ELECTRONICALLY FILED FEB 24, 2015 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
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; UNITYPOINT HEALTH; BROADLAWNS MEDICAL CENTER FOUNDATION, and BROADLAWNS MEDICAL CENTER
Defendants/Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
HON. JUDGE DENNIS J. STOVAL
POLK COUNTY NO. LACL129854

DEFENDANTS/APPELLEES CENTRAL IOWA HOSPITAL CORPORATION, D/B/A IOWA HEALTH PAIN MANAGEMENT CLINIC, IOWA HEALTH SYSTEM, UNITYPOINT HEALTH, DANIEL J. BALDI, D.O., DANIEL J. BALDI, D.O., P.C., UNITED ANESTHESIA & PAIN CONTROL, P.C., BROADLAWNS MEDICAL CENTER FOUNDATION, AND BROADLAWNS MEDICAL CENTER'S APPEAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF FILING

I hereby certify:

That on the 24th day of February, 2015, I filed the Appellees' Brief and Request for Oral Argument by electronically filing via EDMS with the Clerk of the Supreme Court, Iowa Supreme Court.

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I hereby certify that pursuant to Iowa Rules 16.317, 16.1220, and 16.1221(2), the Appellees' Brief and Request for Oral Argument will be served through EDMS whereby EDMS will send a notice of the electronic filing to the following parties who are all registered filers:

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS BECAUSE THERE WAS NO GENUINE ISSUE OF MATERIAL FACT THAT THE STATUTE OF LIMITATIONS HAD RUN AS TO THE ESTATE OF PAUL GRAY AND BRENNA GRAY

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II. WHETHER THERE WAS AN EQUAL PROTECTION VIOLATION BECAUSE OF A DIFFERENT STATUTE OF LIMITATIONS TRIGGER FOR DECEASED INDIVIDUALS

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Argenta v. City of Newton, 382 N.W.2d 457 (Iowa 1986)

Bishop v. Eastern Allamakee Community School District, 346 N.W.2d 500 (Iowa 1984)

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1975 Iowa Acts ch. 239

III. WHETHER THE DISTRICT COURT CORRECTLY RULED THAT PLAINTIFFS' LOSS OF PARENTAL CONSORTIUM CLAIM ON BEHALF OF THE MINOR CHILD, ODG, WAS BARRED BY IOWA CODE § 614.1(9)(B) BECAUSE ODG WAS NOT A LIVING PERSON AT THE TIME OF PAUL GRAY'S DEATH

CASES

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Iowa Code § 633.3(28)(2014)

Iowa R. App. P. 6.907 (2014)

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U.S. CONSTITUTION

U.S. Const. amend. XIV, § 1

IOWA CONSTITUTION

Iowa Const. art. I, § 6

STATUTES AND RULES

1 U.S.C.A. § 8 (2014)

Iowa Code § 611.20 (2014)

Iowa Code § 614.1(9)(b) (2014)

Iowa Code § 613.15 (2014)

Iowa R. App. P. 6.907 (2014)

ROUTING STATEMENT

The issues raised on appeal do not meet the criteria for retention under Iowa Rule of Appellate Procedure 6.1101(2). Iowa R. App. P. 6.1101(2). Rather, Plaintiffs' arguments on appeal involve application of existing legal principles. Accordingly, this matter is appropriate for transfer to the Iowa Court of Appeals pursuant to Iowa Rule of Appellate Procedure 6.1101(3). Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Plaintiffs, the Estate of Paul Dedrick Gray and Brenna Gray, individually and on behalf of the minor child ODG, have appealed the District Court's ruling granting summary judgment in favor of Defendants on all claims. On February 14, 2014, Plaintiffs filed this case claiming medical negligence resulted in the death of Paul Dedrick Gray, who died May 24, 2010. (App. 5-6, ¶¶ 18, 20-22). Pursuant to the Petition, the Defendants determined the case was filed outside the applicable statute of limitations. Defendants also determined that the minor child, ODG, was not alive at the time of Paul Gray's death, and therefore, she had no valid consortium claim. Defendants moved for summary judgment, citing § 614.1(9), the statute of limitations applicable to a medical negligence action resulting in an alleged wrongful death. (Supp. App. 1). The District Court granted the Motion and dismissed the case. (App. 65).

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Plaintiffs filed this action on February 14, 2014. (App. 1) The Petition alleged that the Defendants were negligent in providing medical care to the decedent, Paul Dedrick Gray, causing his death approximately 4 years earlier, on May 24, 2010. (App. 5-6, ¶¶ 18, 20-22). The Plaintiffs also claimed loss of consortium on behalf of the decedent's minor child, ODG. (App. 7, ¶¶ 28-29).

Defendants subsequently discovered that the Estate's claims were filed outside of the statute of limitations and that there was no valid loss of consortium claim because the minor child, ODG, was not yet born at the time of Paul Gray's death. (Supp. App. 9-10).

Accordingly, Defendant Dr. Baldi filed his Answer and simultaneously moved for summary judgment on April 7, 2014. (App. 1, 9, 15). On April 10, 2014, Defendant Central Iowa Hospital Corporation filed its Answer and Motion for Summary Judgment. (App. 1, 22, 27). The Defendants argued that Plaintiffs' wrongful death and loss of consortium claims were barred by the statute of limitations or invalid, and judgment should be entered as a matter of law. (App. 15, 18). Plaintiffs filed a Resistance on April 25, 2014, arguing that the Estate's claims were not barred by the statute of limitations because Plaintiff Brenna Gray did not discover the cause of Paul Gray's death until less than 2 years before the filing of the suit. (App. 30, ¶ 9; App. 35, ¶ 1). Plaintiffs further argued that ODG's loss of parental consortium claim was valid under Iowa Code § 614.1(9)(b) because ODG was a minor child under the age of 8 at the time of the alleged negligence, and therefore, had until her tenth birthday to bring suit. (App. 30, ¶ 9). Defendants filed joint reply briefs in response to Plaintiffs' Resistance on May 30, 2014, and June 24, 2014, respectively. (App. 1). Plaintiffs filed a Supplemental Resistance on June 24, 2014.

The court heard oral argument on the motions on June 26, 2014. (App. 83). On July 28, 2014, the district court entered summary judgment in favor of the Defendants. (App. 60-65). The court determined that discovery of the death triggers the statute of limitations in a wrongful death action. (App. 62-64). The court further held that the word "minor" in Iowa Code Section 614.1(9)(b) refers to a living person, and not a fetus. (App. 64-65). It is undisputed that Plaintiffs learned of Paul Gray's death more than two years before the filing of the action, and ODG was not yet born at the time of the decedent's death. (App. 62-65). Accordingly, the Estate's case was barred by the statute of limitations which expired, at the latest, July 22, 2012, and ODG had no valid claim under Section 614.1(9)(b). (App. 62-65).

On August 12, 2014, Plaintiffs filed a motion to amend and enlarge the Court's ruling granting summary judgment. (App. 1, 67). Defendants filed a joint resistance to the Motion on August 22, 2014. (App. 1, Supp. App. 12). On September 12, 2014, the District Court denied Plaintiffs' motion to amend and enlarge the ruling. (App. 77). Plaintiffs subsequently filed this appeal.

III. FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

In 2010, Paul Gray was a patient at Iowa Health Pain Management, where he sought treatment from Dr. Daniel J. Baldi. (App. 5, ¶ 16). Paul Gray died on May

24, 2010, from a drug overdose. (App. 5, ¶ 18). At the time of his death, his daughter, ODG, was not yet born. (Supp. App. 2).

The Plaintiff, Brenna Gray, was appointed Administrator of the Estate of Paul Gray on July 22, 2010. (App. 19). She also signed an oath in her fiduciary capacity as administrator of the Estate in July 2010. (App. 19).

Despite Ms. Gray's knowledge of her husband's death in 2010, Plaintiffs did not file this cause of action until February 14, 2014—approximately four years after the death of Paul Gray. (App. 1, 19). In the Petition, Plaintiffs allege the negligent acts or omissions of Defendants in providing medical care caused the death of Paul Gray. (App. 6, ¶ 22; 19). Plaintiff Brenna Gray claims she waited to file suit because she "did not discover that Paul Gray's death may have been caused by Dr. Daniel J. Baldi and the other Defendants in this case until less than two years from the date of the filing of the lawsuit in this case." (App. 82). This argument is legally irrelevant because the statute of limitations in a medical negligence wrongful death case accrues on the date of death—in this case, when Ms. Gray learned of Mr. Gray's death.

On April 7, 2014, Defendant Dr. Baldi filed a Motion for Summary Judgment asserting that Plaintiffs' claims are barred by Iowa Code § 614.1(9), the statute of limitations in medical negligence actions. (App. 1, 18). On April 10, 2014, Defendants Central Iowa Hospital Corporation, Iowa Health System, and

UnityPoint Health filed a Motion for Summary Judgment, joining and adopting the arguments made in Defendant Baldi's Motion for Summary Judgment. (App. 27-28). Defendants filed a Joint Reply to Plaintiffs' Resistance and a Supplemental Joint Reply on May 30 and June 24, 2014, respectively. (Supp. App. 1; App. 38).

In their Motions, Defendants asserted that the statute of limitations outlined in Iowa Code § 614.1(9) commences upon the discovery of the death. Accordingly, Plaintiffs failed to file an action for wrongful death and loss of spousal consortium within the statutory period, warranting dismissal of the case. (Supp. App. 1-5). Defendants further argued that ODG, Paul Gray's minor child, was not born at the time of Paul Gray's death and, therefore, was not a minor child within the meaning of Iowa Code § 614.1(9) and had no valid loss of parental consortium claim. (Supp. App. 5-10).

On June 26, 2014, a contested hearing proceeded. (App. 83-107). On July 28, 2014, the Honorable Dennis J. Stovall issued an Order granting Defendants' Motions for Summary Judgment, holding the limitation period in section 614.1(9) commences on the date the death is discovered. (App. 62-64). Consequently, the Plaintiffs failed to file the cause of action within the two-year time period outlined in Iowa Code § 614.1(9). (App. 64). The Court further held that to recover under Iowa Code § 614.1(9)(b), ODG had to be a minor at the time of Paul Gray's death. (App. 64). Because a minor is interpreted to mean a living person, and ODG was

not yet born, the court determined ODG had no loss of parental consortium claim. (App. 65).

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS BECAUSE THERE WAS NO GENUINE ISSUE OF MATERIAL FACT THAT THE STATUTE OF LIMITATIONS HAD RUN AS TO THE ESTATE OF PAUL GRAY AND BRENNA GRAY

A. Preservation of Issue for Review

Defendants agree the issue of whether or not this action was barred by the statute of limitations was preserved in the motion papers and arguments offered in support of and in resistance to Defendants' Motion for Summary Judgment, as well as the District Court's ruling.

B. Standard of Review

Defendants agree that the scope of review is for errors at law. Iowa R. App. P. 6.907.

C. Argument

This is a medical negligence action, alleging that the defendant physician, hospitals and health care entities caused the death of Paul Gray. The two-year statute of limitations of Iowa Code section 614.1(9)(a) applies to medical negligence actions seeking damages for a wrongful death. In death cases, the statute of limitations accrues upon knowledge of the death of the patient. There

can be no dispute that Brenna Gray, the claimant, had knowledge of Mr. Gray's death within two years of its occurrence. Mr. Gray died on May 24, 2010, nearly four years before the Petition was filed on February 14, 2014. Plaintiffs' Petition was filed too late. Therefore, the District Court properly entered summary judgment in favor of Defendants.

Plaintiffs muddy the waters of clear application of the statute of limitations in death cases by misapplying the analysis developed in injury cases. That analysis emerged to protect unsuspecting medical patients when the injury or its factual cause was not known or should not have been known until the time the injury was discovered. That analysis is inapplicable and improper in death cases, where notions of latent causation of injury are simply not at play. Death, unlike a latent injury, immediately puts a person on notice of a need to investigate. In this case, the alleged death by overdose and/or combination of prescription medicines necessarily embraced the alleged cause in fact (consumption of prescription medicines). Knowledge of the death begins the maximum investigation period allowed prior to filing a lawsuit. Under Iowa law, the statute of limitations accrued upon the date Plaintiffs learned of Paul Gray's death. Summary judgment in favor of Defendants is warranted and the district court should be affirmed.

1. Iowa Code Section 614.1(9)(a) and *Schultze v. Landmark Hotel Corp.*, 463 N.W.2d 47 (Iowa 1990) Mandate Summary Judgment in Favor of Defendants

It is undisputed that the subject matter of this lawsuit is the alleged medical negligence of a hospital and a physician. Iowa Code section 614.1(9)(a) provides the applicable statute of limitations:

> those founded on injuries to the person or wrongful death against any physician and surgeon . . . 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 . . . .

Iowa Code § 614.1(9)(a).

In *Schultze v. Landmark Hotel Corp.*, the Iowa Supreme Court was asked to determine whether the statute of limitations commenced on the date of death or on the date the cause of death was discovered. 463 N.W.2d 47, 48 (Iowa 1990). The decedent's widow claimed that the statute of limitations began to run when she received the medical records from the hospital which ultimately led to her discovery of medical malpractice, not on the date of her husband's death. *Id.* The court interpreted the identical provisions of Iowa Code § 614.1(9) at issue in this case and determined that the plain language of the statute mandated that the statute of limitations began to run on the date of death. *Id.* at 49.

In arriving at that holding, the *Schultze* Court determined that when the terms of a statute are unambiguous, the court need not resort to the rules of statutory construction. *Schultze*, 463 N.W.2d at 49. In analyzing the statute, the court stated:

> It is logical that a statute of limitations would prescribe a time certain for the commencement of the limitation period. In common usage the word "death" refers to the end of life, a time certain. The subsection standing alone is intelligible and the meaning is clear. Under these circumstances, our role requires that we not alter the terms prescribed by the legislature with the insertion plaintiff suggests.

Id.

