thus, as *Baines* illustrates, the supreme court's early application of the discovery rule served as an added layer of legal protection for "unsuspecting" victims of medical malpractice by tolling the statute of limitations until the plaintiff had discovered both the physical injury and the wrongful act that caused it.

However, the heightened protection provided to plaintiffs by *Baines* provoked an almost immediate response from Iowa lawmakers seeking to curb the perceived skyrocketing costs of medical malpractice insurance.[22] In 1975, just one year after the *Baines* decision, the Iowa Legislature passed Iowa Code section 614.1(9), which specifically addressed and dramatically altered the statute of limitations for medical malpractice actions.[23] Subsection 9 requires that medical malpractice actions be filed

19. *Id.* at 202 (citations omitted).

20. *Id*. at 201, 203 (citing *Chrischilles*, 150 N.W.2d at 100).

21. *Id.* at 201. The court noted that imputing knowledge of malpractice based solely on a patient's initial perception of physical symptoms would force patients to constantly second-guess their doctors in order to evaluate whether the symptoms they experienced were actually a result of medical negligence: "A rule which would invariably charge a patient with knowledge of malpractice at the time the injury was first perceived would 'punish the patient who relies upon his doctor's advice and (place) a premium on skepticism and distrust.'" *Id.* at 202–03 (citing *Johnson*, 123 N.W.2d at 791).

22. *See, e.g*., Schultze v. Landmark Hotel Corp., 463 N.W.2d 47, 50 (Iowa 1990) (explaining that Iowa Code section 614.1(9) was "part of a comprehensive package of legislation aimed at alleviating the medical malpractice insurance crisis," was passed in "direct response" to *Baines*, and that "its purpose was to restrict the *Baines* discovery rule").

23. *See id.*; Farnum v. G.D. Searle & Co., 339 N.W.2d 392, 395 (Iowa 1983) (noting that the statutory change was intended to restrict application of the discovery rule).

"within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of, the injury or death for which damages are sought in the action, whichever of the dates occurs first . . . ."[24] The new law was part of a comprehensive legislative package passed in an effort to address "'a critical situation'" caused by "'the high cost and impending unavailability of medical malpractice insurance'" in Iowa.[25] By all accounts, the legislation was passed in direct response to the court's decision in *Baines* and was intended to restrict the court's interpretation of the discovery rule in medical malpractice actions.[26] Thus, the practical impact of subsection 9 was to tip the litigation scale in favor of medical practitioners by shifting the relevant inquiry under the statute from whether a plaintiff had knowledge of the negligent or wrongful act that caused an injury to merely whether the patient had knowledge of the injury itself.[27]

However, the *Baines* court's interpretation of the discovery rule did not die without a fight. Despite the legislature's unmistakable intent to restrict the discovery rule with section 614.1(9), the Iowa Court of Appeals applied *Baines* in *Lawse v. University of Iowa Hospitals* over a decade after the passage of subsection 9.[28] The court, citing *Baines*, noted that "[k]nowledge of an injury may or may not be sufficient to alert a reasonably diligent person" of a claim, and further defined "injury" as the "discovery of one's cause of action for negligence."[29]

24. IOWA CODE § 614.1(9)(a) (2007).

25. Schlote v. Dawson, 676 N.W.2d 187, 191 (Iowa 2004) (quoting 1975 Iowa Acts ch. 239, § 1); *see also Schultze*, 463 N.W.2d at 50.

26. *Schultze*, 463 N.W.2d at 50; Koppes v. Pearson, 384 N.W.2d 381, 387 (Iowa 1986); Kohrt v. Yetter, 344 N.W.2d 245, 247 (Iowa 1984); *Farnum*, 339 N.W.2d at 395.

27. *See Koppes*, 384 N.W.2d at 384–85 (noting that Iowa Code section 614.1(9) afforded "deferential treatment" to health care providers); E.H. Schopler, Annotation, *When a Statute of Limitations Commences to Run Against Malpractice Action Against Physician, Surgeon, Dentist, or Similar Practitioner*, 80 A.L.R.2d 360, 372 (1961) ("In determining the proper event which starts the period of limitation running against a malpractice action, the courts are confronted with two conflicting policies, the policy of protecting a practitioner against the danger of stale lawsuits . . . on the one hand, and, on the other hand, the policy of protecting patients against negligence of medical practitioners, which often is difficult to discover within the statutory period of limitation.").

28. Lawse v. Univ. of Iowa Hosps., 434 N.W.2d 895, 898 (Iowa Ct. App. 1988).

29. *Id.*

However, *Baines's* resurrection proved short-lived. In 1995, the supreme court decided *Langner v. Simpson* and, for the first time, analyzed subsection 9 as it related to injuries caused by medical malpractice.[30] After tracing the origins of the discovery rule and analyzing the legislative history of subsection 9, the court concluded:

> Subsection 9 means the statute of limitations now begins to run when the patient knew, or through the use of reasonable diligence should have known, of the injury for which damages are sought. *The statute begins to run even though the patient does not know the physician had* negligently *caused the injury*.[31]

Thus, *Langner* was effectively the proverbial final nail in *Baines*'s coffin. The court's decision decisively demonstrated the marked statutory shift from the patient-friendly rule in *Baines*. But lest any vestige of *Baines*'s interpretation remain, the court in *Schlote v. Dawson* expressly overruled the court of appeals' decision in *Lawse*.[32]

III. ANALYSIS

A. *The Impact of* Schlote v. Dawson

The passage of subsection 9 and its interpretation in *Langner* signaled a more restrictive approach for divining commencement of the statute of limitations in medical malpractice actions. The court's opinion in *Schlote v. Dawson* continued that trend and proved particularly restrictive to "unsuspecting" victims of medical malpractice.[33]

In *Schlote*, the plaintiff was diagnosed with a cancerous tumor on his voice box.[34] Though less intrusive and equally effective means of treatment were available, Schlote's doctor, Dr. Dawson, recommended

30. *See* Langner v. Simpson, 533 N.W.2d 511, 517 (Iowa 1995); *see also* Rathje v. Mercy Hosp., 745 N.W.2d 443, 456 (Iowa 2008) (explaining the history of the court's treatment of section 614.1(9)). In *Schultze v. Landmark Hotel Corp.*, the court analyzed subsection 9 as it related to a wrongful death claim based on medical malpractice. *Schultze*, 463 N.W.2d at 50.

31. *Langner*, 533 N.W.2d at 517 (emphasis added).

32. Schlote v. Dawson, 676 N.W.2d 187, 194 (Iowa 2004).

33. *Id.* at 189. It is worth mentioning, however, that Iowa courts do provide "unsuspecting" patients some relief in cases when a doctor "fraudulently conceals" an injury. In these cases, the supreme court has held that a plaintiff's failure to comply with the statute of limitations will not bar a claim. *Id.* at 195.

