

IN THE IOWA SUPREME COURT
NO. 14-1547

ESTATE OF PAUL DEDRICK GRAY by BRENNA MARIE GRAY,
Administrator of the Estate; BRENNA MARIE GRAY Individually and on
behalf of O.D.G., the minor child of Paul Dedrick Gray
and Brenna Marie Gray,

Plaintiffs/Appellants,

vs.

DANIEL J. BALDI, D.O.; DANIEL J. BALDI, D.O., P.C.; UNITED
ANESTHESIA & PAIN CONTROL, P.C.; CENTRAL IOWA HOSPITAL
CORPORATION; IOWA HEALTH PAIN MANAGEMENT CLINIC;
IOWA HEALTH SYSTEM; UNITY POINT HEALTH; BROADLAWNS
MEDICAL CENTER FOUNDATION, and BROADLAWNS MEDICAL
CENTER,
Defendant/Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
HON. JUDGE DENNIS J. STOVAL
POLK COUNTY NO. LACV 129854

**PLAINTIFFS'/APPELLANTS' FINAL APPEAL BRIEF
REQUEST FOR ORAL ARGUMENT**

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE I: DID THE DISTRICT COURT ERR IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FINDING THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS THE STATUTE OF LIMITATIONS HAD RUN AS TO THE ESTATE OF PAUL GRAY AND BRENNA GRAY?

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Iowa Code §614.1(9)(a)

ISSUE II: DID THE DISTRICT COURT ERR IN GRANTING SUMMARY JUDGMENT FINDING THE STATUTE OF LIMITATIONS BARRED THE CLAIM OF THE MINOR CHILD, O.D.G?

Audubon-Extra Ready Mix, Inc. v. Illinois Cent. Gulf R.R., 335 N.W.2d 148, 152 (Iowa 1983)

City of Cleburne v. Cleburne Living Ct., 473 U.S. 432, 440 (1985)

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Iowa Code §614.1(9)(b)

ROUTING STATEMENT

Pursuant to Iowa Rules of Appellate Procedure 6.903(2)(d) and 6.1101, Appellant states this matter should be retained by the Iowa Supreme Court as this case presents (a) substantial constitutional questions as to the validity of a statute; (b) issues of first impression; and (c) issues presenting substantial questions of enunciating or changing legal principles. *See Iowa R. App. Proc.* 6.1101(2)(a), (c) and (f).

STATEMENT OF THE CASE

The Petition in this matter was filed on February 14, 2014. (App. p. 2). On April 7, 2014, Defendants Daniel Baldi, D.O., Daniel J. Baldi, D.O., P.C., United Anesthesia & Pain Control, P.C., Broadlawns Medical Center Foundation and Broadlawns Medical Center filed an Answer, Affirmative Defenses and Jury Demand. (App. p. 9). On that same date, these Defendants also filed a Motion for Summary Judgment. (App. p. 18). These Defendants' Motion for Summary Judgment asserted that the Plaintiffs' Petition was filed after the expiration of the Statute of Limitations. (App. p. 18).

On April 10, 2014, the Defendants, Central Iowa Hospital Corporation, D/B/A Iowa Health Pan Management Clinic, Iowa Health System and Unity Point Health filed their Answer, Affirmative Defenses and

Jury Demand. (App. p. 12). They joined in the Motion for Summary Judgment filed by the other Defendants. (App. p. 18).

Plaintiffs' filed a resistance to the Motion for Summary Judgment on April 25, 2014. (App. p. 29). Plaintiffs' asserted that the claims of the Plaintiffs were timely. (App. p. 29).

Hearing on Defendant's Motion for Summary Judgment was held on June 26, 2014. (App. p. 60) After hearing the arguments of the parties and reviewing the filings, the District Court entered an Order on July 28, 2014 granting Summary Judgment. (App. p. 60). The Court ruled that as to the Statute of Limitations Issue pertaining to claims of the Estate and Brenna Gray that the Petition was filed after the two year limitation period had expired as provided by Iowa Code §614.1(9)(a). (App. p. 62-64). The Court ruled as to the Statute of Limitations issue pertaining to the claims on behalf of O.D.G.. (App. p. 64-65). Plaintiffs had asserted that since O.D.G. was under the age of eight at the time of the Decedent's death and the action was brought before O.D.G.'s tenth birthday, summary judgment was inappropriate under Iowa Code §614.1(9)(b). (App. p. 64-65). The Court ruled that the Defendants were entitled to summary judgment even though O.D.G. is now a "person who is living" but was not the case at the time of the occurrence. (App. p. 64-65).

