

IN THE IOWA SUPREME COURT  
NO. 14-1547

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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.

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

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**PLAINTIFFS'/APPELLANTS' REPLY BRIEF**

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

**Issue I: THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACT THAT THE STATUTE OF LIMITATIONS HAD NOT RUN AS TO THE ESTATE OF PAUL GRAY AND BRENNIA GRAY**

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*Rathje v. Mercy Hospital*, 745 N.W.2d 443 (Iowa 2008)

*Schultze v. Landmark Hotel Corp.*, 463 N.W.2d 47 (Iowa 1990)

**Issue II: THERE WAS AN EQUAL PROTECTION VIOLATION BECAUSE LIVING AND DECEASED MEDICAL MALPRACTICE LITIGANTS ARE SIMILARLY SITUATED AND A DIFFERENT STATUTE OF LIMITATIONS TRIGGER FOR DECEASED INDIVIDUALS IS NOT RATIONAL AS ADDITIONAL AID IN TERMS OF A DISCOVERY PERIOD MAY BE NECESSARY TO DETERMINE WHETHER A VALID CAUSE OF ACTION FOR WRONGFUL DEATH EXISTS**

*Rathje v. Mercy Hospital*, 745 N.W.2d 443 (Iowa 2008)

**Issue III: THE DISTRICT COURT ERRED IN RULING THAT ODG HAD NO CAUSE OF ACTION AS ODG DID NOT HAVE TO BE BORN AT THE TIME OF THE PLAINTIFFS' DECEDENT'S DEATH AND DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT WERE NOT PROPERLY GRANTED**

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

*Christy v Miulli*, 692 N.W.2d 694, 705, fn4 (Iowa 2005)

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**Issue IV: THERE IS AN EQUAL PROTECTION VIOLATION AS  
ODG IS A PERSON UNDER IOWA LAW AS SHE WAS  
BORN ALIVE AND IS NO LONGER AN UNBORN  
CHILD**

*Dunn v. Rose Way, Inc.*, 333 N.W.2d 830 (1983)  
*McKillip v. Zimmerman*, 191 N.W.2d 706, 709 (Iowa 1971)  
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## ROUTING STATEMENT

The parties appear to disagree as to whether or not this case meets the requirements for remaining in the Supreme Court or being transferred to the Court of Appeals. The criteria for retention to the Iowa Supreme Court are enunciated in Iowa R. App. P. 6.1101(2). Plaintiffs/Appellants have presented in this appeal what appear to be:

- (a) A case where the appellate court will be determining how the principles of the discovery rule adopted in *Rathje v. Mercy Hospital*, 745 N.W.2d 443 (Iowa 2008) apply in a death case when it is not shown that the injury and its cause in fact were known simultaneously, i.e. it is not known at the time of death that the death was medically caused so as to trigger a duty of inquiry. This is an issue of first impression and falls within the purview of the Iowa Supreme Court through Iowa R. App. P. 6.1101(2)(c).
- (b) A case presenting substantial constitutional questions as to the validity of a statute, §614.1(9)(a) and (b), as to Equal Protection Issues, neither of which have existing case law in Iowa that are determinative. This falls within purview of the Iowa Supreme Court through Iowa R. App. P. 6.1101(2)(a).
- (c) A case in which there appears to be a likely conflict with a

published decision of the Supreme Court. Here the result of the District Court appears to conflict with this Court's decision or reasoning as set out in *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830 (1983). This falls within purview of the Iowa Supreme Court through Iowa R. App. P. 6.1101(2)(b).

(d) A case in which there appears to be matters of first impression.

While, Defendants/Appellees contend there is existing determinative case law for all matters that does not appear to be correct. For example, the interpretation of Iowa Code §914.1(9)(b) as to an unborn child is without direct interpretation by the Iowa Supreme Court. While Defendants cite to a number of cases for attempting court construction, Plaintiffs cite to other cases. While Defendants cite to cases contending that unborn children have no right to claim a loss of consortium, Plaintiffs cite to other cases. Neither Plaintiffs nor Defendants cite any case specifically holding as to the concept, because no such case exists in Iowa. This falls within purview of the Iowa Supreme Court through Iowa R. App. P. 6.1101(2)(c).