34. *Id.* at 189.

surgery.[35] As a result of the operation, Schlote lost his voice.[36] Just over two years later, Schlote learned that Dawson's medical license had been suspended for performing unnecessary surgeries; Schlote subsequently filed suit, claiming that his operation had been unnecessary.[37] In response, Dawson moved for summary judgment, asserting that Schlote's claim was barred by the statute of limitations. In particular, Dawson claimed the limitations period began to run when Schlote first learned his voice box had been removed.[38] The district court denied Dawson's motion.[39]

On appeal, however, the supreme court reversed—its decision turning on the court's interpretation of "injury" as incorporated within subsection 9.[40] While Dr. Dawson claimed that "injury" referred to the removal of Schlote's voice box, Schlote contended that "injury" related to the excessive nature of the surgery.[41] Under Schlote's view, because he did not discover the surgery was unnecessary until 1998, his lawsuit—filed in 2000—was not barred by the statute of limitations.[42] In rejecting Schlote's position, the court held that "injury" related not to the wrongful act that caused the injury, but rather to the "physical harm" itself.[43] Because the injury suffered by Schlote was the removal of his voice box, and because he knew immediately after surgery that his voice box had been removed, the two-year statute of limitations began at that point.[44] Therefore, Schlote's claim was time-barred.[45] The court further opined: "We recognize that our interpretation of 614.1(9) eliminates the discovery rule for medical malpractice claims as we have known it. Moreover, the facts here aptly

35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 190.
40. *See id.* at 192–94.
41. *Id.* at 189–90.
42. *Id.*
43. *Id.* at 192–94. The court supported this proposition by looking to its holding in *Schultze*. In that case, the court concluded that the statute of limitations under Iowa Code section 614.1(9) began to run upon the discovery of death, not upon the discovery of the wrongful act that caused death. *Id.* (citing Schultze v. Landmark Hotel Corp., 463 N.W.2d 47, 48 (Iowa 1990)). Thus, in *Schlote*, the court held that because the statute connects the terms "injury" and "death" with the conjunction "or," the term "injury" similarly related to the physical harm or injury itself, not to the wrongful act that caused an injury. *Id.* at 193.
44. *Id.* at 194.
45. *Id.*

demonstrate that the statute severely restricts the rights of unsuspecting patients who may be injured because of unnecessary and excessive surgery."[46]

At first blush, the result in *Schlote* proved troubling. In determining when the statute of limitations began to run under Iowa Code section 614.1(9), two questions were asked: What was the injury? And, when was the patient put on notice of that injury?[47] In *Schlote*, the answer to the first question was clear: the physical harm suffered by Schlote was the removal of his voice box.[48] However, while Schlote was certainly immediately aware that his voice box was gone, he could not have known that this was, in fact, an "injury."[49] After all, the removal of his voice box was the intended result of the surgery. [50] Thus, while a reasonably diligent investigation by Schlote likely would have revealed to him that he had suffered an "injury," there was no reason for him to conduct such an inquiry, absent some knowledge that the surgery was, indeed, wrongful.[51] Based on this reasoning, the dissent in *Schlote* argued that section 614.1(9) should not absolutely "preclude using knowledge of the wrongful act" to commence the statute of limitations in cases when "the wrongfulness of the act is a necessary component to acquiring knowledge of the underlying injury."[52] The dissent further explained: "[T]his opinion means every patient must now obtain a second—or third—opinion when surgery or another medical procedure is performed to protect against the statute of limitations running on some unknown injury."[53] Thus, the result in *Schlote*, the dissent argued, was not only "unsound," but also "absurd."[54]

46. *Id.* Interestingly, as the appellants in *Rathje* noted, the court's statement that *Schlote* eliminates the discovery rule as we have known it does not appear to be accurate. Brief of Petitioner-Appellant at 15, Rathje v. Mercy Hosp., 745 N.W.2d 443 (Iowa 2008) (No. 04-2081). In holding that "injury" refers to the physical harm—not the wrongful act—the *Schlote* court was merely upholding the conclusion in *Langner*. *See id.*

47. Schlote v. Dawson, 676 N.W. 2d 184, 192–93 (Iowa 2004).

48. *Id.* at 194.

49. *Id.* at 197 (Cady, J., dissenting) (noting that "removal of the voice box, as the intended result, cannot, by itself, be viewed by the patient to be an injury").

50. *Id.*

51. *See id.*

52. *Id.* at 196.

53. *Id.*

54. *Id.* (noting that the majority's opinion was "unsound" and suggesting its interpretation would lead to "absurd results").

B. *Diagnosing the Problem*

Subsequent application of section 614.1(9) appeared, at times, similarly absurd,[55] harsh,[56] and confusing[57]—especially, as the court in *Schlote* predicted, for "unsuspecting" victims of medical malpractice.[58] Cases involving medical misdiagnosis proved most problematic. In these types of cases, pinpointing the injury itself was particularly challenging because most claims involved either an internal condition that developed without specific external symptoms, or a slowly evolving, progressive condition.[59]

Determining the point at which a patient had notice of such an injury was equally difficult. Courts often reached conflicting conclusions as to the extent of physical harm necessary to trigger commencement of the statute of limitations.[60] Further, the decisions interpreting section 614.1(9) left unresolved the effect of patients' reasonably diligent investigation into their injuries; specifically, whether such investigation might result in tolling the limitations period.[61]

In short, these unresolved areas of ambiguity left patients, attorneys, and courts alike grasping for consistency and predictability in medical misdiagnosis cases, and left "unsuspecting" patients particularly vulnerable to the statute of limitations defense.

1. *Defining "Injury"*

At the core of the confusion created by section 614.1(9) was the definition of one of the statute's fundamental terms. As one might expect, it is difficult to charge a patient with notice of an injury if that injury cannot first be defined. Yet, the definition of "injury," for purposes of applying the statute of limitations in medical malpractice actions, had been the

55. *See, e.g.*, Reply Brief of Petitioner-Appellant at 16, Murtha v. Cahalan, 745 N.W.2d 711 (Iowa 2008) (No. 04-1727).

56. Rathje v. Mercy Hosp., No. LACV040011, at 7 (Iowa Dist. Ct. Dec. 1, 2004) (acknowledging the outcome in *Rathje* seemed "harsh and unduly burdensome").

57. Rock v. Warhank, No. 05-1753, 2006 WL 2872499, at *3 (Iowa Ct. App. Oct. 11, 2006) (noting that "in recent years there has been confusion over the malpractice limitation and the use of the discovery rule").

58. *Schlote*, 676 N.W.2d at 194.

59. *See infra* Part III.B.1.

60. *See infra* Part III.B.2.

61. *See infra* Part III.B.3.

subject of "considerable debate" in Iowa.[62] The term, after all, is not defined by Iowa Code section 614.1(9).[63] Rather, in *Schlote*, injury was defined as a "physical harm . . . rather than the wrongful act that caused the injury."[64]

Importantly, however, the supreme court had never addressed the meaning of "injury" in the medical misdiagnosis context.[65] Instead, the court had applied the definition in cases when the injury was immediately apparent and caused by a single affirmative act.[66] In sharp contrast, defining injury in misdiagnosis cases proved much more difficult because these cases often involved conditions with few, if any, external symptoms or conditions that were slowly evolving and progressive in nature. *Murtha v. Cahalan* and *Rathje v. Mercy Hospital* are instructive in this regard.

a. Murtha v. Cahalan. In June 1997, Tamra Murtha discovered a lump in her left breast.[67] Shortly thereafter, Murtha consulted her primary care physician, as well as her gynecologist.[68] A subsequent mammogram revealed no malignancy.[69] Nevertheless, Murtha was referred to a surgeon, Dr. Cahalan, who conducted a fine-needle biopsy of the lump, reviewed the mammogram, and agreed the lump was simply a benign cyst.[70] Murtha followed up with annual mammograms each of the next four years.[71] In addition, over that same period, she consulted two new doctors and underwent an ultrasound and another needle biopsy.[72] Over a five-year period, Murtha consulted eight different doctors, none of whom detected any cause for concern over the lump in her breast.[73] However, that changed in June 2002, when Murtha consulted yet another