On August 12, 2014, Plaintiff's filed a Motion under Iowa Rule of Civil Procedure 1.904 (2) to Enlarge and Amend Ruling re: Motion for Summary Judgment. (App. p. 67). Plaintiffs' Motion to Enlarge and Amend Ruling requested the Court to expand its rulings and address issues and arguments that were urged but not specifically addressed in the ruling, including the assertions that the Court's construction of the statute rendered the statute unconstitutional as a denial of equal protection. (App. p. 72).

On September 12, 2014, the District Court entered an Order denying Plaintiffs' Motion to Enlarge and Amend. (App. p. 77). The District Court ruled that the previous ruling sufficiently dealt with Plaintiffs arguments but still failed to specifically address Plaintiffs' arguments as to Equal Protection rights under the United States and Iowa Constitutions. (App. p. 77). Plaintiffs timely filed their Notice of Appeal on September 18, 2014. (App. p. 79).

STATEMENT OF FACTS

This case arises out of the death of Paul Detrick Gray (hereinafter Paul), which occurred on May 24, 2010 while under the care of Defendants and Daniel J. Baldi D.O., (hereinafter Baldi). (App. p. 2). Paul made an appointment and met with Baldi on or about December 27, 2005, wherein Baldi undertook and agreed to provide care to Paul and to use due,

reasonable and proper skill and effort to diagnose and treat Paul's symptoms and conditions. (App. p. 2). Baldi's treatment included examination of Paul, diagnosis of his condition and a course of treatment that included prescribing numerous, excessive and/or conflicting controlled pain medication during the period of December 27, 2005 and continued up to the date of Paul's death (App. p. 2). While under the care and treatment of the Defendants, on May 24, 2010, Paul died of an accidental overdose of and/or combination of prescription medicines as allowed and/or prescribed by Dr. Baldi. (App. p. 2).

Brenna Gray asserted by affidavit that she was not aware of the cause and causal connection of Paul's death with Defendants until within two years of the filing of the Petition. (App. p. 82). At the time of Paul's death, Plaintiff Brenna Gray was pregnant with Plaintiff O.D.G., the child of Paul, who was born six months after Paul's death. (App. p. 2; App. p. 82).

ARGUMENT

ISSUE I: THE DISTRICT COURT ERRED IN GRANTING THE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT FINDING THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS THE STATUTE OF LIMITATIONS HAD RUN AS TO THE ESTATE OF PAUL GRAY AND BRENN A GRAY.

1. Application of Statute and Common Law.

A. Preservation of error and standard of review.

This issue was preserved by Plaintiffs when resisting the Motion for Summary Judgment, including through submission of responses to statements of facts, submission of statements of additional facts precluding summary judgment and arguing the issues in briefs. (App. p. 30-31; App. p. 33-34; App. p. 35; App. P 71-72). Further the District Court specifically ruled on these issues. (App. p. 60; App. p. 77-78).

For a moving party to be entitled to summary judgment the moving party must prove there are no genuine issues of material fact. Iowa R. Civ. P. Rule 1.981(3). In *Peak v. Adams*, 799 N.W.2d 535 (Iowa 2011), the Iowa Supreme Court stated the following as to standard of review on an appeal from the grant of a motion for summary judgment:

“Our review of a summary judgment is for correction of errors at law. *Huber v. Hovey*, 501 N.W.2d 53, 55 (Iowa 1993).

[W]e ask whether the moving party has demonstrated the absence of any genuine issue of material fact and is entitled to judgment as a matter of law. The resisting party must set forth specific facts showing that a genuine factual issue exists. Summary judgment is proper if the only issue is the legal consequences flowing from undisputed facts.