The *Schultze* court noted that the statute created a "modified" discovery rule for purposes of a wrongful death which requires the claimant to simply know of the death to trigger the statute of limitations. *Id.* at 50. Courts may not, "under the guise of judicial construction, add modifying words to the statute or change its terms." *Id.* at 49. When interpreting statutes that include words unaccompanied by specific definitions, the words will be given their ordinary meaning. *Schlote v. Dawson*, 676 N.W.2d 187, 192 (Iowa 2004). The *Schultze* court held that adding any requirements other than knowledge of the death would "create a discovery rule that supersedes a statutorily imposed discovery rule. This is contrary to the legislative intent." *Id.* at 49.

In citing cases from Minnesota, Kentucky, North Dakota and Pennsylvania, the *Schultze* court also recognized that the discovery rule was unavailable in a

wrongful death action because the nature of a death warrants investigation for any possible cause of action. *Id.* The court identified the rationale supporting the legislature's decision to require simple knowledge of the death to trigger the statute of limitations:

> [W]hen the fact of death is known to the plaintiff, "no additional aid in terms of a discovery period is necessary" because the fact that a death has occurred provides the plaintiff with the starting point to determine whether a valid cause of action for wrongful death exists. *Id.* We conclude that this reasoning explains our legislature's intent in enacting subsection 9.

Id. (citing *Krueger v. St. Joseph's Hospital*, 305. N.W.2d 18, 23 (N.D. 1981)). As the *Krueger* court reasoned in full:

> The discovery rule applicable in malpractice actions does not apply to wrongful death actions because it is the fact of death itself which should indicate a starting point for inquiry regarding a cause of action for wrongful death. When the facts used to determine whether a cause of action exists are equally available to the plaintiff, no additional aid in terms of a discovery period is necessary. In the context of a wrongful death action, this equality exists when death occurs, while in malpractice actions the difficulty of ascertaining the facts indicating malpractice necessitates a "discovery rule". The situation is much different in a wrongful death action when the facts used to determine whether a cause of action exists are rendered unascertainable due to fraud or fraudulent concealment. In this context, s 28-01-24, N.D.C.C., applies to wrongful death actions despite the fact that death has occurred, and the essential element giving rise to a cause of action for wrongful death is, generally, the death of the injured party.

Krueger, 305. N.W.2d at 23. Stated another way, the general rule is that the statute of limitations is triggered when "the claimant knew, or through the use of

reasonable diligence should have known . . . the injury or death for which damages are sought in the action . . ." and the exception to the general rule is when "the facts used to determine whether a cause of action exists are rendered unascertainable due to fraud or fraudulent concealment." Iowa Code § 614.1(9)(a); *Krueger*, 305. N.W.2d at 23.

Again, there is no ambiguity for the Court to resolve. Iowa Code section 614.1(9)(a) specifically instructs that actions founded upon wrongful death arising out of medical negligence must be brought within two years of the date the claimant knew of the death for which damages are sought. *Schultze*, 463 N.W.2d at 50; *Lightfoot v. Catholic Health Initiatives – Iowa Corp.,* 2013 WL 1452932 (Iowa Ct. App. 2013) (unreported). Paul Gray died on May 24, 2010. (Pls.' Pet. ¶ 18). The Plaintiff, Mr. Gray's wife, knew of the death, at the absolute latest, by July 22, 2010, as she was named administrator of Mr. Gray's Estate, Polk County case number ESPR 061230, on July 22, 2010. (App. 19). She also signed an oath in her fiduciary capacity as administrator of the Estate in July of 2010. (App. 19). Because Brenna Gray served as administrator of Mr. Gray's Estate in 2010—a proceeding that would not exist but for his death—there simply can be no dispute that Brenna Gray, the claimant, had knowledge of Mr. Gray's death at that time.

Despite her knowledge of the death, the case was not filed until February 14, 2014, more than three years later. (App. 1, 19). These basic facts—events

occurring on three dates—cannot be disputed. Application of the plain language of Iowa Code section 614.1(9)(a) in this case alleges damages arising from a wrongful death results in summary judgment in favor of Defendants. *Schultze*, 463 N.W.2d at 50; *Lightfoot,* 2013 WL 1452932. Accordingly, the Petition is time-barred as a matter of law and summary judgment was properly entered by the district court.

2. *Schultze* is Still Good Law After *Rathje v. Mercy Hospital Medical Center*, 745 N.W.2d 443 (Iowa 2008) and *Murtha v. Cahalan*, 745 N.W.2d 711, 715 (Iowa 2008), and Summary Judgment was Properly Entered in Favor of Defendants

The statute of limitations is "designed primarily to protect the courts and defendants from the multitude of problems that can occur in dealing with stale claims." *Rathje v. Mercy Hospital Medical Center*, 745 N.W.2d 443, 448 (Iowa 2008) (citing Iowa Code § 2529 (1890)); *Fadden v. Satterlee*, 43 F. 568, 68-69 (S.D. Iowa 1890); *Schulte v. Wageman*, 465 N.W.2d 285, 286 (Iowa 1991)). Iowa developed a bright-line rule that the statute of limitations accrued when the injury occurred, even if the Plaintiff had not discovered the injury or its cause. *Rathje*, 745 N.W.2d at 449. "The individual hardship visited on those plaintiffs who failed to discover the injury before the end of the statute-of-limitations period was largely considered to be the price paid to achieve the greater societal goals of the statute of limitations." *Rathje*, 745 N.W.2d at 450.

Iowa courts also developed a common law discovery rule "that the knowledge needed to start the statute of limitations only meant that the plaintiff needed that amount of information to allow a reasonably prudent person to discover the fraud or wrong by making inquiries. This concept later became known as 'inquiry notice.'" *Rathje*, 745 N.W.2d at 450.

In 1974, the Iowa Supreme Court determined when the statute of limitations accrued in a medical malpractice injury case. *Baines v. Blenderman*, 223 N.W.2d 199, 202 (Iowa 1974), superseded by statute. At the time *Baines* was decided, there was a national split of authority as to whether the discovery rule was triggered upon knowledge that the conduct of the physician was negligent or wrongful (a broad approach), or whether it was triggered upon knowledge of its injury and its factual cause (a narrow approach). *Rathje*, 745 N.W.2d at 452-53. The *Baines* court held that in the context of a medical malpractice case, a claim did not accrue under the discovery rule to trigger the statute of limitations until the plaintiff knew or should have known of the injury, its cause, and the existence of the cause of action. *Rathje*, 745 N.W.2d at 452 (citing *Baines*, 223 N.W.2d at 202). The *Baines* court "simply assumed the discovery rule meant the statute of limitations was triggered upon discovery of the cause of action, which included the negligence of the physician, and gave no consideration to a discovery rule that

would trigger commencement of the limitations period upon actual or imputed knowledge of the injury and its cause." *Rathje*, 745 N.W.2d at 452.