62. Murtha v. Cahalan, 745 N.W.2d 711, 715 (Iowa 2008).
63. *See* IOWA CODE § 614.1(9) (2007).
64. Schlote v. Dawson, 676 N.W.2d 184, 193 (Iowa 2004).
65. *See Murtha*, 745 N.W.2d at 716.
66. *See, e.g.*, Ratcliff v. Graether, 697 N.W.2d 119, 124 (Iowa 2005); *Schlote*, 676 N.W.2d at 191.
67. *Murtha*, 745 N.W.2d at 712.
68. *Id.*; Brief of Petitioner-Appellant at 6, Murtha v. Cahalan, 745 N.W.2d 711 (Iowa 2008) (No. 04-1727).
69. *Murtha*, 745 N.W.2d at 712.
70. *Id.*
71. *See id.* at 712–13.
72. *See id.*; Brief of Petitioner Murtha, *supra* note 68, at 7–9.
73. Brief of Petitioner Murtha, *supra* note 68, at 7–9.

doctor who performed an excisional biopsy on the cyst.[74] This time, Murtha was told that the lump was cancerous.[75]

On September 5, 2003, Murtha filed a lawsuit against the physicians she claimed had failed to properly diagnose her cancerous condition.[76] The district court, however, dismissed the claim, finding that it was barred by the two-year statute of limitations under section 614.1(9).[77] The judge held that Murtha was on inquiry notice of her injury when she first found the lump in her breast in 1997—not when she was diagnosed with cancer in 2003, as Murtha contended.[78]

The primary issue on appeal involved the definition of Murtha's injury for purposes of applying the statute of limitations.[79] The district court held that the presence of the lump itself constituted Murtha's injury.[80] Murtha, on the other hand, asserted that her injury was the development of breast cancer, not the continuing presence of the lump.[81] She pointed out that doctors had repeatedly diagnosed the lump as merely a benign cyst, and by definition, a "benign" condition could not conceivably be construed as a "physical harm."[82] Therefore, Murtha contended, notice of the lump alone could not commence the statute of limitations.[83] To hold otherwise, she argued, required her—a lay patient—to diagnose a condition that her doctor could not. She concluded forcefully: "If this Court is going to require patients to know more than their doctors, it should issue such an edict now so that the citizens of this state are well aware that the laws governing medical negligence actions in this state provide them no protection for substandard care."[84]

b. Rathje v. Mercy Hospital. *Rathje* demonstrates a second, related complexity plaguing misdiagnosis cases: defining "injury" when a plaintiff's physical harm stems from an injury that is cumulative in nature.

74. *Murtha*, 745 N.W.2d at 713.
75. *Id.*
76. *Id.*
77. Murtha v. Cahalan, No. CL 93629, at 10 (Iowa Dist. Ct. Oct. 13, 2004).
78. *Id.* at 6 ("The facts in this case show that Murtha knew a problem existed as early as 1997 when she sought treatment for the lump or mass in her left breast.").
79. *Murtha*, 745 N.W.2d at 715.
80. *Murtha*, No. CL 93629, at 6–7.
81. Brief of Petitioner Murtha, *supra* note 68, at 27.
82. *See id.* at 26–27.
83. *Id.*
84. Reply Brief of Petitioner Murtha, *supra* note 55, at 18.

On March 19, 1999, sixteen-year-old Georgia Rathje was voluntarily admitted to a local hospital for treatment for alcohol abuse.[85] As part of her treatment, Rathje was prescribed a drug called Antabuse.[86] Before she received her first dose, doctors performed liver function studies on Rathje, and the studies indicated normal liver function.[87] Though the manufacturer of Antabuse recommended follow-up liver function tests to screen for liver damage, none were performed.[88] On April 5, 1999, Rathje began to experience nausea, abdominal pain, and vomiting.[89] She promptly reported her symptoms to her doctor, who ordered several gastrointestinal tests to be performed.[90] As a result, doctors diagnosed Rathje with "peptic disease" and prescribed Prevacid to help relieve her symptoms.[91] Despite the treatment, Rathje continued to experience periodic cramping and vomiting and continued to report these symptoms to her doctor.[92] On April 26, 1999, Rathje's symptoms worsened, and in addition, she experienced jaundice, yellowing of the whites of her eyes, and abdominal tenderness.[93] Subsequent testing showed that Rathje had suffered serious liver damage, likely due to the Antabuse treatment. After her condition worsened yet again, Rathje received a liver transplant.[94]

On April 26, 2001, two years after doctors discovered the liver damage resulting from her treatment, Rathje filed suit against her doctor and the hospital that treated her.[95] However, the district court granted the defendants' motion for summary judgment, finding that Rathje's claim was time-barred.[96] Relying on *Schlote*, the district court held that the statute of limitations began to run soon after the onset of Rathje's physical symptoms and well prior to the worsening of the symptoms she experienced April 26, 1999.[97] Thus, the court found that Rathje's lawsuit had been filed several days too late.

85. Rathje v. Mercy Hosp., 745 N.W.2d 443, 445 (Iowa 2008).
86. *Id.*
87. Brief of Petitioner Rathje, *supra* note 46, at 6.
88. *Id.* at 7.
89. *Rathje*, 745 N.W.2d at 445.
90. *Id.*
91. *Id.*
92. *Id.* at 446.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*

Rathje argued on appeal that the nausea and cramping she experienced were merely symptoms of her reaction to Antabuse toxicity—a condition altogether separate from the injury for which she was suing: irreparable liver damage.[98] Rathje asserted that her symptoms were not, therefore, sufficient to put her on notice of her liver injury, since the ultimate injury—liver failure—had not occurred when she first experienced physical symptoms.[99] Rather, the liver damage could only occur through subsequent and continued acts of negligent care, which had not yet occurred at the time she experienced those initial symptoms.[100] Stated another way, the ultimate injury was preventable until all the acts of negligence had occurred.[101] Thus, she contended, only when she developed symptoms clearly indicative of the irreparable liver damage, such as jaundice and abdominal tenderness, did she have notice of the "injury" for which she sought damages.[102] Therefore, her claim should not be time-barred.

The district court had rejected Rathje's argument, finding instead that Antabuse toxicity was sufficiently related to the irreparable liver damage and, therefore, that Rathje had notice of her injury upon her initial appreciation of symptoms.[103] This decision, it could be argued, effectively charged Rathje with knowledge of her injury before the ultimate injury had occurred, before doctors had recognized the potential for such injury, and

98. Brief of Petitioner Rathje, *supra* note 46, at 25–26.

99. *See id.* at 27–30.

100. *See id.* Rathje attempted to distinguish a "cumulative" injury from a "progressive" injury, explaining that a progressive injury is one that is continuous but evolving, such as cancer. *See* DVD: Oral Argument of *Rathje v. Mercy Hospital*, 745 N.W.2d 443 (Iowa 2008) (on file with Iowa Supreme Court). The Iowa Supreme Court had previously recognized that a plaintiff cannot apply separate limitation periods in cases in which the injury is progressive—when an initial injury develops into multiple successive injuries. *See* LeBeau v. Dimig, 446 N.W.2d 800, 802 (Iowa 1989) (holding that "claim-splitting" is not allowed). Thus, if Rathje's liver failure and the Antabuse toxicity were deemed to have been part of the same injury, then the statute of limitations would run from the point at which Rathje had notice of the effects of Antabuse. However, Rathje argued that a cumulative injury, in contrast, is a distinct injury because it is a product of repeated acts of negligence—without which the injury would not have occurred. *See* DVD: Oral Argument of *Rathje*, 745 N.W.2d 443 (on file with Iowa Supreme Court). Thus, the statute should not have commenced until she had notice of her irreversible liver failure.

101. Brief of Petitioner Rathje, *supra* note 46, at 29.

102. *Id.* at 26.

103. *See* Rathje v. Mercy Hosp., LACV 040011, at 6–7 (Iowa Dist. Ct. Dec. 1, 2004).

before many of the negligent acts causing the ultimate injury had been performed.