Id. (citations omitted). Moreover, a “factual issue is ‘material’ only if ‘the dispute is over facts that might affect the outcome of the suit.’ ” *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001) (quoting *Fouts ex rel. Jensen v. Mason*, 592 N.W.2d 33, 35 (Iowa 1999)). As we elaborated in *Covenant Clinic*:

In ruling on a summary judgment motion, the court must look

at the facts in a light most favorable to the party resisting the motion. The court must also consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record. An inference is legitimate if it is “rational, reasonable, and otherwise permissible under the governing substantive law.” On the other hand, an inference is not legitimate if it is “based upon speculation or conjecture.” If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists.

Id. at 717–18 (citations omitted) (quoting *Butler v. Hoover Nature Trail, Inc.*, 530 N.W.2d 85, 88 (Iowa Ct.App.1994).”

Id. at 542-543.

B. Argument.

Paul died on May 24, 2010. (App. p. 5) Brenna was appointed administrator of Paul's estate on July 22, 2010 and filed the Petition at Law against Defendant's on February 14, 2014. (App. p. 60). Brenna alleged and signed an affidavit that she did not know of the negligence of the Defendants until less than 2 years from the date of the filing of the petition in this case. (App. p. 82) Plaintiffs allege facts in this case of medical negligence by the Defendants which caused the death of Paul. (App. p. 2)

The issue on appeal is whether the Petition against the Defendants was filed within the Statute of Limitations as set forth in Iowa Code §614(1)(9).

This section states:

9. Malpractice.

a. Except as provided in paragraph “b”, those founded on injuries to the person or wrongful death against any

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

There are several cases that address the interpretation or definition of Iowa Code §614.1(9)(a). In *Schultze v. Landmark Hotel Corp.*, 463 N.W.2d 47 (Iowa 1990), the Iowa Supreme Court interpreted this code section to provide that the statute of limitations for medical malpractice begins to run on the date of death. *Id.* at 48-49. It did so based upon its rejection of the assertion by the plaintiff that the word “wrongful” should be added to the statute. *Id.* At 48-49. This included the interpretation that the legislature's enactment of this specific statutory statute of limitations was intended to create its own “modified discovery rule.” *Id.* At 51. This ruling by the Iowa Supreme Court was in response to the specific argument of the plaintiff that the commencement date of the statute of limitations was to be delayed until the plaintiff “knew the death was wrongful.” *Id.* However,

the Iowa Supreme Court based its conclusion upon the concept that “when the fact of death is known to the plaintiff, no additional aid in terms of a discovery period is necessary” because the fact of the death has occurred provides the plaintiff when the starting point to determine whether a valid cause of action for wrongful death exists. *Id.* at 50 (citing, *Krueger v. St. Joseph's Hosp.*, 305 N.W.2d 18, 23-24(N.D. 1981). In *Schultze*, the Court rejected the argument of unfairness and held that “all information from which the cause of death could be ascertained was available to plaintiff at the time of his wife's death.” *Id.* At 51.

While *Schultze* provides a background for this Court, Plaintiffs here urge that this does not address situations, as in the present case, where the cause of death was not or cannot be ascertained or even support a specific reason to believe, at the time of death, that the cause of death was due to medical negligence. Further, the reasoning set forth in *Rathje v. Mercy Hospital*, 745 N.W.2d 443 (Iowa 2008), shows this later case law to be the controlling law in this case.

The Iowa Supreme Court, when first addressing the claims in *Rathje*, states:

In this appeal, we must decide if the district court correctly granted summary judgment in a medical malpractice action based on a claim that the plaintiffs failed to file their petition within the statute of limitations. Although the district court

relied on our line of prior cases in reaching its decision, **we now conclude the statute of limitations for medical malpractice actions does not begin to run until discovery of both the injury and its factual cause.** On our review, we reverse the decision of the district court and remand for further proceedings. (emphasis added). *Id.*

The above emphasized language demonstrates the holding in *Shultze* is in direct conflict with the holding in *Rathje*. The holding in *Schultze* stated that when death is known to the plaintiff, no additional aid in terms of a discovery period is necessary. *Schultze*, at 50. As *Rathje* points out and holds, “both the injury and its factual cause” are necessary before the statute of limitations begins to run. *Rathje* at 443. In other words, in a medical malpractice action, the statute of limitations does not begin to run until the plaintiff has determined both the injury AND the causal relationship to the injury. In this particular case, applying *Rathje*, the statute of limitations would not begin until the Administrator, Brenna, knew of the injury (here Paul's death) AND the causal relationship to the injury (here Paul's death). It takes more than just mere knowledge of injury or death, it also takes knowledge of the cause of the injury or death.