In response to *Baines*, the Iowa Legislature enacted tort reform. *Rathje*, 745 N.W.2d at 455-56. Iowa Code section 614.1(9)(a) was enacted "as a specific exception to the general statute of limitations for malpractice actions against a specific group of medical personnel and medical facilities." *Rathje*, 745 N.W.2d at 455. "Since the enactment of the statute, the dispute in Iowa . . . has mostly centered on the extent to which the legislature intended to restrict the triggering event for the two-year limitation." *Rathje*, 745 N.W.2d at 455. In cases decided prior to *Rathje*, as a whole, the Iowa Supreme Court generally held "that the statute of limitations begins to run when the plaintiff knows or, through the use of reasonable diligence, should have known of the physical harm." *Rathje*, 745 N.W.2d at 457. Iowa developed a discovery rule essentially requiring only inquiry notice of the physical harm. *Rathje*, 745 N.W.2d at 457, 460.

Importantly, prior to *Rathje*, the Iowa Supreme Court never had to address a case in which the injury and its cause in fact were not known simultaneously, thus time-barring claims of unsuspecting patients. *Rathje*, 745 N.W.2d at 460. In cases prior to *Rathje*, the Supreme Court stated "that a patient only needs to be 'aware that a problem exists' to commence the statute of limitations, the 'problem' necessarily embraced the cause in fact of the injury." *Rathje*, 745 N.W.2d at 460.

As the *Rathje* court further opined, knowledge that the conduct of the physician is factually responsible for the injury is supported by Iowa's application of inquiry notice to the discovery rule:

> Inquiry notice plays a role in the medical malpractice statute due to the implied knowledge ("should have known") component of the statute. This component charges a plaintiff with knowledge of those facts that a reasonable investigation would have disclosed. *See Franzen*, 377 N.W.2d at 662. Under the statute, once a plaintiff gains information sufficient to alert a reasonable person of the need to investigate "the injury," the limitation period begins to run. *Id.* The acquisition of this information is notice that imposes a duty to make a factual inquiry into the existence of the injury. The statute of limitations is triggered upon the acquisition of this information because, once a plaintiff is "armed with the facts about the harm done to him, [the plaintiff] can protect himself [from the statute of limitations] by seeking advice in the medical and legal community."

Rathje, 745 N.W.2d at 460-61 (citations omitted). Yet the *Rathje* court still recognized that "[i]n some instances, the cause of medical malpractice injuries may be evident from facts of the injury alone . . . ." *Rathje*, 745 N.W.2d at 461.

Critically, the preceding *Rathje* analysis centered upon the meaning of **injury** as it factually relates to medical treatment in malpractice cases. This is in accordance with the "fundamental objective of applying the discovery rule to the statute of limitations . . . to put malpractice plaintiffs on comparable footing as 'other tort claimants' to be able to 'determine within the period of limitations whether to sue or not.'" *Rathje*, 745 N.W.2d at 461 (citing *Kubrick*, 44 U.S. at

124). The only case discussed by the *Rathje* court involving **death** relating to medical treatment was *Schultze v. Landmark Hotel Corp.*

Schultze is still good law. The thorough *Rathje* decision does not criticize or call into question the vitality of *Schultze.* Rather, the *Rathje* court cited *Schultze* as follows:

> 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.

Rathje, 745 N.W.2d at 456 (emphasis added). And as the above-cited decisions make clear, "generally" refers to the general rule of knowledge of death triggering accrual of the statute limitations. The exception to that general rule is when the facts used to determine whether a cause of action exists are rendered

unascertainable due to fraud or fraudulent concealment. There is no legal support for Plaintiffs' argument that the exception to the general rule is that the statute of limitations will not accrue until he/she has both actual knowledge of death and its cause in fact.

Indeed, in 2013, the Iowa Court of Appeals addressed this precise issue in *Lightfoot v. Catholic Health Initiatives – Iowa Corp.,* 2013 WL 1452932 (Iowa Ct. App. 2013). In *Lightfoot*, the Plaintiff's husband died more than two years before a valid petition was filed asserting her wrongful death claim. *Id.* at *1. The defendant health care providers moved for summary judgment, citing the two-year statute of limitations. *Id.* The plaintiff argued that the statutory period began to run when she received the medical records pertaining to the care and treatment rendered by the defendants, not the date she learned of her husband's death. *Id.* at *2. Affirming the district court's entry of summary judgment, the Court of Appeals stated:

> *Schultze* is controlling. Lightfoot indisputably knew of her husband's death on July 25, 2009. The clock began ticking on that date. Because Lightfoot did not sue the hospital and physician in her capacity as administrator within two years, her action was time-barred and the district court did not err in granting summary judgment for the defendants.

Id.

After the opinion was released in *Lightfoot,* the Plaintiff filed an Application for Further Review. Again, Plaintiff argued that the discovery of the medical care

at issue, and not the death itself, triggered the statute of limitations. On June 7, 2013, the Iowa Supreme Court, reviewing the application *en banc*, denied the application. (Supp. App. 26).

Murtha v. Cahalan, the companion case to *Rathje* which was filed on the same day, also supports the District Court's ruling in this case. The *Murtha* court specifically referenced the fact that a death is a situation where the statute of limitations accrues immediately upon death, making a judicial inquiry into the existence of an injury or a cause in fact unnecessary. *Murtha v. Cahalan*, 745 N.W.2d 711, 715 (Iowa 2008). The court explained:

> In many medical malpractice cases, the injury for which damages are sought is immediately apparent. *See, e.g., Christy v. Miulli,* 692 N.W.2d 694, 699-700 (Iowa 2005) (plaintiff was immediately aware of the injury-death-upon the death of the deceased); *Langner,* 533 N.W.2d at 518 (patient was immediately aware of her injury-emotional and mental stress-upon hearing the defendant's harmful statements). In those cases, it is relatively simple to determine what the injury is, when it occurred, its cause in fact, and when the plaintiff knew, or should have known, of it-all of which occurred at the same time. Application of section 614.1(9) to such cases is straightforward.

Id.

Accordingly, Plaintiffs' assumption that *Rathje* and *Murtha* changed the law with respect to the accrual of a wrongful death action arising out of alleged medical malpractice is simply incorrect. These cases cite *Schultze* to illustrate that injury cases are unique from wrongful death cases. Furthermore, they recognize that in a death action, the nature of a death is such that an inquiry into potential

causes of action is immediately warranted. This is precisely the holding of *Schultze*, which still stands undisturbed after decades of intervening cases. The plain language of the statute and the overarching rationales supporting it are unaffected by anything the court held in the series of 2008 cases. Quite simply, Iowa courts have declined to extend the statute of limitations in a wrongful death action more than two years beyond the date the claimant learned of the death.

The Iowa Supreme Court has recognized that the legislature intended the statute to run from two years after the discovery of the death without qualification or additional analysis. This is not the case of an unsuspecting injured patient. So notions of latent causation of injury are not at play. Death, unlike a latent injury, immediately put Plaintiffs on notice of a need to investigate. Mr. Gray's alleged death by overdose and/or combination of prescription medicines necessarily embraced the alleged cause in fact (consumption of prescription medicines). No policy reasons exist to sidestep the effect of Iowa Code section 614.1(9)(a) to excuse the Plaintiffs' failure to comply with the clear time requirements announced by the Iowa Legislature. Knowledge of the death began the maximum investigation period allowed prior to filing this lawsuit. Under Iowa law, the statute of limitations accrued upon the date Plaintiffs learned of Paul Gray's death. Summary judgment in favor of Defendants is warranted and the District Court should be affirmed.