(e) Plaintiffs contend that in this matter there are substantial questions of enunciating or changing legal principles due to *Rathje v. Mercy*

*Hospital*, 745 N.W.2d 443 (Iowa 2008). This falls within purview of the Iowa Supreme Court through Iowa R. App. P. 6.1101(2)(d).

Plaintiffs/Appellants would suggest all of these issues appear to indicate that the Supreme Court of Iowa retain this case for decision.

**I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACT THAT THE STATUTE OF LIMITATIONS HAD NOT RUN AS TO THE ESTATE OF PAUL GRAY AND BRENN A GRAY.**

This issue is argued at Issue I, pages 9-22 of Plaintiffs' Brief.

The Defendants miss the point of Plaintiffs' appeal and arguments and the application of previous decisions of the Iowa Supreme Court. Perhaps a few quotations from the most relevant cases can bring demonstrate this issue and bring the error of Defendants' argument into focus.

Defendants rely greatly upon *Schultze v. Landmark Hotel Corp.*, 463 N.W.2d 47 (Iowa 1990). The following is an Iowa Supreme Court summary of its pertinent ruling as to interpretation of §614.1(9)(a) in *Schultze*:

“In *Schultze*, a patient was admitted to a hospital for treatment of a hip fracture and died seventeen days later. 463 N.W.2d at 48. Her personal representative eventually sued the hospital and treating physicians for malpractice by filing a claim more than two years after the death, but less than two years after the plaintiff discovered the alleged negligence of the physicians. *Id.* We concluded the lawsuit was untimely under the statute because the discovery rule did not delay the running of the statute until the plaintiff discovered the wrongful act. *Id.* at 49-50. We focused on the triggering event used by the legislature

under the statute-injury or death-and found neither the plain language of the statute nor the history of the statute permitted us to inject any modifying language that the injury or death be wrongful. *Id.* In reviewing the legislative history, however, we did not acknowledge or discuss the two different triggering events recognized around the country or how the concept of an injury in the context of a statute of limitations traditionally embraced other elements of the claim. Instead, we observed the discovery rule was generally inapplicable to wrongful-death claims because death from medical care is the type of event that should give rise to the duty to investigate a cause of action. *Id.* at 50.” (emphasis added)

*Rathje v. Mercy Hospital*, 745 N.W.2d 443, 456 (Iowa 2008). Plaintiffs emphasize the phrase “because death from medical care is the type of event that should give rise to the duty to investigate a cause of action” since the Court was addressing the concept that if a wrongful death “from medical care” is what is known, then there is a duty to investigate a cause of action. The issue for which Plaintiffs seek review in this appeal is in those cases where death is not known to be from medical care. Defendants ignore this concept and assert that anytime a death occurs, the duty of inquiry automatically arises to determine if it was caused by medical care and thereby starting the running of the statute of limitations. Plaintiffs assert that is not the concept to be derived from *Rathje v. Mercy Hospital*, 745 N.W.2d 443 (Iowa 2008).

In *Rathje v. Mercy Hospital*, 745 N.W.2d 443 (Iowa 2008), the Iowa Supreme Court stated the following:

“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. \*\*\* Thus, the discovery of relevant facts about the injury to commence the statute of limitations must include its cause in order to justify the commencement of the limitation period. The Iowa legislature could not have intended to commence the running of the statute of limitations through inquiry notice before inquiry is warranted.” (emphasis added)

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“We think it is clear our legislature intended the medical malpractice statute of limitations to commence upon actual or imputed knowledge of both the injury and its cause in fact. Moreover, it is equally clear this twin-faceted triggering event must at least be identified by sufficient facts to put a reasonably diligent plaintiff on notice to investigate.”

*Id.* at 461. Plaintiffs contend that *Schultze*, decided before *Rathje* and therefore decided under pre-*Rathje* concepts, assumed causation by medical care because there was not yet a distinction in Iowa case law between knowledge of injury and notice/knowledge of causation of the injury. Yet *Rathje* makes it clear that simply having notice/knowledge of injury is not sufficient to begin a duty of inquiry. The additional facet of causation is

required. Both the Defendants and the District Court (and the Court of Appeals in *Lightfoot v. Catholic Health Initiatives-Iowa Corp.*, 832 N.W.2d 384 (2013)) assume that *Schultze* holds all deaths immediately place the prospective plaintiff on a duty of inquiry even if there is no notice/knowledge that the death was caused by medical care. Plaintiffs contend this is inconsistent with the logic and rationale of *Rathje*. Plaintiffs contend that when a person dies and wrongful death is alleged, if the death is alleged to be due to medical care, there must be knowledge of the death and of the death's cause by medical care. Just as for injuries, once a plaintiff is on reasonable notice that the death was caused by medical care, the duty of inquiry arises and the statute of limitations begins to run.