Plaintiffs here contend that the District Court incorrectly found the *Rathje* Court's legal analysis and reasoning discussion was to be limited to the context of allegations of wrongful injuries and was not to be extended to allegations of wrongful death cases. (App. p. 61). The District Court found

the *Rathje* holding applied to those cases dealing injury (and not injuries resulting in death), while the *Schultze* holding applied to those cases dealing with death. (App. p. 62-63). Thus, the District Court found *Schultze* to be the applicable and controlling law to this case. (App. p. 62-63).

The question this Court must ponder from this appeal is why would the standard be any different between injury or death in the context of the principles of *Rathje* and the provisions of Iowa Code §614.1(9)(a)? Simply because the facts in *Schultze* deal with death and the fact pattern in *Rathje* addresses injury, does not mean the concept or the rules are or should be different. In fact, the concept enunciated in *Rathje* is that knowledge of the “factual” injury and “causal relationship” to the physician or hospital is needed, not knowledge of negligence by the medical provider. This demonstrates that when applying the statute to the phrase “or death” immediately after the word “injury” in Iowa Code §614.1(9)(a), the concept is that Iowa law, as set forth in *Rathje*, requires that not only must a plaintiff know of the “fact” of death, but the plaintiff must also know of a “cause” or “causal relationship” of that death to the medical professional.

By applying *Schultze* to the present case, the District Court found that Paul's mere death was enough to trigger the statute of limitations because Brenna “should have known.” (App. p. 62-63). The question this Court

must ask is what exactly is it that Brenna “should have known” under the District Court's reasoning when applying *Schultze*. What Brenna knew at the time of Paul's death was that Paul had died. It is alleged that she did not become aware of the causes of until much later. (App. p. 4; App. p. 82). What duty did Brenna have to investigate? Her knowledge of death is no different from her knowledge of an injury. Does it make sense to draw a distinction of this type between an injury that does not result in death and an injury that does result in death? Simply because Paul became deceased, did she need to become a medical investigator and determine all reasons for the death? This is exactly what the District Court ruling is promoting, yet is against the very reasoning and rulings from the appellate court in *Rathje*. Yet, how is that different from a person who is injured? Why is it that when a person is injured, the duty of investigation does not automatically apply to bar the action unless commenced within 2 years and yet if a person dies the duty to investigate is held to automatically apply? Plaintiffs urge there is no rational distinction between the two. In *Rathje* the following was stated that should have applicability to this issue:

“If the limitation period to file a lawsuit under the statute is interpreted to commence once plaintiffs gain sufficient information of the injury or physical harm without regard to its cause, some plaintiffs may not know enough to understand the need to seek expert advice about the possibility of a lawsuit to protect themselves from the statute. In some instances, the

cause of medical malpractice injuries may be evident from facts of the injury alone, but in other cases it may not. Yet, in all cases, a plaintiff must at least know the cause of the injury resulted or may have resulted from medical care in order to be protected from the consequences of the statute of limitations by seeking expert advice from the medical and legal communities.”

Rathje at 461. Plaintiffs here urge that it should be an issue of fact as to when the cause or causal relationship is sufficiently known to give rise to a duty of inquiry, whether it be from an injury or from a death.

Contrary to the assertions of the District Court, *Rathje* did involve a change in the law of Iowa as to application of the discovery rule to medical malpractice cases. The *Rathje* Court stated: The approach taken today departs from the direction we have taken in our prior cases since the time the statute was enacted. *Rathje* at 463.

The District Court further noted there was no explicit statement by the *Rathje* Court wishing to overturn *Schultze*. (App. p. 63). Should an appellate court specifically state each and every case previously determined is overruled, even when that issue is not specifically presented to the appellate court? Or is the providing of further definitions, explanations and clarification of the law enough to alert a district court to changing laws and principles? When definitions, explanations and clarifications are provided by this Court, there should be no need for an explicit statement all prior

cases are overruled. Indeed, in addition to stating that the approach to this statute had changed in *Rathje*, the Court stated: “Thus, we are again faced with the prospect of applying the statute of limitations to deny an unsuspecting plaintiff of the right to pursue a claim for medical malpractice. *Rathje* at 458. The rulings by the District Court in this case will do the same to plaintiffs such as the Plaintiffs in this case as it relates to injuries that result in death rather than just injuries.