3. Plaintiffs Cite an Incorrect Standard as to When the Statute of Limitations Accrues in Medical Malpractice Cases

Plaintiffs' Petition states that Brenna Gray discovered Defendants' conduct within two years of the filing of the Petition. (App. 4, ¶ 14). Plaintiffs further argue that: "Under the present state of facts and a motion to dismiss, the Defendants have not shown that the Plaintiffs, on the date of death, knew that Defendants' negligence was the cause in fact of the injury – death of Paul Dedrick Gray until the medical records from the Defendants were issued to Plaintiff as the autopsy showed no reason as to the death of Paul Dedrick Gray that would have to do with Defendants' medical care of Plaintiff." (Pls.' Proof Br. p. 3). For the reasons explained above, the Plaintiffs' formulation of the standard as to when the statute of limitations accrued—knowledge of negligence—is the very holding of *Baines* that was repudiated by the Iowa Legislature. Moreover, Plaintiffs attempt to establish the accrual of Plaintiffs' claim at a date later than knowledge of Mr. Gray's date of death, likely refers to the portion of Iowa Code § 614.1(9)(a) sometimes referred to as the "discovery rule." Plaintiffs argue that their cause of action accrued upon the discovery of Defendants' conduct, not on the date of Mr. Gray's death. For the reasons discussed above, this argument is contrary to law, as the cause of action accrues on the date the claimant learned of the decedent's death, not later.

II. THERE WAS NO EQUAL PROTECTION VIOLATION BECAUSE LIVING AND DECEASED MEDICAL MALPRACTICE LITIGANTS ARE NOT SIMILARLY SITUATED AND BECAUSE A DIFFERENT STATUTE OF LIMITATIONS TRIGGER FOR DECEASED INDIVIDUALS IS RATIONAL BECAUSE NO ADDITIONAL AID IN TERMS OF A DISCOVERY PERIOD IS NECESSARY TO DETERMINE WHETHER A VALID CAUSE OF ACTION FOR WRONGFUL DEATH EXISTS.

A. PRESERVATION OF ISSUE FOR REVIEW

Defendants agree that error has been preserved on this issue.

B. STANDARD OF REVIEW

Defendants agree that claims having a constitutional basis are reviewed *de novo*. Iowa R. App. P. 6.907. The Iowa Supreme Court normally avoids constitutional claims when an appeal can be decided on other grounds. *See State v. Kukowski*, 704 N.W.2d 687, 690 (Iowa 2005) (citations omitted).

C. ARGUMENT

Plaintiffs argue that they would be denied equal protection if Iowa Code § 614.1(9)(a) is interpreted to mean the statute of limitations accrues upon discovery of death for wrongful death medical malpractice plaintiffs, and upon discovery of injury and its cause in fact for living medical malpractice plaintiffs. (Pls.' Proof Br. pp. 19-20).

As an initial matter, there truly is no equal protection classification to analyze in this case. As discussed below, Iowa law treats many kinds of medical malpractice litigants differently. Here, Iowa Code § 614.1(9)(a) has created two

categories (*i.e.*, not similarly situated) of litigants, those living and those deceased. Iowa Code § 614.1(9)(a) applies uniformly to deceased medical malpractice litigants. Accordingly, Plaintiffs' argument fails on this basis alone because there is no different application of law to similarly situated medical malpractice litigants. However, assuming *arguendo* living and deceased patients are similarly situated litigants, the District Court's application of the two year wrongful death statute of limitations is entirely consistent and rational in light of the goals of Iowa Code § 614.1(9).

"Because statutes of limitation do not implicate or affect fundamental rights, *see Chase Sec. Corp. v. Donaldson,* 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628, 1635–36 (1945), this court applies a rational-basis test in determining an equal protection challenge to a statute of limitations." *Fisher v. McCrary-Rost Clinic, P.C.*, 580 N.W.2d 723, 725 (Iowa 1998) *(citing Koppes v. Pearson,* 384 N.W.2d 381, 384 (Iowa 1986)); *see also King v. State,* 818 N.W.2d 1, 23, 27–28 (Iowa 2012); *Estate of Ayala-Gomez v. Sohn*, No. 11-2017, 2012 WL 4900919 (Iowa Ct. App. 2012) (unreported). Further,

> Under the rational basis test, a legislative classification is upheld if any conceivable state of facts reasonably justify it. Additionally, the guarantee of equal protection does not exact uniformity of procedure. The legislature may classify litigants and adopt certain procedures for one class and different procedures for other classes, so long as the classification is reasonable. All that is required is that similarly situated litigants be treated equally.

Koppes v. Pearson, 384 N.W.2d 381, 384 (Iowa 1986), abrogated on different grounds by *Christy v. Miulli*, 692 N.W.2d 694, 700-702 (Iowa 2005) (citing *Bishop v. Eastern Allamakee Community School District,* 346 N.W.2d 500, 505 (Iowa 1984)). "Plaintiff[] bears a heavy burden of negating every reasonable basis upon which the statute may be sustained." *Fisher*, 580 N.W.2d at 725-26 (Iowa 1998) (citing *Argenta v. City of Newton,* 382 N.W.2d 457, 461 (Iowa 1986)). Iowa Courts "will uphold the statute if it bears some fair relationship to a legitimate public purpose." *Fisher*, 580 N.W.2d at 725 (citing *Stracke v. City of Council Bluffs,* 341 N.W.2d 731, 733 (Iowa 1983)).

As the *Fisher* court reasoned and as noted above, "[t]he legislature enacted section 614.1(9) as a response to 'a critical situation' caused by 'the high cost and impending unavailability of medical malpractice insurance.'" *Fisher*, 580 N.W.2d at 725 (citing 1975 Iowa Acts ch. 239, § 1); *Rathje*, 745 N.W.2d at 454-55. The *Rathje* court further noted that in 1975, the concomitant drumbeat of tort reform that had swept the country, which was "predicated on claims of a mounting medical malpractice crisis." *Rathje*, 745 N.W.2d at 455. Efforts to "tighten the statute of limitations to reduce a physician's exposure to future liability for malpractice lawsuits" were in full effect as the "medical malpractice insurance industry began to increase premiums to protect against the resulting 'long tail' of potential liability." *Id.*

In light of the tort reform history summarized by the *Rathje* court, it is clear the Iowa legislature enacted the malpractice statute of limitations with the intent of placing outside limits on the timeframe in which malpractice actions can be filed. *Rathje*, 745 N.W.2d at 455. In interpreting this tort reform codified at Iowa Code § 614.1(9), the Iowa Supreme Court has made clear that where a date of death is certain, the cause of action accrues to the estate on that date. *Schultze*, 463 N.W.2d at 50.