In the present case, the District Court determined that the death of Paul Gray in and of itself was automatically sufficient to place the Estate and Brenna Gray on inquiry notice and that the statute of limitations expired within two years after the death of Paul Gray. Plaintiffs contend the District Court erred as it applied an incorrect standard of law and that there are disputed issues of fact that relate to that issue. Summary judgment should have been denied.

**II. THERE WAS AN EQUAL PROTECTION VIOLATION BECAUSE LIVING AND DECEASED MEDICAL MALPRACTICE LITIGANTS ARE SIMILARLY SITUATED AND A DIFFERENT STATUTE OF LIMITATIONS TRIGGER**

**FOR DECEASED INDIVIDUALS IS NOT RATIONAL AS ADDITIONAL AID IN TERMS OF A DISCOVERY PERIOD MAY BE NECESSARY TO DETERMINE WHETHER A VALID CAUSE OF ACTION FOR WRONGFUL DEATH EXISTS.**

This issue is argued at Issue I, pages 11-15 of Plaintiffs' Brief.

The Defendants confuse this issue by failing to address the relevant classification to be used for an equal protection challenge. In order to bring this into focus based upon this blurring of the classifications, Plaintiffs suggest that the two classes to be compared are: persons who suffered an injury that did not result in death and are unaware of the injury relationship to medical care compared to persons who suffered an injury that did result in death but are unaware of the death relationship to medical care.

Plaintiffs contend that under the Defendants' arguments, and the District Court ruling, the persons who suffered an injury that resulted in death but are unaware of the death relationship to medical care are being denied equal treatment under the law because they are being held to be on a duty of inquiry as to medical care being a cause when it is not shown that they have facts that place them on notice that medical care was the cause. Virtually all persons who die, under the interpretation of the Defendants and the District Court, are held to a standard of being on duty of inquiry to determine the cause of any injury causing death and to investigate medical

care as a cause of that death. Yet, those persons who are injured and do not die have no duty of inquiry until they have notice that the injury was caused by medical care. Plaintiffs contend this is a denial of equal protection.

As previously stated in this brief, the Iowa Supreme Court stated in

*Rathje*:

“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.”

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“Thus, the discovery of relevant facts about the injury to commence the statute of limitations must include its cause in order to justify the commencement of the limitation period. The Iowa legislature could not have intended to commence the running of the statute of limitations through inquiry notice before inquiry is warranted.”

*Rathje* at 461. Plaintiffs assert that to apply the same statute and the same language and yet require death victims to immediately begin investigation of medical cause before they have any reasonable basis to understand the death resulted from medical cause, has no rationality to support the legislation.

Defendants do not offer any rational basis for this distinction. To be sure the Defendants do cite to the language of this Court and references to tort reform and intent to restrict statutes of limitation. (See Defendants’ Brief, p. 25). However, this Court has already made it clear that those goals

of the legislature were directed at the enacted statute of repose. *Rathje* at 458<sup>1</sup>. The statute of repose is not at issue in this case as the case was filed well within the statute of repose. The Plaintiffs assert no rational basis for the classification caused by the District Court’s interpretation of Iowa Code §614(9)(a) and *Rathje*, has been or can be shown. If the statute is interpreted as urged by the Defendants, and as held by the District Court, it will stand as an unconstitutional denial of equal protections. The Ruling of the District Court should be reversed.

**III: THE DISTRICT COURT ERRED IN RULING THAT ODG HAD NO CAUSE OF ACTION AS ODG DID NOT HAVE TO BE BORN AT THE TIME OF PLAINTIFFS’ DECEDENT’S DEATH AND DEFENDANTS’ MOTIONS FOR SUMMARY JUDGMENT WERE NOT PROPERLY GRANTED.**

This issue is argued in Issue II, pages 22-32 of Plaintiffs’ Brief.