Iowa Code §614.1(9)(a) states a lawsuit must be filled “within two years after the date the claimant knew or though reasonable diligence should have known or received notice in writing of the existence” of negligence. This is not a simple line in the sand that by saying death gives notice. Here, Defendants and the District Court indicate mere death of Paul was notice to Brenna of the cause of Paul’s death and the relationship to Defendants. This could not be farther from the truth. At a minimum, this raises a fact question for a jury to determine when Brenna knew of the cause of the death of Paul and the causal relationship to the Defendants. The District Court should be reversed in the granting of the summary judgment.

2. Denial of Equal Protection.

A. Preservation of error and standard of review.

This issue was preserved by Plaintiffs when resisting the Motion for

Summary Judgment, including through submission of responses to statements of facts, submission of statements of additional facts precluding summary judgment and arguing the issues in briefs. (App. p. 30-31; App. p. 33-34; App. p. 35; App. p. 67-68) While the issue was presented to the District Court, it did not specifically rule on this issue. (App. p. 60; App. p. 77-78).

The Supreme Court reviews an alleged violation of constitutional rights de novo. *State v Bower*, 725 N.W.2d 435, 440 (Iowa 2007) citing to *State v Shanahan*, 712 N.W.2d 121, 131, (Iowa 2006). This review requires an independent evaluation of the totality of the circumstances. *Id. at 440*.

B. Argument.

Should the Court determine that the plain language and the statutory intent does not support Plaintiff's assertions, Plaintiff contends that interpretation of Iowa Code §614.1(9)(a) would amount to a denial of equal protection under the equal protection provisions of the Constitution of Iowa and the 14th Amendment to the Constitution of the United States of America. Statutes are cloaked with a presumption of constitutionality. *Id. at 441*. A party challenging the constitutionality bears the heavy burden of proving the unconstitutionality beyond a reasonable doubt. *Id. at 441*. Every reasonable basis upon which the statute could be held constitutional must be refused by

the Plaintiff. *Id.* at 441. However, if the Court can construe a statute in more than one way, one of which is constitutional, the court will adopt that construction. *Id.* at 441. See also, *Kruck v. Needles*, 144 N.W.2d 296, 301-302 (Iowa 1966) citing to). *Kruidenier v. McCulloch*, 258 Iowa 1121, 142 N.W.2d 355, 362.

The Iowa Constitution, Art.1 §6, states that “the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.” IA. Const. art. 1 §6. Accord the 14th Amendment to the United States Constitution. These constitutional provisions apply to an invalid attempt to create a distinction between an injury that causes death and an injury that does not cause death. This Court can save the constitutionality of the statute by construing the statute as urged by Plaintiffs herein.

Plaintiffs argue that there be rational basis scrutiny in that it must be reasonably related to a legitimate government interest. *King v. State*, 818 N.W.2d 1 (Iowa 2012)(citing *Sanchez*, 692 N.W.2d 812, 817 (Iowa 2005)). There is no rational basis for the legislature or the common law to distinguish between an injury causing death and an injury not causing death as it applies to the application of the discovery of the cause of action. As earlier stated, in *Rathje*, the Supreme Court determined that before the

statute of limitations language of the statute can be applied, the Court must determine that the fact of injury and the understanding of the relationship of the injury to the defendant must be known. The *Rathje* Court acted to supplement that definition by including an additional requirement that the statute of limitations is only triggered upon knowledge or imputed knowledge, of the cause in fact of the physical or mental injury. There is no rational basis for a distinction to be made between a wrongful act causing injury not causing death from when the wrongful act causes death, but the survivors do not understand the relationship of the death to the defendant. There is no rational basis for a distinction which deprives the distinction of constitutionality under the requirement of equal protection. Accordingly, this Court should not accord to the District Court's interpretation of the statute and common law, as this would be a denial of equal protection as to all claims made in this case by Plaintiffs.