2. *Inquiry Notice*

a. *Sufficient Symptomology*. Equally difficult in misdiagnosis cases is determining the point at which a patient should be charged with notice of an injury. The Iowa Supreme Court had left unanswered the extent of physical harm required to trigger the statute of limitations.[104] As a result, widespread disparities developed between Iowa courts as to the appreciation of symptoms necessary to commence the limitations period.

In *Langner v. Simpson*, the supreme court held that a patient was put on notice of his injury when he realized "a problem exist[ed]."[105] However, the court did not further define the quantum of symptoms necessary to conclude that a patient knew or should have known of the "problem." In *Babcock v. Broadlawns Medical Center*, the Iowa Court of Appeals held that mere symptoms were enough to put a patient on notice of an injury.[106] In *Babcock*, the plaintiff had experienced groin pain immediately following hernia surgery, but upon medical consultation, had been told by his doctor that the pain was likely the result of a simple nerve injury.[107] Three years after his hernia operation, however, the patient learned that a nerve had been mistakenly damaged during the procedure.[108] In holding that the statute of limitations barred the patient's claim, the court held that the statute commenced once the patient acknowledged symptoms, and therefore, began to run when the patient noticed groin pain.[109] This interpretation of *Langner* placed the onus squarely on patients to be keenly aware of each and every symptom and its potentially ominous implications.

Other decisions, however, seemed to reject *Babcock*'s demanding approach. However, these opinions varied widely and somewhat inexplicably, and their approaches were inconsistently applied. For example, just one year after holding that a person had inquiry notice upon

104. *See* Brief of Respondent-Appellee at 21, Rathje v. Mercy Hosp., 745 N.W.2d 443 (Iowa 2008) (No. 04-2081) ("*Schlote* did not address the extent of physical harm required to trigger the limitations period . . . .").

105. Langner v. Simpson, 533 N.W.2d 511, 518 (Iowa 1995).

106. Babcock v. Broadlawns Med. Ctr., No. 03-1008, 2004 WL 1396199, at *2 (Iowa Ct. App. June 23, 2004).

107. *Id.* at *1.

108. *Id.*

109. *Id.* at *2.

"acknowledged symptoms" in *Babcock*, the Iowa Court of Appeals held in *Marshall-Lucas v. Goodwill* that "not every pain or symptom will put a person on inquiry notice."[110] In *Caswell v. Yost*, decided the same year as *Babcock*, the Iowa Court of Appeals held that a patient had notice of an injury only upon perception of worsening symptoms.[111] Additionally, in *Beamon v. Hanson*, decided just one year before *Babcock*, the court of appeals appeared to apply a more relaxed standard.[112] The court suggested that the patient did not have inquiry notice of his diabetes until he had been properly diagnosed by his physician—even though he had experienced and been treated for various ailments consistent with diabetes for four years prior to the correct diagnosis.[113] Taken together, these cases suggested that the statute of limitations could have commenced as early as a patient's first "acknowledged symptoms" or as late as the patient's proper diagnosis.

b. *Ambiguous Symptoms*. The confusion did not end there. Further complicating the issue were cases in which a patient admittedly acknowledged symptoms, but the symptoms exhibited were not necessarily indicative of the "injury . . . for which damages [were] sought."[114] In those cases, the symptoms could naturally be attributed by a patient (or doctor) to another independent and logical explanation. Iowa courts struggled to develop a consistent method of applying the statute of limitations in these types of situations.

i. Rathje v. Mercy Hospital. In *Rathje*, the district court held that the statute of limitations commenced upon Georgia Rathje's earliest

110. Marshall-Lucas v. Goodwill, No. 04-1536, 2005 WL 2085952, at *3 (Iowa Ct. App. Aug. 31, 2005).

111. Caswell v. Yost, No. 02-2051, 2003 WL 22096223, at *2 (Iowa Ct. App. Sept. 10, 2003) (holding that the patient was put on notice when the rash worsened and did not improve); *see* Muldoon v. Burgman, No. 05-0602, 2006 WL 1230004, at *1 (Iowa Ct. App. Apr. 26, 2006) (affirming that the patient was on notice of her injury after she experienced a "dramatic change of condition").

112. *See* Beaman v. Hanson, No. 99-1193, 2002 WL 1974053, at *1–2 (Iowa Ct. App. Aug. 28, 2002).

113. *Id.*; *see* Thompson v. Mary Greeley Med. Ctr., No. 02-0437, 2003 WL 21071315, at *1 (Iowa Ct. App. May 14, 2003) (noting that the patient was on notice of her latex allergy only after her doctor suggested the allergy as a possible diagnosis—despite having experienced symptoms for nearly two years prior).

114. *See* IOWA CODE § 614.1(9)(a) (2007).

appreciation of physical symptoms.[115] On April 5, 1999, Rathje first experienced nausea, abdominal pain, and vomiting.[116] At the time, doctors had interpreted these as mere symptoms of "peptic disease," and subsequently prescribed an over-the-counter medication.[117] It was not until April 26 that Rathje developed worsening symptoms clearly indicative of serious liver damage, including jaundice, yellowing of the whites of her eyes, and abdominal tenderness.[118] However, the district court held that Rathje had notice of her injury "well prior" to the symptoms manifested on April 26.[119]

Consequently, on appeal, Rathje argued that she could not have been placed on notice of her liver injury by her initial symptoms because those symptoms were consistent with the peptic disease misdiagnosed by her doctors.[120] Because the symptoms could naturally have been attributed to this altogether independent and unrelated condition, the symptoms were simply too ambiguous to provide Rathje sufficient notice of her underlying "injury" for purposes of commencing the limitations period. "To assert that at the first appearance of physical symptoms . . . that the statute of limitations would begin to run, would require all plaintiffs to properly self-diagnose . . . . Clearly, the *Schlote* decision is not intended to stretch the definition of "injury" to the first perception of physical symptomology."[121]

Thus, under the district court's decision in *Rathje*, a patient was not only saddled with the responsibility to correctly self-diagnose a professionally misdiagnosed condition, but the patient was also required to distinguish the symptoms of her unknown injury from similar symptoms potentially caused by an unrelated condition. This outcome, as the district court readily acknowledged, appeared "harsh or unduly burdensome"—charging a patient with knowledge of an injury when even a doctor had failed to make the proper diagnosis.[122]

ii. Marshall-Lucas v. Goodwill. In stark contrast to *Rathje*,

115. Rathje v. Mercy Hosp., LACV 040011, at 7 (Iowa Dist. Ct. Dec. 1, 2004).

116. Rathje v. Mercy Hosp., 745 N.W.2d 443, 445 (Iowa 2008); Brief of Petitioner Rathje, *supra* note 46, at 7.

117. *See* Brief of Petitioner Rathje, *supra* note 46, at 8.

118. *See id.*; *Rathje*, 745 N.W.2d at 446.

119. *Rathje*, LACV 040011, at 7.

120. *See* Brief of Petitioner Rathje, *supra* note 46, at 26.