While Plaintiffs argue that it is unjust to treat deceased patients differently than living patients, the Iowa Supreme Court has already upheld Iowa Code § 614.1(9) differing treatment of medical malpractice litigants. *Fisher*, 580 N.W.2d at 725. In *Fisher*, the Iowa Supreme Court upheld Iowa Code § 614.1(9)(a)'s distinction drawn between living malpractice litigants who have had objects unintentionally left in their body during a medical procedure and those who had clinically required objects improperly placed in their body or negligently omitted. *Fisher*, 580 N.W.2d at 725. Because of the passage of time, the vagaries of proof of the elements of different medical malpractice claims provide a rational basis for treating different living (*i.e.*, similarly situated) medical malpractice claimants differently. *Fisher*, 580 N.W.2d at 725.

As previously discussed, in *Schultze,* the Iowa Supreme Court determined that the discovery rule, which was written into Iowa Code § 614.1(9) to protect

individuals with latent injuries caused by malpractice, was unavailable in cases involving a wrongful death. *Id.* The court treated litigants in death cases differently than living persons claiming a personal injury. *Id.* In holding that the discovery rule does not apply to wrongful death actions, the court stated:

> [W]hen the fact of death is known to the plaintiff, "no additional aid in terms of a discovery period is necessary" because the fact that a death has occurred provides the plaintiff with the starting point to determine whether a valid cause of action for wrongful death exists. *Id.* We conclude that this reasoning explains our legislature's intent in enacting subsection 9.

Schultze, 463 N.W.2d at 50 (further finding no unjust unfairness in refusing to invoke discovery rule to extend statute of limitations for wrongful death actions because all the information from which the cause of death could be ascertained was available to plaintiff at the time of his wife's death").

Thus, there is no basis for the argument that it is unfair or unconstitutional to treat litigants in a wrongful death action differently than individuals claiming an injury that did not result in death. The courts and legislature have made clear that this is not a manifestly unreasonable practice, and thus rational. As to the claim that this limitation is generally "unfair" the Iowa Supreme Court has succinctly addressed this argument in the past:

> As we have recognized, [statutes of limitation] are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through

> legislation. They represent a public policy about the privilege to litigate....

Schlote, 676 N.W.2d at 194 (citation omitted). Equitable arguments for applying different limitations periods, "as appealing as they are, hold little sway in the face of 'the priorities that the legislature has set forth in an express statutory provision.'" *See Estate of Ayala-Gomez v. Sohn*, No. 11-2017, 2012 WL 4900919 (Iowa Ct. App. 2012) (citing *Schultze,* 463 N.W .2d at 51). Thus, the constitutional and policy arguments do not apply here and the district court's ruling should be affirmed.

III. THE DISTRICT COURT CORRECTLY RULED THAT ODG HAS NO CAUSE OF ACTION BECAUSE SHE WAS NOT ALIVE AT THE TIME OF PLAINTIFFS' DECEDENT'S DEATH AND PLAINTIFFS' PETITION WAS PROPERLY DISMISSED

A. PRESERVATION OF ISSUE FOR REVIEW

Defendants agree this issue was preserved in the motion papers and arguments offered in support of and in resistance to Defendants' motions for summary judgment, as well as the district court's ruling.

B. STANDARD OF REVIEW

Defendants agree that the scope of review is for errors at law. Iowa R. App. P. 6.907.

C. ARGUMENT

Plaintiffs contend the minor child, ODG, has a valid claim under Iowa Code § 614.1(9)(b) because she was less than eight years old at the time of Paul Gray's death and, therefore, has until the age of ten to file a cause of action related to his death.

Plaintiffs' argument is simply unsupported by the facts and the plain language of the statute applicable to this case. There is no valid loss of parental consortium claim under § 614.1(9)(b) because ODG was not born at the time of Paul Gray's death. (Supp. App. 2, 5-11). This is consistent with the plain language of Iowa Code § 614.1(9)(b). The undisputed facts and law forming the basis of the Defendants' Motions for Summary Judgment and the District Court's ruling were well established in the record and dismissal of this action was appropriate.

1. ODG Has No Valid Claim Under Iowa Code Section 614.1(9)(b)

a. The Plain Language of Iowa Code § 614.1(9)(b) Supports Dismissal

Plaintiffs allege ODG's loss of parental consortium claim is valid and timely under Iowa Code § 614.1(9)(b). The Code section encompasses medical malpractice actions "brought on behalf of a minor," including loss of parental consortium damages. *Christy v. Miulli*, 692 N.W.2d 694, 705 (Iowa 2005). The Code section states:

> 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.

IOWA CODE § 614.1(9)(b) (2014)(emphasis added).

The issue is whether ODG was a minor at the time the "act, omission, or occurrence alleged in the action occurred." Iowa Code § 614.1(9)(b)(2014). Plaintiffs claim ODG was a minor at the time of the occurrence because she was under the age of eight at the time of her father's death. (Pls.' Br. pp. 25-26). They further argue her claim is timely because it was brought before her tenth birthday. (Pls.' Br. p. 25). However, it is undisputed that at the time of Paul Gray's death, ODG was not yet born. (Supp. App. 2, 11). As such, Plaintiffs' arguments are unsupported by the plain language of the statute, which applies only to minors, and not unborn children. Iowa Code § 614.1(9)(b) (2014).

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." *McKillip v. Zimmerman*, 191 N.W.2d 706, 709 (Iowa 1971). Courts do not have the "prerogative to read into a statute an intent and meaning not

expressed [ ]." *Schultze*, 463 N.W.2d at 50. Typically, courts cannot, "under the guise of judicial construction, add modifying words to the statute or change its terms." *Id.* at 49.

Plaintiffs ask the Court to interpret the word "minor" as used in § 614.1(9)(b) to allow an unborn child to recover loss of consortium. This is clearly contrary to the plain language of the statute. The plain language of § 614.1(9)(b) explicitly states that ODG had to be a minor "when the act, omission, or occurrence alleged in the action *occurred*[,]" not when the action was filed. Iowa Code § 614.1(9)(b)(2014) (emphasis added). Though Plaintiffs argue that ODG met the requirements of the statute because she was a "negative age" at the time of the occurrence, as the district court noted, "in the ordinary sense, the word 'minor' refers to a living person and does not include someone with a negative age." (App. 64 (quoting *Estate of Ayala-Gomez v. Sohn*, No. 11–2017, 2012 WL 4900919, at *2 (Iowa Ct. App. Oct. 17, 2012) ("[A] minor is a person who is living.")).

The plain language of the statute demonstrates that because ODG was not a living person at the time of Paul Gray's death as required by the statute, she has no valid claim under 614.1(9)(b) and her claims were properly dismissed as untimely.

b. Prior Iowa Case Law Supports the District Court's Ruling

Plaintiffs argue at length that a fetus is considered a minor under § 614.1(9)(b). However, Plaintiffs do not cite any support for this argument, and Iowa courts have consistently held that the term minor implies a living person.

The definition of a minor child was explored in the case of *Hammen v. Iles*. 2013 WL 2368810 (Iowa Ct. App. May 30, 2013) (unreported). In *Hammen*, a child that incurred injury during birth died of his injuries years later. *Id.* at *1. Two years after the child's death, his parents filed suit against the physician that delivered the child and the hospital in which the child was born. *Id.* The defendants moved for summary judgment, arguing the child's claims belonged to his Estate, and no estate had been opened within the applicable statute of limitations. *Id.* The parents argued that because the child was a minor, pursuant to § 614.1(9)(b), the claim was not yet barred by the statute of limitations. *Id.* The trial court determined the parents lacked standing to sue and held § 614.1(9)(b) did not apply because the child was not a minor at the time the suit was filed. *Id.* at *2.