3. Summary.

If this Court takes the interpretation the Defendants promoted and the District Court endorsed, it turns every potential Plaintiff into a medical investigator after an injury or death, just to ensure the statute of limitations does not toll. Brenna's affidavit clearly states she was not aware of the cause and causal connection of Paul's death to the Defendants until within

the two year statute of limitations. (App. p. 82) Causes of action for wrongful injuries have no rational basis for distinction from causes of action for wrongful death as it relates to statutes of limitations. To make such a distinction would violate both the federal and state constitution relating to equal protection of the law. Construing the statute and common law as urged by Plaintiffs in this case, would correctly apply the statutory language and the common law, and provide a constitutional construction.

The District Court erred in not applying the rationale of *Rathje*. As this is a material issue of disputed fact, the District Court improperly granted Defendants' Motions for Summary Judgment.

ISSUE II: THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT FINDING THE STATUTE OF LIMITATIONS BARRED THE CLAIM OF THE MINOR CHILD, O.D.G.

1. Interpretation of the Statute.

A. Preservation of error and standard of review.

This issue was preserved by Plaintiffs when resisting the Motion for Summary Judgment, including through submission of responses to statements of facts, submission of statements of additional facts precluding summary judgment and arguing the issues in briefs. (App. p. 30-31; App. p. 33-34; App. p. 35; App. p. 71-72) Further the District Court specifically ruled on these issues. (App. p. 64-65).

As noted in Issue I above, the standard for review is for correction of errors at law. *Peak v. Adams*, 799 N.W.2d 535, 542 (Iowa 2011).

B. Argument

In the case of the claim of the minor child, O.D.G., the District Court held that the claim was barred by the statute of limitations and that summary judgment was proper. (App. p. 64-65). All parties and the Court agreed this is an action for medical malpractice, thus, Iowa Code §614.1(9) applied. The Ruling of the District Court resulted from its interpretation and application of the medical malpractice statute of limitation provisions set out in Iowa Code §614.1(9)(b).

Iowa Code §614.1(9)(b) provides:

9. Malpractice.

(b) An action subject to paragraph “a” and brought on behalf of a minor who was under the age of eight years when the act, omission, or occurrence alleged in the action occurred shall be commenced no later than the minor’s tenth birthday or as provided in paragraph “a”, whichever is later.

In other words, if a medical malpractice action fits within the provisions of Iowa Code §614.1(9)(b), then the provisions of Iowa Code §614(1)(9)(a) do not apply. In applying Iowa Code §614.1(9)(b), the District Court correctly notes (citing to *McKillip v. Zimmerman*, 191 N.W.

2d 706, 709 (Iowa 1971)) that, when interpreting a statute, “if the language...when given its plain and rational meaning is precise and free from ambiguity, no more is necessary than to apply the words used in their ordinary sense in connection with the subject considered” (App. p. 64). It was in the interpretation of this statutory language that the District veered away from the “plain and rational” meaning of the words of the statute.

Here, the case of the minor child, O.D.G., has been brought by the Estate and through the next friend, Brenna Gray. The District Court correctly found O.D.G. was not born until approximately three months after Paul’s death. (App. p. 64). Plaintiffs contend the provisions of Iowa Code §614.1(9)(b) provide that O.D.G. timely brought her action and O.D.G. was a child less than eight at the time of occurrence that caused the death of her father and she was not yet ten years old at the time this suit was filed. (App. p. 82).

The District Court, on the other hand, held the language of the statute states that O.D.G. had to be a “minor” when the act causing death occurred, holding in the ordinary sense the word “minor” refers to a living person and does not include someone with a negative age. (App. p. 64). Contrary to the holding of the District Court, the language of the statute does not so state. Instead, the “plain and rational” meaning of the language of the statute in

subsection (b) provides that when a minor who brings an action and is not yet ten years old when the action is filed (as is the case here with O.D.G.) if that minor child was under the age of eight when occurrence that caused the death occurred (as is the case here with O.D.G.), the cause of action for malpractice is not considered barred by the statute of limitations.