1. Interpretation of the Statute.

(a) *Construction of the Statutory Language supports Plaintiffs’ claim for reversal*

Defendants/Appellees argue that ODG has no valid claim under §614.1(9)(b). See (Defendants’ Brief p. 29). The Plaintiffs Initial Brief

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<sup>1</sup> “Instead, the legislature was largely reacting to the national movement for a statute of repose as a response to the prevailing trend toward the adoption of the discovery rule in medical malpractice cases. *Baines*, of course, made the movement particularly relevant in Iowa by 1975. Yet, there was no similar organized legislative movement that would indicate our legislature intended for the physical injury, alone, to serve as the triggering event under the discovery rule.” *Rathje*, at 458.

addresses what Plaintiffs contend is the correct construction. The brief of the Defendants (and thereby also the District Court) goes wrong several ways.

The language being interpreted, Iowa Code §614(1)(9)(b), provides:

## **9. Malpractice.**

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(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. (emphasis added).

The seminal problem with the Defendants’ argument is that they skip a phrase in the statute to reach their construction of the statute. Properly constructed, the language of the statute does not read, or even imply, that the minor who has brought the cause of action must have been a living minor at the time of injury. The Defendants attempt to apply the word “minor” to the phrase “when the act, omission, or occurrence alleged in the action occurred.” Yet in order to reach this construction of the statute they skip and ignore the phrase in between those two phrases, i.e. the phrase “who was under the age of eight years when”. Proper construction applies the phrase “who was under the age of eight years” to the immediately following phrase “when the act, omission, or occurrence alleged in the

action occurred”. As such the word “minor” refers to the person making the claim, here ODG brought by the Estate of Paul Dedrick Gray. That person making the loss of consortium claim, here the person ODG who is a minor, had to be under 8 years of age at the time of the act, omission or occurrence alleged in the case.<sup>2</sup> This is the proper construction of the statute and is as urged by the Plaintiffs in their initial brief.

The second problem with the Defendants’ argument is that they wrongly assert ODG cannot claim for a loss of consortium contending she was not a “person” as she was not yet born at the time of the act, omission or occurrence alleged in the suit.<sup>3</sup> That argument seems to directly contradict the holding of the Iowa Supreme Court in *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830 (1983), where, in allowing a parent’s claim for loss of consortium for the death of an unborn child, it was specifically held that: “A minor person is simply one who has not yet reached majority, a category

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<sup>2</sup> For example, a minor who was 9 or 10 at the time of the act, omission or occurrence cannot use §614.1(9)(b) as the statute of limitations.

<sup>3</sup> To support this proposition Defendants cite to the District Court’s citation of the unreported case of *Estate of Ayala-Gomez v. Sohn*, No. 11-2017, 2012 WL 4900919. (Defendants’ Brief, p. 31). But, the minor in that unreported case was not unborn; she had lived for 1 year. She was dead at the time the lawsuit was started. Here ODG was unborn, was born alive and is now living. The statement by the Court of Appeals in the *Sohn* case, meant the Plaintiff minor had to be alive at the time of the filing of the case for §614.1(9)(b) to apply. Here ODG was and is alive at the time of the filing and processing of this case. *Sohn* provides no support for the argument of the Defendants and the holding of the District Court.

which certainly includes unborn persons.” *Id.* at 833. Here the statute says minor. Applying the reasoning of *Dunn*, ODG was minor at the time of the death of Paul Gray, her father, and was a minor at the time the suit in this case was filed.

b. *Prior Iowa Law Supports Plaintiff’s request for Reversal.*

As noted above, a case supporting the argument of Plaintiffs is the case of *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830 (1983), wherein the Iowa Supreme Court stated: “A minor person is simply one who has not yet reached majority, a category which certainly includes unborn persons.” *Id.* at 833. Comparatively, the cases cited by Defendants do not provide holdings that detract from this holding in *Dunn*.

Essentially the Defendants confuse the citation to cases involving the survival statute wherein the claim was made for a “wrongful death” of an unborn child or a child who has died before the lawsuit was filed. See, e.g. *Weitl v. Moes*, 311 N.W.2d 259, 271-273 (Iowa 1981), *overruled on other grounds by Audubon-Exira Ready Mix, Inc. v. Ill. Cent. Gulf. R. R.*, 335 N.W.2d 148, 152 (Iowa 1983)(“Accordingly, we hold that a fetus, whether viable or not, is not a ‘person’ within the meaning of section 611.20. In so doing we repeat the admonition in *McKillip* that we express no opinion regarding the existence of a fetus as a person in a biological, religious or

philosophical sense); *McKillip v. Zimmerman*, 191 N.W.2d 706, 709 (Iowa 1971) (“We hold only the legislature in enacting the statutes applicable to this case did not intend to include an unborn fetus when it adopted our survival statute, section 611.20.”); *Hammen v. Iles*, 2013 WL 2368810 (Iowa Ct. App. May 30, 2013)(“We conclude the district court correctly understood Iowa Code section 614.1(9)(b) as tolling the statute of limitations only so long as the minor is alive.”).