121. Reply Brief of Petitioner Rathje at 7, Rathje v. Mercy Hosp., 745 N.W.2d 443 (Iowa 2008) (No. 04-2081).

122. *Rathje*, LACV 040011, at 7.

however, the Iowa Court of Appeals has held that a patient should not be charged with notice of an injury when the perceived symptoms mirrored those of an unrelated medical condition.[123] In *Marshall-Lucas v. Goodwill*, a patient sought treatment for a severe rash in January 1999, and doctors prescribed a medication to clear it up.[124] After finishing the medication, the patient began experiencing joint pain, which her doctors attributed to finishing the prescription.[125] Her physician recommended that she resume taking the medication to alleviate the pain.[126] In December 2000, the patient underwent knee surgery after experiencing increasing pain in her right knee.[127] She was subsequently diagnosed with a condition called avascular necrosis.[128] In 2001, doctors informed her that the condition may have developed as a result of the medication prescribed for her rash in 1999.[129] The patient then filed a medical malpractice claim against her doctors in December 2002—almost four years after she had been prescribed the medication.[130] The district court subsequently granted the defendant's motion for summary judgment, finding the plaintiff's claim time-barred.[131]

The Iowa Court of Appeals, however, held that the claim should not have been dismissed.[132] The court explained that the patient could not have been aware of her injury when she first experienced pain in 1999, noting that "not every pain or symptom will put a person on inquiry notice."[133] The court further concluded that the patient's leg pain did not provide sufficient notice of her injury, since the pain could also have been attributed to her arthritis, fibromyalgia, or even a recent fall.[134] Importantly, the court also considered the difficulty with which the patient's avascular necrosis was diagnosed: "If medical professionals had such apparent difficulty with this diagnosis, we cannot say, as a matter of

123. Marshall-Lucas v. Goodwill, No. 04-1536, 2005 WL 2085952, at *3 (Iowa Ct. App. Aug. 31, 2005).
124. *Id.* at *1.
125. *Id.*
126. *Id.*
127. *Id.* at *2.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at *3.
133. *Id.*
134. *Id.*

law, that a reasonable person in Marshall-Lucas's position . . . would have been put on inquiry notice."[135] Thus, the court in *Marshall-Lucas* seemed to recognize the absurdity of requiring a patient to recognize her injury even when a physician could not.

3. *Reasonably Diligent Investigation*

Also unsettling were those misdiagnosis cases in which a patient performed a reasonably diligent investigation upon perception of some physical symptoms, only to be misdiagnosed a second, third, or fourth time. In these cases, the patient clearly did what the law seemed to require—reasonable and diligent investigation into the symptoms of a potential injury.[136] Yet Iowa courts were conflicted as to the effect of such diligent investigation, or more specifically, whether it was sufficient to toll the running of the limitations period.

a. Clark v. Larson. While no Iowa court has ever explicitly held that a physician's misdiagnosis would affect the running of the statute of limitations, the Iowa Court of Appeals appeared initially to leave open the possibility that a reasonably diligent investigation could provide some safe harbor for unsuspecting victims of misdiagnosis.[137]

In *Clark v. Larson*, a patient sued her physician for malpractice after the physician allegedly misread a CT scan of the patient's neck.[138] The doctor had failed to recognize the presence of a malignant mass.[139] However, the lower court held the patient's claim was barred by the statute

135. *Id.* at *4.

136. In *Langner v. Simpson*, a patient was charged with notice of her injury upon awareness that "a problem exists." Langner v. Simpson, 533 N.W.2d 511, 518 (Iowa 1995). At the point of awareness, the patient was charged with the duty to investigate and "with knowledge of facts that would have been disclosed by a reasonably diligent investigation." *Id.* Thus, in determining inquiry notice for a misdiagnosis case, the relevant inquiry is whether the injury could have been revealed by a reasonably diligent investigation. *See* Aukes v. Creagh-Larramendi, No. 02-1673, 2004 WL 57578, at *3 n.2 (Iowa Ct. App. Jan. 14, 2004) ("The question is whether [the patient] would have discovered her injury or injuries, whatever their cause, through a reasonably diligent investigation."). It follows that when a patient conducts a "diligent" investigation, yet fails to learn of the injury due to a subsequent misdiagnosis, the running of the statute of limitations should be tolled. *See* Clark v. Larson, No. 00-1324, 2002 WL 100256, at *3 (Iowa Ct. App. Jan. 28, 2002).

137. *Clark*, 2002 WL 100256, at *3.

138. *Id.* at *1.

139. *Id.*

of limitations.[140] It noted that a separate report interpreting the scan, issued by the Mayo Clinic, had noted the presence of an abnormality, and further, that the patient had been privy to that report.[141] Thus, the lower court concluded that the report provided the patient sufficient notice of her injury more than two years before she filed her lawsuit.[142]

However, the Iowa Court of Appeals disagreed.[143] The court pointed out that while the report noted the presence of an abnormality, it went on to conclude that the finding was likely "insignificant" and that there was nothing suspicious to "warrant[] further imaging at this time."[144] The court explained: "Even if the report suggests that [the defendant doctor] misread the CT scan, that fact is not sufficient to trigger the statute because the report clearly indicates [the patient] sustained no resulting harm."[145] Therefore, the court concluded, because the report actually dispelled the patient's concerns over the presence of the abnormality, the patient "did not know nor could [she] have known through the exercise of reasonable diligence that [she] was injured as of [the date of the report]."[146] Thus, the holding in *Clark* seems to support the proposition that when a patient diligently investigates a suspected injury, only to be misdiagnosed again, knowledge of the injury cannot be imputed to the patient, and consequently, the statute of limitations will be tolled.

However, future decisions held just the opposite—that misdiagnoses would not delay the running of the statute. As one decision explained: "conflicting or erroneous medical advice concerning the cause of . . . symptoms is irrelevant."[147] This interpretation, best illustrated by the decisions in *Murtha v. Cahalan* and *Rock v. Warhank*, effectively forced unsuspecting patients to "play doctor" and self-diagnose an otherwise misdiagnosed condition.[148]

140. *Id.* at *2.
141. *See id.* at *3.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. Babcock v. Broadlawns Med. Ctr., No. 03-1008, 2004 WL 1396199, at *2 (Iowa Ct. App. June 23, 2004).
148. *See* Murtha v. Cahalan, CL 93629, at 7 (Iowa Dist. Ct. Oct. 13, 2004); Rock v. Warhank, No. 05-1753, 2006 WL 2872499 (Iowa Ct. App. Oct. 11, 2006).

b. Murtha v. Cahalan. In Murtha, as described in detail above, the district court dismissed a lawsuit filed by Tamra Murtha against several physicians, whom she claimed had failed to properly diagnose her breast cancer.[149] Murtha initially discovered a lump in her left breast in 1997.[150] After her discovery, she consulted nine doctors over a period of five years to monitor and examine the abnormality.[151] Each doctor diagnosed the lump as benign, until the last.[152] After performing a biopsy, the last doctor diagnosed the lump as a cancerous tumor.[153]

In dismissing Murtha's claim, the district court concluded that Murtha had notice of her injury upon discovery of the lump in her breast in 1997—not when she was correctly diagnosed with breast cancer five years later in 2002.[154] Therefore, her claim, filed in 2003, was barred by the statute of limitations.[155]

On appeal, Murtha contended that the limitations period could not have commenced until she was correctly diagnosed as suffering from breast cancer.[156] She argued that she could not have had notice of her physical harm because she had repeatedly investigated its cause and had repeatedly been assured by her physicians that there was, in fact, no physical harm.[157] Further, Murtha asserted that, under *Langner*, the relevant inquiry in determining whether a party has notice of an injury is whether that injury could have been revealed by a reasonably diligent investigation.[158] Consequently, when a patient actually conducted a reasonably diligent investigation and when that investigation failed to reveal a physical harm, the patient should not be charged with notice of a physical harm. Murtha argued that in requiring her to be on notice of a condition that eight doctors failed to recognize, the district court had effectively "require[d] a lay patient to know more than her doctors . . . ."[159] She added:

149. *Murtha*, CL 93629, at 10.
150. Murtha v. Cahalan, 745 N.W.2d 711, 712 (Iowa 2008).
151. Brief of Petitioner Murtha, *supra* note 68, at 7–9.
152. *Murtha*, 745 N.W.2d at 713.
153. *Id.*
154. Murtha v. Cahalan, CL 93629, at 6 (Iowa Dist. Ct. Oct. 13, 2004).
155. *Id.* at 10.
156. Brief of Petitioner Murtha, *supra* note 68, at 27.
157. Reply Brief of Petitioner Murtha, *supra* note 55, at 17–18.
158. *Id.* at 17; *see also* Aukes v. Creagh-Larramendi, No. 02-1673, 2004 WL 57578, at *3 (Iowa Ct. App. Jan. 14, 2004).
159. Brief of Petitioner Murtha, *supra* note 68, at 5.