The interpretation of the Code section by the District Court fails accord the “plain and rational” meaning as it fails to consider those children who were in utero at the time of injury or death. The rational basis for the statute is obviously to allow children a longer statute of limitations to bring medical malpractice actions. What is the rational concept that would support a meaning that holds a child in utero has a shorter statute of limitations than a child who is born, even if only by as little as 1 second? Are these in utero children not eligible for reparations for the harm done to their parent simply because they were not outside of the womb? Is it rational to construe the language in a way that bars such suits? Plaintiffs contend that the language and rational meaning of the words used, do not lead to such an interpretation.

2. Denial of Equal Protection.

A. Preservation of error and standard of review.

This issue was preserved by Plaintiffs when resisting the Motion for

Summary Judgment, including through submission of responses to statements of facts, submission of statements of additional facts precluding summary judgment and arguing the issues in briefs. (App. p. 30-31; App. p. 33-34; App. p. 35; App. p. 71-72). While the District Court did not specifically rule on this issue, it was raised in the resistances and briefs and urged in the Rule 1.904 (App. p. 60; App. p. 77-78).

The Supreme Court reviews an alleged violation of constitutional rights de novo. *State v Bower*, 725 N.W.2d 435, 440 (Iowa 2007) citing to *State v Shanahan*, 712 N.W.2d 121, 131, (Iowa 2006). This review requires an independent evaluation of the totality of the circumstances. *Id. at 440*.

B. Argument.

Should the Court determine that the plain language and the statutory intent does not support Plaintiff's assertions, Plaintiff contends that interpretation of Iowa Code §614.1(9)(a) would amount to a denial of equal protection under the equal protection provisions of the Constitution of Iowa, Art. §1 and §6 and the 14th Amendment to the Constitution of the United States of America. Statutes are cloaked with a presumption of constitutionality. *Id. at 441*. A party challenging the constitutionality bears the heavy burden of proving the unconstitutionality beyond a reasonable doubt. *Id. at 441*. Every reasonable basis upon which the statute could be

held constitutional must be refused by the Plaintiff. *Id.* at 441. However, if the court can construe a statute in more than one way, one of which is constitutional, the court will adopt that construction. *Id.* at 441. See also, *Kruck v. Needles*, 144 N.W.2d 296, 301-302 (Iowa 1966) citing to *Kruidenier v. McCulloch*, 258 Iowa 1121, 142 N.W.2d 355, 362.

These constitutional provisions apply applies to the attempt to deny the child O.D.G. the right to a claim for loss of consortium and support from a father who was subjected to wrongful death. The Iowa general assembly gives the right to loss of parental consortium services, and support to children through Iowa Code §613.15 and common law. Iowa Code §613.15 (Injury or death of spouse or parent—measure of recovery); *Kulish v. West Side Unlimited Corp.*, 545 N.W.2d 860, 862 (Iowa 1996)(citing *Audubon* “...minor children may recover consortium damages when their parents are injured or killed”)(*Audubon-Extra Ready Mix, Inc. v. Illinois Cent. Gulf R.R.*, 335 N.W.2d 148, 152 (Iowa 1983)). The only difference between the minor children who receive this benefit and O.D.G. and O.D.G.’s class of unborn children when the “act, omission, or occurrence alleged in the action occurred” is that they were just unborn at the time of the death of their father. Iowa Code §614.1(9)(b). Now they are alive, and even though they were not out of the womb when the act, omission, or occurrence took place,

they are alive now and should have equal right to recover consortium and support in an action. Denying them that recovery would deny them equal protection under the law violating the Privileges of parental consortium and support under Iowa Constitution Article 1 §6, and denying them the happiness of services of their parents under Iowa Constitution Article 1 §1. I.A. Const. Art. 1 §6 (“...grant to any citizen, or class of citizens,, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.”); I.A. Const. Art. 1 §1 (...certain inalienable rights—among which are those of enjoying and defending...possessing and protection property, and pursuing and obtaining...happiness.”). See also the 14th Amendment to the United States Constitution.

It is a rare and minute difference as to whether the child was born at the time of the act, omission, or occurrence, or not. O.D.G. was not born at the time of the act, omission or occurrence. However, she is now, and denying her the right to bring this action would be irrational. Plaintiffs assert either strict scrutiny, or at the minimum, rational basis should apply. There must be a rational reason to deny O.D.G. and these similar children this right.