The Iowa Court of Appeals affirmed the decision of the trial court. The court determined that § 614.1(9)(b) applies only to *living* minors. *Id.* Upon review of other Iowa Code sections, the court noted the term "minor" is consistently interpreted to mean a living person. *Id.* (citing Iowa Code § 633.3(28) ("minor is a person not of full age."); § 599.1 ("the period of minority extends to the age of

eighteen years, but all minors attain their majority by marriage."); and § 598.1(6) ("[m]inor child" means any person under legal age."). The court also cited the case of *Christy v. Miulli*, which noted that numerous other jurisdictions have found "'a limitations statute such as § 614.1(9)(b) applies only to living children.'" *Id.* (citing *Christy v. Miulli*, 692 N.W.2d 694, 705 n.4 (Iowa 2005)). Therefore, the court interpreted the term "minor" as used in § 614.1(9)(b) to mean a living child. *Id.*

Other Iowa cases have held that a fetus or embryo is not considered a person under various Iowa statutes. In *McKillip v. Zimmerman*, the Iowa Supreme Court noted that an unborn child was not a "person" as defined under the Iowa survival statute, § 611.20. 191 N.W.2d 706, 709 (Iowa 1971); Iowa Code § 611.20 (2014). The court stated, "how indeed could an unborn child be a person with liability as referred to in the statute?" *Id.* This ruling has been upheld in subsequent cases. *See 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) (holding the "ordinary meaning of the word 'person' is a human being who has attained a recognized individual identity by being born alive."). Similarly, the court in *In re Marriage of Witten* determined that an embryo was not a "child" for purposes of Iowa's child custody laws. 672 N.W.2d 768, 774-76 (Iowa 2003).

Because the child must be a minor when the triggering incident occurs, and the term "minor" as used in § 614.1(9)(b) is defined as a living child, the district court properly dismissed ODG's claim. It is undisputed that at the time of Paul Gray's death, ODG was an unborn fetus and, therefore, was not yet a living person. (Supp. App. 2, 11). Because ODG was not a living person when the triggering incident occurred, ODG has no valid claim under § 614.1(9)(b). Accordingly, the district court was correct in its ruling and should be affirmed on appeal.

2. ODG's Loss of Consortium Claim is Not Valid Because No Parent-Child Relationship Ever Existed

ODG's claim for loss of parental consortium must fail as Paul Gray's death occurred before the commencement of any parent-child relationship. Generally, children born or conceived after the injury or death of the parent have no claim for loss of parental consortium. *See* 12 Causes of Action 2d 419 (originally published in 1999) (West). Iowa courts have recognized that to recover damages for a consortium claim, there must be some established relationship between the injured party and the individual making the claim. For example, courts have held there is no recovery for loss of spousal consortium when the parties were not married at the time of the triggering incident.

a. Prior Iowa Case Law Supports the District Court's Ruling

Iowa courts have previously held that children who are not living at the time of a parent's injury have no right of consortium. In *Doe v. Cherwitz,* the plaintiff

brought suit against a physician for sexual assault several years after the assault occurred. 518 N.W.2d 362 (Iowa 1994). The plaintiff's husband and children also brought loss of consortium claims, though the act occurred prior to the plaintiff's marriage and the birth of her children. *Id.* The Iowa Supreme Court noted the plaintiffs were married after the incident occurred and, therefore, the loss of spousal consortium claim was invalid. *Id.* at 365. The court reasoned that the right of consortium grows out of the marital relationship. *Id.* (citations omitted). Therefore, because there was no marital relationship at the time of the incident, there was no cause of action for spousal consortium. *Id.* The court held the same was true for the loss of parental consortium claims—because the children were not living when the alleged assault occurred, there was no established parent-child relationship at the time of the incident that supported a loss of parental consortium claim. *Id.*

Similarly, the requisite parent-child relationship needed for a loss of parental consortium claim has not been established in the instant case. Like in *Cherwitz*, the triggering incident, the death of Paul Gray, occurred months before ODG's birth. (Pls.' Br. p. 25; Supp. App. 2, 11). Because Paul Gray died prior to the commencement of any parent-child relationship, ODG cannot now bring a loss of consortium claim. As the court indicated in *Cherwitz*, the "right of consortium grows out of the . . . relationship." 518 N.W.2d at 365. Just as an individual

cannot recover spousal consortium when no marital relationship existed at the time of the tort, a child cannot recover parental consortium when no parent-child relationship ever existed. Therefore, because ODG was not living at the time of Paul Gray's death and no parent-child relationship had been established, she cannot now claim a loss of parental consortium.

IV. THERE IS NO EQUAL PROTECTION VIOLATION BECAUSE THE EQUAL PROTECTION CLAUSE DOES NOT APPLY TO AN UNBORN CHILD

A. PRESERVATION OF ISSUE FOR REVIEW

Defendants agree the issue of whether ODG was denied equal protection under the law was preserved in the motion papers and arguments offered in support of and in resistance to Defendants' Motion for Summary Judgment, and in the motions and arguments offered in support of and in resistance to Plaintiffs' motion to enlarge and amend the district court's ruling granting summary judgment.

B. STANDARD OF REVIEW

Defendants agree that claims having a constitutional basis are reviewed *de novo*. Iowa R. App. P. 6.907. The Iowa Supreme Court normally avoids constitutional claims when an appeal can be decided on other grounds. *See State v. Kukowski*, 704 N.W.2d 687, 690 (Iowa 2005) (citations omitted).

C. ARGUMENT

Plaintiffs argue that ODG, as an unborn child, should have been entitled to similar recovery under § 614.1(9)(b) as a living person and, consequently, the district court's interpretation of Iowa Code § 614.1(9)(b) amounts to a denial of equal protection under the Iowa and United States Constitutions. (Pls.' Br. pp. 27-29). Plaintiffs' argument provides no basis to avoid application of Iowa Code § 614.1(9)(b).

1. The Equal Protection Clause of the Iowa and U.S. Constitution Does Not Apply to Unborn Children

The Plaintiffs claim that as a matter of equal protection, unborn children should have the same right to recover for loss of consortium arising from the death of their parent as a living, minor child.[1] (Pls.' Br. p. 28). Plaintiffs argue this classification is subject to strict scrutiny because the statute infringes on the "fundamental right to have a parent" and because unborn children are considered a suspect class. (Pls.' Br. p. 30). "Classifications based on race, alienage, or national origin and those affecting fundamental rights are evaluated according to a standard known as 'strict scrutiny.'" *Varnum,* 763 N.W.2d at 880 (citing *Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998). Plaintiffs allege there is not a

[1] It is unclear whether Plaintiffs are claiming an equal protection violation based on a common law right of an unborn child to recover consortium damages resulting from injury to or death of a parent. Plaintiffs claim the Iowa general assembly gives the right to loss of parental consortium through common law. (Pls.' Proof Br. p. 28). However, this is a misstatement of the law. "[N]either children nor parents have a common law right to recover damages for the loss of consortium of a parent or child, respectively." *Kulish v. W. Side Unlimited Corp.*, 545 N.W.2d 860, 863 (Iowa 1996).