The Defendant cited cases involve unborn children making “wrongful death” claims who were never born or who die before the suit is filed. The present case is about a “loss of consortium” claim for ODG, who was a unborn child, who was born alive, who was alive when the suit was filed and who is still alive. It is notable that within the terms of *Christy v Miulli*, 692 N.W.2d 694, 705, fn4 (Iowa 2005) ODG is a living child and within “... a limitations statute such as §614.1(9)(b) [which applies] only to living children.”

Of importance in the application of case law in the interpretation in the consideration of the purpose of the legislature in enacting the statute.

“In the final analysis the question must turn on the rule's purpose. In interpreting rule 8 we can and do set completely aside all the philosophical arguments about the status of the unborn. Those arguments are not at issue here.”

*Dunn v. Rose Way, Inc.*, 333 N.W.2d 830, 833 (Iowa 1983). Essentially this

demonstrates that the purpose of the statute should be thought about through the eyes of the legislature and what it was trying to prevent and enable with the statute. Plaintiffs contend the purpose of Iowa Code §614.1(9)(b) is to allow minor children who were below the age of eight when the triggering incident occurred, additional time to file suit. That purpose is frustrated and not fostered by the construction of the statute urged by Defendants and adopted by the District Court. That policy, on the other hand, is supported and fostered by the construction urged by the Plaintiffs. The District Court erred in dismissing the loss of consortium claims of ODG.

2. ODG's Loss of Consortium Claim is Based Upon a Legally Existing Parent-Child Relationship.

The Defendants argue that “O.D.G.’s claim for loss of parental consortium must fail as Paul Gray’s death occurred before the commencement of any parent-child relationship” (Defendants’ Brief, p. 34). This argument by Defendants is contrary to one of the holdings of the Iowa Supreme Court in the case of *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830 (1983).

In *Dunn*, a father brought a claim for damages arising from death of his unborn child in automobile accident. *Id.* at 831. The Court first held that no wrongful death claim existed for a child who was not born alive. *Id.* at 831. In a separate and additional holding that a loss of consortium claim

existed for the father as to the death of the unborn child, the Court stated:

“Defendants add a linguistic argument, asserting, “minor child” simply does not include an unborn child. The difficulty with this argument is that it depends on which dictionary is used. Webster’s New International Dictionary, Third Ed. (1964), defines a child as “an unborn or recently born human being; fetus; infant; baby.” This plain definition is not changed by addition of the word “minor.” A minor person is simply one who has not yet reached majority, a category which certainly includes unborn persons. According to Webster’s International Dictionary the word minor is derived from the Latin (*minororis*: smaller, less, inferior). A consideration of the real meaning of the words minor and child strongly support plaintiff’s claim.”

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“It is one thing for the legislature to say that a wrongful death recovery shall accrue to a person’s estate. It is quite another to allow a parent to recover when they are deprived of the anticipated services, companionship, and society of a minor child. In the latter situation the deprivation does not necessarily relate to the child’s birth. And the parents’ loss certainly does not vanish because the deprivation occurred prior to birth. To the deprived parent the loss is real either way.”

*Id.* at 833. It should be noted the Court referred to the “anticipated” services, companionship and society and that the “loss certainly does not vanish because the deprivation occurred prior to birth”. *Id.* at 833. Accordingly, the holding in *Dunn* supports the proposition that loss of consortium claims (both parental claims and children claims as to loss of consortium) do not depend upon the issue of whether a conceived child was or has been born or not. Certainly nothing cited by Defendants herein

demonstrates a different concept should apply with regard to the existence of a minor child's loss of consortium and a parent's loss of consortium. These statements by the Court in *Dunn* strongly support the claim of ODG herein that her later birth, which did actually occur in a few months after her father's death and from which she currently survives, does not cause her loss of consortium claim to either not exist or to vanish because she was not born at the time of her father's death.