> If the lower court decision is to stand, that decision will legally support the proposition that Tamra Murtha, as a lay patient, has a duty to possess a greater diagnostic ability than her treating physicians. Such an outcome is absurd. The effect of [the decision] . . . is to require Tamra Murtha to begin investigating her cause of action against the named defendants before she ever saw them professionally. Such a proposition makes no sense.[160]

The district court's ruling effectively required Murtha to sue her physicians for an injury she was assured, for five years subsequent, did not exist.

c. Rock v. Warhank. The Iowa Court of Appeals reached a similar result in *Rock v. Warhank*.[161] Pamela Rock sought medical attention for a lump she discovered in her left breast.[162] In late May 2002, her doctor performed a mammogram and told Rock the results were normal.[163] However, shortly thereafter, Rock was asked to come back so additional views could be taken of her *right* breast.[164] When Pamela returned for her second visit, she became concerned that there had been confusion over the breast in which the lump was located.[165] However, she was assured by the mammogram technician that images of her left breast were fine and that Rock "shouldn't worry about it anymore."[166] Subsequently, Rock's doctor, unknowingly viewing the report on the *right* breast, told Rock everything was fine.[167] Still concerned, Rock sought another opinion several months later and was told she had breast cancer.[168] She subsequently filed suit in October 2004, two years after her breast cancer was diagnosed.[169]

The district court dismissed the case on the defendant's motion for summary judgment, holding that the statute of limitations began to run in

160. Reply Brief of Petitioner Murtha, *supra* note 55, at 16.
161. Rock v. Warhank, No. 05-1753, 2006 WL 2872499 (Iowa Ct. App. Oct. 11, 2006).
162. *Id.* at *1.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*

June 2002—over two years before the lawsuit was filed.[170] The court of appeals upheld the lower court's finding, explaining that the statute began to run when Rock became concerned that there was confusion over which breast harbored the lump.[171] The court noted that while "Pamela did exercise diligence in seeking the advice of several physicians," the running of the statute of limitations was not tolled.[172] The court reasoned that Rock's notice of her injury was evidenced by the fact that she had become concerned with a possible mix-up, which was "precisely why she continued to seek another opinion a few months later."[173]

This outcome seems doubly unjust. Not only did Rock's diligent investigation fail to toll the running of the statute of limitations, but she was also effectively *penalized* for her diligence, as her continued concern was viewed by the court as notice of her injury, thereby triggering the statute of limitations.[174]

C. *Treating the Problem*

The problems surrounding application of Iowa Code section 614.1(9) did not go unnoticed by Iowa courts. In *Rock*, the court of appeals opined that "in recent years there has been confusion over the malpractice limitation and the use of the discovery rule."[175] And, as the supreme court would later point out, application of the statute of limitations "has raised some questions about the fairness of the outcome of a number of [medical malpractice] cases."[176] Yet, while the challenges in applying section 614.1(9) were readily acknowledged, the supreme court had admonished that "it is up to the legislature and not this court to address this problem."[177]

However, on February 22, 2008, it was the supreme court—not the legislature—that acted to drastically alter interpretation of the statute of limitations to ease the harshness of its prior decisions. In response to what it termed the "systemic problems" plaguing application of the medical

170. *Id.* at *2.
171. *Id.* at *1.
172. *Id.* at *3.
173. *Id.*
174. *See id.*
175. *Id.*
176. Rathje v. Mercy Hosp., 745 N.W.2d 443, 447 (Iowa 2008).
177. Schlote v. Dawson, 676 N.W.2d 187, 194 (Iowa 2004) (citing Schulte v. Wageman, 465 N.W.2d 285, 287 (Iowa 1991)).

malpractice statute of limitations, the court once again revisited its interpretation of section 614.1(9).[178] The court issued two important opinions, *Rathje* and *Murtha*, in which it attempted to add much needed clarity to what had become a confusing body of interpretive law.[179] In doing so, the court redefined the test—and the terms—used in applying the limitations period to medical malpractice actions.

1. *The* Rathje *Test.*

The most profound change came in *Rathje*. *Rathje* provided the court its first opportunity to address the application of the statute of limitations in the medical misdiagnosis context; specifically, when the injury and its cause were not simultaneously known by the patient.[180] As the court noted, the case once again raised "the prospect of applying the statute of limitations to deny an unsuspecting plaintiff of the right to pursue a claim for medical malpractice."[181]

The supreme court began its opinion with an extensive examination of the origins of Iowa's statute of limitations and discovery rule, dating back to the nineteenth century.[182] The historical perspective, the court opined, was necessary to "help understand the intent of [the] legislature in choosing the language it used to write the statute of limitations for medical malpractice actions."[183] In tracing the evolution of the limitations period, the court paid particularly close attention to two national trends that had developed immediately prior to the passage of section 614.1(9).[184]

The first trend related to application of the discovery rule to medical malpractice actions. According to the court, two distinct schools of thought had emerged as to the appropriate "triggering event" for purposes of commencing the limitations period.[185] Under the majority view, the statute of limitations was triggered upon knowledge of the cause of action, which required knowledge that a physician's conduct was negligent or wrongful.[186] This view was adopted by the Iowa Supreme Court in

178. *Rathje*, 745 N.W.2d at 463.
179. *See id.*; Murtha v. Cahalan, 745 N.W.2d 711 (Iowa 2008).
180. *Rathje*, 745 N.W.2d at 457.
181. *Id.* at 457–58.
182. *Id.* at 447–57.
183. *Id.* at 448.
184. *Id.* at 452–55.
185. *Id.* at 452.
186. *Id.* at 452–53.

Baines.[187] In stark contrast, the minority view of the discovery rule interpreted the limitations period as commencing upon a patient's knowledge of the injury and its factual cause.[188] This latter view did not require discovery of a physician's negligent or wrongful acts.[189]

Interestingly, and importantly, the court noted that while most jurisdictions had adopted one of these two tests for applying the discovery rule, courts had often failed to articulate exactly which test was being applied.[190] Even when they did, courts were imprecise in stating the required elements of the respective standards—often failing to make clear that the "triggering event" required notice of both the "injury" and either its factual cause or the physician's wrongdoing: "[C]ourts would simply declare the statute of limitations commenced upon discovery of the 'injury,' when a full articulation of the rule would have revealed whether they required discovery of all the elements of the cause of action, or merely discovery of the injury and its cause."[191] Failing to acknowledge the requisite causation elements occasionally gave rise to the suggestion by some courts that the statute of limitations commenced merely upon plaintiff's notice of his injury alone, regardless of knowledge of its cause. This was, as the court noted in *Rathje*, the view eventually adopted in Iowa.[192]

> [O]ur prior cases have failed to identify the role of factual causation as an element of the statutory discovery rule. As experienced in other jurisdictions from time to time, we have applied the discovery rule literally in terms of "the injury" and have neglected to affirmatively acknowledge the role and necessity of any type of causation in the analysis.[193]

Importantly, the court pointed out, this view had been repeatedly rejected in other jurisdictions as inconsistent with the purpose of the discovery rule.[194]

187. *Id.* at 452.
188. *Id*.
189. *Id.* at 453.
190. *Id.*
191. *Id.*
192. *See* Kline v. McGuire, No. 99-1534, 2000 WL 1827215, at *4 (Iowa Ct. App. Dec. 13, 2000) (holding that the statute of limitations began to run "whether or not plaintiffs then knew or should have known the symptoms were causally related to medical care provided by defendants").
193. *Rathje*, 745 N.W.2d at 460.
194. *Id.* at 454.