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. (Pls.' Br. p. 30). Plaintiffs' arguments fail because they are unsupported by Iowa or federal law.

There is no equal protection violation to analyze in the present case because an unborn child is not considered a living person under Iowa or federal law. *See e.g. Roe v. Wade*, 410 U.S. 113, 158 (1973); *McKillip v. Zimmerman*, 191 N.W.2d 706, 709 (Iowa 1971). "Equal protection demands that laws treat alike all *people* who are 'similarly situated with respect to the legitimate purposes of the law.'" *Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009)(citations omitted)(emphasis added); U.S. Const. amend. XIV, § 1; Iowa Const. art. I, § 6. Before considering whether different treatment under a statute is permitted under the equal protection clause, Plaintiffs must establish as a preliminary matter that they are similarly situated. *See Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009). In the present case, Plaintiffs cannot even engage in a "similarly situated" analysis, because an unborn child is not considered a person and, therefore, cannot represent a class of litigants.

The United States Supreme Court has held that unborn children are not included within the protection of the Fourteenth Amendment, which contains the

Equal Protection Clause. In *Roe v. Wade*, the Supreme Court held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158 (citing U.S. Const. amend. XIV); *see also* 1 U.S.C.A. § 8(a)(2014) (" In determining any Act of Congress. . . the word "person", "human being", "child" and "individual," shall include every infant member. . . who is born alive."). The Supreme Court has never renounced its holding in *Roe* that the Equal Protection Clause does not apply to a fetus. The Plaintiffs do not argue that the Iowa Constitution's Equal Protection Clause is broader than or different from the Federal Constitution in this regard. To the contrary, "[g]enerally, the federal and state equal protection clauses are viewed as identical in scope, import, and purpose. . . ." *Varnum,* 763 N.W.2d at 880; *see also* Iowa Const. art. I, § 6. Therefore, the legislature may apply § 614.1(9)(b) only to living persons, and not unborn children, without violating the state and federal Equal Protection Clause. *See Fort Worth Osteopathic Hosp., Inc.* v. Reese, 148 S.W.3d 94, 98 (Tex. 2004). Accordingly, Plaintiffs' argument fails on this basis alone because there is no different application of law to similarly situated medical malpractice litigants.

2. Assuming, Arguendo, a Valid Classification Exists, There is a Rational Basis for Distinguishing Between the Unborn and Living Minors

In the present case, no further analysis is necessary because Plaintiffs' case fails before even reaching a "similarly situated" inquiry. However, assuming,

arguendo, that there is a valid classification, the correct level of scrutiny is a rational basis analysis. Though Plaintiffs argue there is a "fundamental right to have a parent" that mandates the application of a strict scrutiny analysis, Plaintiffs cite no authority for this argument. (Pls.' Br. 30). The key to determining whether a right is fundamental, lies in assessing whether the right is "explicitly or implicitly guaranteed by the constitution." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973). The right to have a parent is not among the rights afforded explicit or implicit protection under our state or federal constitution. *See* U.S. Const. amend. XIV, § 1; Iowa Const. art. I. As such, it cannot be deemed a fundamental right.

Even if there was a fundamental right to have a parent, it is irrelevant to the disposition of the present case, as Iowa Code § 614.1(9)(b) in no way interferes with the right to have a parent. Rather, the statute governs a minor child's ability to recover for alleged negligence by a physician. This right is subject to the rational basis test. "In reviewing equal protection claims involving one's entitlement to recover damages for the injury to or death of another, [courts] apply a rational basis test." *Kulish v. W. Side Unlimited Corp.*, 545 N.W.2d 860, 862 (Iowa 1996) (citing *Ruden v. Parker*, 462 N.W.2d 674, 676 (Iowa 1990)); *Parham v. Hughes*, 441 U.S. 347, 358, (1979) (Stewart, J., plurality) ("It cannot seriously

be argued that a statutory entitlement to sue for the wrongful death of another is itself a 'fundamental' or constitutional right.").

There is a rational basis for distinguishing the unborn from living minors for purposes of loss of consortium. Because the unborn are not considered living persons, they are not afforded rights independent of their mother under Iowa law. In *McKillip v. Zimmerman*, the Iowa Supreme Court noted that an unborn child is not a "person" as defined under the Iowa survival statute § 611.20. 191 N.W.2d at 709; Iowa Code § 611.20 (2014). As a result, the court held the estate of an unborn child cannot pursue a wrongful death claim. *Id.* ("How indeed could an unborn child be a person with liability as referred to in the statute?"). Unlike a living minor, an unborn child does not have rights that have fully vested under the law, is not capable of suffering legal injury, and may not pursue legal recourse to address that injury. Thus, there is no equal protection violation, as there is a rational basis for treating living persons differently than an unborn fetus.

Additionally, the fact that an unborn child is not afforded the same rights available to a living minor in medical negligence cases is entirely consistent and rational in light of the goals of Iowa Code § 614.1(9)(b). The purpose of § 614.1(9) was to "tighten the statute of limitations to reduce a physician's exposure to future liability for malpractice lawsuits." *Rathje*, 745 N.W.2d at 455. The legislature's intent was to provide certainty to, and place limits on, the timeframe

in which malpractice actions can be filed. *Id.* "It is logical that a statute of limitations would prescribe a time certain for the commencement of the limitation period." *Schultze,* 463 N.W.2d at 49. Thus, there is a rational basis for any differing treatment among living minors and the unborn, and the statute is not unconstitutional.

ODG is not the subject of an equal protection violation because the equal protection clause does not apply to unborn children. Additionally, even if the equal protection clause was interpreted to protect unborn children, there is a rational basis for distinguishing between the unborn and living minors. Therefore, the district court's interpretation of § 614.1(9)(b) is constitutional and its ruling must be affirmed.

CONCLUSION

The District Court did not err in granting summary judgment and dismissing Plaintiffs' Petition. Plaintiffs filed a wrongful death action against a licensed physician, clinic, and health system claiming negligent care. As such, the case fell within the plain language of the two-year statute of limitations contained in Iowa Code § 614.1(9)(a). It was not until nearly four years after the death of Paul Gray that Plaintiffs' filed this cause of action, and thus any claims for wrongful death or loss of consortium brought on behalf of Paul Gray's estate or Brenna Gray are barred by the statute of limitations. Further, Plaintiffs conceded that at the time of

Paul Gray's death, ODG was not born. As such, she was not a minor at the time of the occurrence as required by Iowa Code § 614.1(9)(b), and has no valid loss of consortium claim. Plaintiffs' attempts to create new rules and standards for wrongful death and unborn children are simply unsupported by law. Consequently, the district court properly granted summary judgment and its decision must be affirmed on appeal.

SUBMISSION REQUEST

Appellees hereby request oral argument on this appeal.

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