Other case law cited by Defendants does not detract from the above discussion of *Dunn*. For example, Defendants cite to the case of *Doe v Cherwitz*, 518 N.W.2d 362 (Iowa 1994). (Appellee's Brief, p. 35). In *Doe*, a woman claimed injury many years previous when she was 18 and the Iowa Supreme Court held that she was not a "child" when the injury occurred so the two year statute of limitations began to run at that time. *Id.* at 364. The woman both married and conceived her children after the date of the injury. *Id.* at 364-365. The Iowa Supreme Court held that no loss of consortium cause of action could accrue for the husband as there was no marital relationship during the statute of limitations. *Id.* at 364-365. Without discussion the Court also held that the children, who were neither conceived nor born during the time prior to the running of the statute of limitations, did not have loss of consortium claims. *Id.* at 365. Contrary to the assertions of

the Defendants, the Court did not tie its ruling on the minor children's claims to any concept that the children had to be living (vs. conceived) at the time of the injury. Rather, the concept of *Doe* applicable herein, and consistent with *Dunn*, is that if a minor child is not conceived before the statute of limitations has expired, the claim for loss of parental consortium will not exist. *Id.* at 365. The present case is different. First, ODG was conceived prior to the death of her father, Paul Gray, and therefore before any statute of limitations ran. (App. p. 35). Second, ODG was born a few months after the death of Paul Gray and clearly before any statute of limitations ran. (App. p. 35). ODG has a valid loss of consortium claim that should not have been dismissed in this case. m

**IV. THERE IS AN EQUAL PROTECTION VIOLATION AS ODG IS A PERSON UNDER IOWA LAW AS SHE WAS BORN ALIVE AND IS NO LONGER AN UNBORN CHILD.**

This issue is argued as Issue II, at pages 22-32 of Plaintiffs' Brief. In the initial Brief, Plaintiffs' assert that the construction of the statute, Iowa Code §614.1(9)(b) as asserted by the Defendants and as adopted by the District Court, cause the statute to be unconstitutional in a denial of equal protection. (Issue II, Appellants' Brief, p. 26).<sup>4</sup> The Defendants, in pursuing

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<sup>4</sup> Defendants' confusingly state that it is "unclear" whether the claim by Plaintiffs is as to a statute or the common law. (Defendants' Brief, p 37, FN1). The Court should not be misled by this incorrect assertion of

their attempted defense of the statute as construed by the District Court at their behest, mis-construe the argument of the Plaintiffs. The classification the Defendants assert is not the relevant classification.

Here, at the time of the filing of the lawsuit, ODG was a living person. Her claim for loss of consortium from the death of her father is being denied by the District Court Ruling, because, while she was clearly conceived before her father's death, since she was not yet outside the womb of her mother, she is being required to file her claim within 2 years and not within 10 years. Plaintiffs contend, if this is a correct construction of the statute, there has been a denial of equal protection.

Under the assertions of the Defendant and the holding of the District Court, a child who is up to age 1 second from being born (clearly less than 8 years old) must file a loss of consortium suit within two years of the death but a child at least age 1 second after birth (clearly under 8 years old) has 10 years to file suit. The children are similarly situated, they all have lost their

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Defendants, as the Brief of Plaintiffs make it clear it is the statute, not the common law, that Plaintiffs assert as to a challenge of constitutionality. (Plaintiffs' Brief, p. 31). Indeed, even the Defendants knew that as a fact as they state in summarizing the Plaintiffs' claims that it is the statute that Plaintiffs claim is unconstitutional. (Defendants' Brief, p. 37-38) ("Plaintiffs allege there is not a compelling state interest, or in the alternative a rational basis, justifying a distinction between unborn children and living children under the statute and, therefore, the district court's interpretation of §614.1(9)(b) constitutes an equal protection violation".) (emphasis added).

parent after conception. They all have lost the consortium of their parent. They are all under 8 years of age. The only difference is that some were born and outside the womb before their parent died and some were not. The fortuitous nature of the status of the birth of the child should not be a determining factor on whether a claim can be processed or not. As the Court said in *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830 (1983), as to a loss of consortium claim “the deprivation does not necessarily relate to the child’s birth.” *Id.* at 833.