“If a statute affects a fundamental right...it is subjected to strict scrutiny review” *Sanchez v. State* 692 N.W.2d 812 (Iowa 2005)(citing *City*

of *Cleburne v. Cleburne Living Ct.*, 473 U.S. 432, 440 (1985). “The State must prove it is narrowly tailored to the achievement of a compelling state interest” *Id.* Here Plaintiffs argue that it is a fundamental right to have a parent, or to protect the happiness of self for that parent. I.A. Const. art. 1 §1. If Iowa Code §314.1(9)(b) is interpreted that O.D.G. cannot have a cause of action, then it infringes on her fundamental right, and creates a suspect class, that of being an unborn fetus. If O.D.G. had not survived and was not living now, this distinction would be necessary and indeed, Defendant’s above cases make a good argument for that distinction. However, O.D.G. did survive, and going with Defendants interpretation would harm O.D.G.. There is no compelling state interest to not allow O.D.G. this claim, as she is alive. Plaintiffs contend there would be no compelling interest in restricting minor children who are unborn when an “act, omission, or occurrence... occurred” but then were born from causes of action, loss of consortium or otherwise, on medical malpractice claims.

In the alternative, Plaintiffs argue that there be rational basis scrutiny in that it must be reasonably related to a legitimate government interest. *King v. State*, 818 N.W.2d 1 (Iowa 2012)(citing *Sanchez*, 692 N.W.2d 812, 817 (Iowa 2005). Even here, Plaintiffs argue there can be no legitimate government interest in not allowing minor children who were not born when

an act, omission, or occurrence, occurred but were then later born and survive, from pursuing a cause of action related to that act, omission, or occurrence. And even if there is, it must be reasonably related to that governmental interest. Plaintiffs contend there is no governmental interest to support such a distinction.

There is no rational basis for a distinction which deprives the distinction of constitutionality under the requirement of equal protection. Accordingly, this Court should not accord to the Defendants' and the District Court's interpretation of the statute and common law, as this would be a denial of equal protection as to the claims of O.D.G. as made in this case.

3. Summary.

The District Court erred when granting summary judgment on this issue finding O.D.G. is precluded from filing a malpractice action within the time limitation of Iowa Code §614.1(9)(b) due to the fact she was “not born yet” at the time of Paul's death. Further, if the statute were to be interpreted as held by the District Court, there will be a denial of equal protection. Construing the statute and common law as urged by Plaintiffs in this case, would correctly apply the statutory language and the common law, and provide a constitutional construction.

This Court should reverse the District Court decision and allow O.D.G.'s case to proceed in the death of her father at the hands of medical professionals who are alleged to have acted negligently.¹

CONCLUSION

Based on the above arguments, Plaintiff requests that this Court reverse the rulings of the District Court which granted summary judgment to the Defendants and determined that the Petition and claims were not filed within the statute of limitations. This case should be remanded to the District Court for processing to trial.

REQUEST FOR ORAL ARGUMENT

Pursuant to I.R.A.P. 6.908, Plaintiff-Appellants state they desire to be heard in oral argument on this appeal.

Respectfully Submitted,

By: /s/ Bruce H. Stoltze _____

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¹ If the Court denies this argument of O.D.G., then the Court should allow the claim to proceed on the same basis as the claim of the Estate and Brenna Gary as urged in Issue I above.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this brief contains 6,959 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(9).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and they type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14.

/s/ Bruce H. Stoltze _____

CERTIFICATE OF SERVICE

I, Bruce H. Stoltze, a member of the Bar of Iowa, hereby certify that on the 24th day of February, 2015, I served the above Appellant’s Brief and Request for Oral Argument by emailing one (1) copy thereof to all parties:

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CERTIFICATE OF FILING

I, Bruce H. Stoltze, hereby certify that I, or a person acting on my direction, did file the attached Appellant's Brief and Request for oral Argument by electronically filing via EDMS one copy (1) copy thereof with the Clerk of the Iowa Supreme Court on this 24th day of February, 2015.

/s/ Bruce H. Stoltze _____

ATTORNEY'S COST CERTIFICATE

The undersigned attorney does hereby certify that the actual cost of producing the foregoing Appellant's Proof Appeal Brief and Request for Oral Argument was \$0.00.

/s/ Bruce H. Stoltze _____