The second important trend leading up to the passage of section 614.1(9) was the nationwide movement for tort reform.[195] In particular, the court noted, the "drumbeat of tort reform" centered on curtailing open-ended liability in medical malpractice cases.[196] State legislatures had focused their efforts primarily on enacting statutes of repose.[197] Iowa lawmakers followed suit in 1975, passing a reform package that included a six-year period of repose for medical malpractice actions, along with adoption of the two-year statute of limitations and discovery rule for medical malpractice actions.[198] The *Rathje* court concluded that in passing section 614.1(9), "the legislature was largely reacting to the national movement for a statute of repose . . . ."[199]

Still, section 614.1(9) was also clearly intended to alter application of Iowa's discovery rule in malpractice actions.[200] The Iowa Supreme Court has repeatedly stated that the statute was enacted in "direct response" to the decision in *Baines*, which tolled commencement of the limitations period until a plaintiff had knowledge of both his injury and the physician's wrongdoing.[201] Thus, the legislature likely intended to replace *Baines's* interpretation of the discovery rule with the minority view that notice of an injury and its cause were sufficient to trigger the limitations period.[202] Importantly, however, the court noted that there was nothing surrounding the passage of section 614.1(9) to suggest that the legislation was intended to "strip the triggering event under the discovery rule down to the bare bones," requiring notice of injury alone and rejecting any requirement of knowledge of causation.[203]

As a result, the *Rathje* court concluded that the context surrounding the enactment of Iowa's statute of limitations provided little support for Iowa courts' interpretation that notice of an injury alone, without knowledge of its cause, was sufficient to commence the limitations period under section 614.1(9).[204] Rather, the historical evidence suggested the legislature merely intended to replace *Baines* with the minority view—that

195. *Id.*
196. *Id.* at 454–55.
197. *Id.*
198. *Id.* at 455.
199. *Id.* at 458.
200. *Id.* at 458–60.
201. *See id.* at 458.
202. *Id.*
203. *Id.*
204. *Id.* at 461–63.

the statute of limitations commenced upon notice of both the injury and its factual cause.[205] The court emphasized the inherent unfairness in continuing its prior application of the limitations period, noting that "unsuspecting" patients "may not know enough to understand the need to seek expert advice about the possibility of a lawsuit to protect themselves from the statute."[206]

Against this historical backdrop, the court adopted the previously-described twin-faceted test for determining when the statute of limitations is triggered in medical malpractice actions. The standard requires the plaintiff to have knowledge or imputed knowledge of both the injury or "physical harm" and the cause in fact of the injury.[207] The court repeatedly stressed, however, that the standard does not require a plaintiff to understand the wrongful nature of the cause of the injury.[208]

The court noted that while the change in interpretation departed from its prior cases interpreting the statute, the departure would best resolve the systemic problems plaguing prior application of section 614.1(9). [209]

> [The new test] better reflects the objective of the discovery rule to prevent the limitations period from commencing when blameless plaintiffs are unsuspecting of a possible claim. We choose this approach because it is consistent with the language of the statute when placed in proper historical context, consistent with the purposes and goals of the statutory discovery rule, fair to patients, doctors and the medical malpractice insurance industry, respectful of the trust and confidence essential to a doctor-patient relationship, and best meets the overall goals of the justice system.[210]

In concluding, the court opined that if its latest "interpretation of the medical malpractice statute of limitations was out of line with the original intent of the legislature, that body can respond to correct it" and

205. *Id.*

206. *Id.* at 461. The court further opined: "The Iowa legislature could not have intended to commence the running of the statute of limitations through inquiry notice before inquiry is warranted." *Id.*

207. *Id.* at 458 (citing Baines v. Blenderman, 223 N.W.2d 199, 202 (Iowa 1974)).

208. *Id.* at 459–60.

209. *Id.* at 463.

210. *Id.*

"intervene if we have missed the mark."[211]

Having redefined the standard for commencement of the statute of limitations, the court reversed the lower court's grant of summary judgment against Georgia Rathje.[212] It acknowledged that under the previous standard articulated in *Langner* and *Schlote*, the lower court had properly determined that Georgia Rathje's claim should be barred.[213] The facts had clearly shown that the Rathjes were placed on inquiry notice of Georgia's physical harm in early April 1999, when Georgia initially began to experience symptoms.[214] Further, the court flatly rejected Rathje's argument that the initial symptoms of Antabuse toxicity were independent of and unrelated to Rathje's eventual liver failure, and as such, were insufficient to put her on notice of the eventual cumulative injury.[215] The court noted that this was, in essence, an argument for claim-splitting, a theory the court had previously rejected.[216]

However, the court held that application of the new twin-faceted test to the facts in *Rathje* required reversal of the lower court's decision. The Iowa Supreme Court held that a jury could find that there were not sufficient facts available to Rathje at the time she was on notice of her physical harm that would have alerted a reasonably diligent person that the cause of the injury may have originated from her medical treatment.[217] Therefore, the court held, it was error to find as a matter of law that Georgia Rathje had notice sufficient to trigger the statute of limitations. [218]

2. *Redefining Injury*

Under the new standard announced in *Rathje*, the statute of limitations commences when: (1) the plaintiff has knowledge, or imputed knowledge, of an injury; and (2) the plaintiff has knowledge, or imputed knowledge, of the cause-in-fact of such injury.[219] While the court focused primarily on the second prong of the test—the newly fashioned causation requirement—in *Rathje*, it clarified the first prong of the test in a

211. *Id.*
212. *Id.*
213. *Id.* at 457.
214. *Id.*
215. *Id.* at 457–58.
216. *Id.* at 458.
217. *Id.* at 463.
218. *Id.*
219. Murtha v. Cahalan, 745 N.W.2d 711, 714 (Iowa 2008).

companion case, *Murtha*. For the first time, *Murtha* required the court to consider the definition of "injury" as applied to cases of negligent misdiagnosis.[220]

Though admittedly the subject of "considerable debate,"[221] the Iowa Supreme Court had previously defined "injury" as a "physical harm."[222] Thus, the statute of limitations commenced when a patient knew, or should have had known, of the "physical harm" for which compensation was sought.[223] In *Murtha*, plaintiff Tamra Murtha filed medical malpractice claims against several doctors for failing to properly diagnose breast cancer after she discovered a lump in her breast.[224] The district court held Murtha's claims were barred by the statute of limitations, explaining that the limitations period commenced when Murtha first discovered the lump in her breast.[225] The lump, the court reasoned, constituted her "physical harm."[226] Thus, while numerous doctors would later tell Murtha the lump was benign, the lower court held that knowledge of the lump itself was sufficient to trigger commencement of the statute.[227]

This determination, the Iowa Supreme Court concluded, incorrectly construed section 614.1(9).[228] In most cases, the court noted, application of the definition of "injury" was straightforward.[229] In cases like *Schlote* and *Langner*, in which the harm was immediately apparent, it was "relatively simple to determine what the injury [was], when it occurred, its cause in fact, and when the plaintiff knew, or should have known, of it . . . ."[230] In contrast, cases like *Murtha* presented a unique challenge because misdiagnosis claims are often based on injuries with no external symptoms or resulting from a progressive condition:

> In [misdiagnosis] cases, it is not at all clear at what stage the ultimate injury for which the plaintiff seeks damages actually occurred, nor is the cause of such injury always clear . . . . Further, determining when

220. *Id.* at 714–15.
221. *Id.* at 715.
222. *Id.*
223. *See id.*
224. *Id.* at 713.
225. *Id.* at 714.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.* at 715.
230. *Id.*

> the plaintiff knew, or should have known, of the existence of the not-immediately-apparent injury, for statute-of-limitations purposes, is far from straightforward.[231]

As a result, the court sought to fashion a more workable definition of "injury" to apply in misdiagnosis cases.[232] After looking to other jurisdictions for guidance, the court concluded that an injury was often deemed as having occurred when "the problem [grew] into a more serious condition which pose[d] a greater danger to the patient or which require[d] more extensive treatment."[233] Stated another way, an injury was not merely the continuing undiagnosed condition.[234] The court explained:

> In every misdiagnosis case, the patient has some type of medical problem at the time the physician is consulted. But the injury upon which the cause of action is based is not the original detrimental condition; it is the injury which later occurs because of the misdiagnosis and failure to treat.[235]

Under this view, the injury suffered by Murtha was not the continuing existence of the lump in her breast, but rather it was the development of breast cancer.[236] Thus, the court concluded that without conclusive medical evidence as to when the cancer had developed, the district court had wrongly determined that the statute of limitations commenced upon mere knowledge of the lump. Instead, the question as to when the lump grew into a more serious condition was a question for the jury.[237] A reasonable fact finder, the supreme court explained, could have determined that Murtha had notice of her injury only after the December 7, 2001 appointment in which it was recommended the lump on her breast be excised.[238] Thus, the district court's grant of summary judgment was

231. *Id.* at 715–16.

232. *Id.* at 716.

233. *Id.* (quoting DeBoer v. Brown, 673 P.2d 912, 914 (Ariz. 1983) (citations and emphasis omitted)).

234. *Id.* at 717. This determination, the court acknowledged, is "highly fact-specific." *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 718.

238. *Id.* Further, under the newly added causation requirement of *Rathje*, even if the injury had occurred more than two years before Murtha filed suit, it was still a question for a jury as to when Murtha—given the subsequent misdiagnoses—could reasonably be charged with notice of her injury. *Id.*

reversed.[239]

D. *Long-Term Prognosis*

In short, the decisions in *Rathje* and *Murtha* squarely tackled the most nettlesome problems plaguing Iowa courts in applying the statute of limitations to medical malpractice actions. First, the court refined the definition of injury to better address the unique nature of the physical harm facing plaintiffs in misdiagnosis cases.[240] It provided valuable guidance in holding that an injury in the misdiagnosis context is not a patient's original detrimental condition, but rather its development into a more serious or dangerous condition.[241] Equally beneficial, for clarity's sake, was the court's unequivocal rejection in *Rathje* of the argument that, in cases of misdiagnosis, a progressive or cumulative injury is independent from the initial injury from which it originates.[242]

Next, and most significantly, the supreme court revamped the test for determining when the statute of limitations commences. It added the requirement that for the limitations period to run in a medical malpractice context, a patient must have notice not only of the injury itself, but also of the cause-in-fact of the injury.[243] Adding this causation element should eliminate much of the prior confusion over the extent of symptomology sufficient to trigger the statute of limitations. Further, it appears the newly modified test will also eliminate uncertainty as to the effect of a patient's reasonably diligent investigation. While the supreme court did not explicitly address this issue, it certainly follows that when a patient conducts a reasonably diligent investigation into a physical harm, only to then be misdiagnosed, that patient cannot logically possess the requisite knowledge or imputed knowledge of the cause-in-fact of the existing physical harm.[244] Thus, the statute of limitations would not commence.

It is worth noting, however, that the added clarity provided by *Rathje* and *Murtha* is not without some potential side effects. The two decisions promise to drastically alter the outcomes of future cases, and some critics

239. *Id.*

240. *See generally Murtha*, 745 N.W.2d 711.

241. *Id.* at 717.

242. Rathje v. Mercy Hosp., 745 N.W.2d 443, 461–62 (Iowa 2008).

243. *Id.* at 461.

244. The court seemed to allude to this outcome in its closing remarks in *Murtha*: "Even if a fact finder concludes that Murtha's lump developed into cancer or her cancer progressed . . . [,] it is still a fact question . . . as to when she knew, or should have known, of that injury and its cause in fact." *Murtha*, 745 N.W.2d at 718.

no doubt worry that *Rathje* and *Murtha* will prove a coup for future malpractice plaintiffs. However, it must be remembered that the court's decisions leave unhampered the legislature's fundamental goal in passing section 614.1(9), which was to overrule application of the discovery rule as interpreted in *Baines*. As the court repeatedly stressed in *Rathje*, a plaintiff need not have notice of the wrongful nature of the act causing the harm for the statute of limitations to commence. Further, *Rathje* and *Murtha* did little to ease the harshness of *Schlote*, which still severely restricts the rights of unsuspecting patients. While commencement of the statute of limitations now additionally requires notice of an injury's cause-in-fact, the limitations period may still run long before a patient has any inkling of the wrongful nature of the act—as it did in *Schlote*. Thus, while the recent decisions will likely result in more commonsense outcomes for misdiagnosis victims, application of the statute continues to afford "deferential treatment" to health care providers.[245]

IV. CONCLUSION

After years of troubled interpretation and tortured application of Iowa's medical malpractice statute of limitations, the Iowa Supreme Court's decisions in *Rathje* and *Murtha* promise to add some clarity to what had become a medical malpractice morass. Prior to 1975, Iowa courts held that the statute of limitations in malpractice cases did not commence until a patient knew, or should have known, of the wrongful or negligent act that caused the injury. This patient-friendly interpretation came to an abrupt halt in 1975, when the Iowa legislature passed Iowa Code section 614.1(9) in an apparent attempt to rein in the discovery rule as articulated in *Baines*. Under subsection 9, the statute of limitations commenced when a patient knew, or through the use of reasonable diligence should have known, only of the injury for which damages were sought. By design, application of the new statute proved much more restrictive to patients in future medical malpractice cases. However, in *Langner* and *Schlote*, the Iowa Supreme Court interpreted the statute in a way that proved particularly devastating for unsuspecting victims of medical misdiagnosis. In defining "injury" under the statute as a "physical harm," the court held that the limitations period commenced when a patient had notice merely that some physical problem existed. While application of the statute of limitations under this interpretation was reasonably straightforward in cases when the physical harm was immediately apparent, application was far more challenging in cases when injuries developed more subtly as a result of negligent

245. Koppes v. Pearson, 384 N.W.2d 381, 384–85 (Iowa 1986).

misdiagnosis. Consequently, courts struggled to define the injury in misdiagnosis cases, and further, to determine the point at which misdiagnosis patients had notice of their injuries. The resulting confusion led to sometimes absurd outcomes: courts requiring patients to recognize and diagnose an injury when even trained professionals had failed to do so.

In response to these readily acknowledged difficulties, the supreme court once again revisited its interpretation of section 614.1(9) in *Rathje* and *Murtha*. In doing so, the court refined the definition of "injury" as applied in the misdiagnosis context, and more importantly, altered the test for commencement of the statute of limitations to require knowledge of the cause-in-fact of a patient's injury. Though it is far too early to know just how effective such changes will be in addressing the systemic problems facing courts in applying the statute, it initially appears that the decisions should result in more consistent, predictable, and fair outcomes in medical misdiagnosis cases.

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