The Defendant’s again state in this section of their Brief that “... an unborn child is not considered a person...”. (Defendants’ Brief, p. 38).<sup>5</sup> As stated earlier, this argument by Defendants contradicts this Court’s statements in *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830 (1983) wherein an unborn child was, in fact, determined by this Court to be considered a “person”. *Id.* at 833. (“A minor person is simply one who has not yet reached majority, a category which certainly includes unborn persons”).

The Defendants cite to abortion cases such as *Roe v Wade*, 410 U.S.

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<sup>5</sup> At several places in the Defendants’ Brief, the phrase “living person” is used by the Defendants. See, e.g. Defendants’ Brief, pp. 33-34. Yet, none of the cases cited by the Defendants addresses loss of consortium claims such as *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830 (1983) and §614.1(9)(b) does not use the words “living child” or “living person”. Those are simply the words or phrases the Defendants request the Court to add to the statute in order to reach the interpretation the Defendants desire.

113, 158 (1973). But abortion analysis has nothing to do with this case. Indeed, the Defendants continue to confuse the issue by citing to cases of claims of unborn children who are not born alive. ODG was not aborted. ODG did not die. ODG does not assert a wrongful death claim. ODG was born alive. ODG is still alive. Cases addressing claims of unborn children not born alive are not relevant to this case. This case involves a living and born child.

The case of *McKillip v Zimmerman*, 191 N.W.2d 706(Iowa 1971) is mis-cited by Defendants and is not apposite. *McKillip* holds that the survival of a death claim does not exist for a fetus who is not born alive. *Id.* at 709 (We hold ‘person’ as used in Code section 611.20 means only those born alive.”). In other words, if a fetus is not born alive a cause of action for that fetus does not survive. Again, ODG was born alive and survives to this date. Under the *McKillip* case, ODG is a person for whom survival of claims would exist. Since she has not died, the statute does not come into play in this case.

In considering the rational basis for the statute, the Defendants refer to the concept of the goals of Iowa Code §614.1(9) as being a goal to “tighten the statute of limitations to reduce a physician’s exposure to future liability for malpractice lawsuits”. (Defendants’ Brief, p. 41, citing to *Rathje v.*

*Mercy Hospital*, 745 N.W.2d 443, 455 (Iowa 2008). The Defendants recognize, as well, that the legislature’s intent was to provide certainty to, and place limits on, the timeframe in which malpractice actions can be filed”. (Defendants’ Brief, p. 41, citing to *Rathje v. Mercy Hospital*, 745 N.W.2d 443, 455 (Iowa 2008). Likewise, another goal was that “It is logical that a statute of limitations would prescribe a time certain for the commencement of the limitation period”. (Defendants’ Brief, p. 41, citing to *Schultze v. Landmark Hotel Corp.*, 463 N.W.2d 47, 49 (Iowa 1990), Plaintiffs contend these asserted rational bases do not support the classification of the statute as held by the District Court in this case and as urged by the Defendants.

First, nothing about allowing a loss of consortium claim for an unborn child who is born alive after the death of the parent alters the policy of having a time certain for the commencement of the limitation period. It still expires on the date the child under 8 reaches the age of 10.

Second, nothing about allowing a loss of consortium claim for an unborn child who is born alive after the death of the parent alters the policy of having certainty to, and placing limits on, the timeframe in which malpractice actions can be filed. It still expires on the date the child under 8 reaches the age of 10.

Thirdly, there is still a tightening of the statute of limitations period to reduce a physician's exposure to a malpractice suit. It still expires on the date the child under 8 reaches the age of 10 or the passing of the date of the statute of repose.

The rational bases asserted by the Defendants do not directly address the issue of the classification raised in this case. Here, the legislature specifically set out an extended timeframe for children under the age of eight to assert a malpractice claim. Certainly the goal of that extension was to grant to such children (young person) a longer time within which to make a malpractice claim. Asserting a distinction between a person under eight who is born and a person who is under eight but conceived and not born, does not further the rational goal of granting a child (young person) an extended time frame for filing a malpractice action. There is no rational basis for differing treatment and this statute is unconstitutional as a denial of equal protection if the statute is construed as the District Court held and the Defendants assert.

### **CONCLUSION**

Based on the above arguments and the arguments made in Plaintiffs' Brief, Plaintiffs request 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.

Respectfully Submitted,

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### **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this brief contains 6,024 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

