

**IN THE COURT OF APPEALS OF IOWA**

No. 6-559 / 05-1753  
Filed October 11, 2006

**PAMELA G. ROCK and KEITH A. ROCK,**  
Plaintiffs-Appellants,

**vs.**

**ROSE WARHANK, M.D., BLUE GRASS FAMILY MEDICAL CENTER, a/k/a  
FAMILY MEDICAL CENTER OF BLUE GRASS, ROBERT W. HARTUNG, M.D.,  
CENTER FOR BREAST HEALTH, and GENESIS MEDICAL CENTER,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Scott County, David H. Sivright, Jr.,  
Judge.

The plaintiffs appeal from the district court's order granting summary  
judgment in favor of the defendants and dismissing their medical malpractice  
suit. **AFFIRMED.**

David A. Millage of Gallagher, Millage & Gallagher, P.L.C., Davenport, for  
appellants.

Constance Alt, Sarah J. Gayer, and Tricia Hoffman-Simanek of  
Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellee Robert W. Hartung,  
M.D. Charles Miller and Diane Reinsch of Lane & Waterman, L.L.P., Davenport,  
for appellee Genesis Medical Center and Center for Breast Health. Richard  
Trinrud of Brooks & Trinrud, Davenport, for appellee Rose Warhank, M.D.

Blue Grass Family Medical Center, Blue Grass, pro se.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

**VOGEL, P.J.**

Pamela and Keith Rock appeal from the district court's grant of summary judgment in favor of defendants Dr. Rose Warhank, Dr. Robert Hartung, the Center for Breast Health, Genesis Medical Center, and Bluegrass Family Medical Center (a/k/a Family Medical Center of Blue Grass)<sup>1</sup>, dismissing their medical malpractice suit. Because we agree with the district court's conclusion that the Rock's suit was not timely filed under the applicable statute of limitations, we affirm.

**I. Background Facts and Proceedings.**

Pamela Rock, who has a direct family history of breast cancer and fibrocystic breast disease, noticed a lump in her left breast in May 2002. She called her family physician, Dr. Warhank at Blue Grass Family Medical Center, to have it examined. Dr. Warhank referred Pamela to the Center for Breast Health for a bi-lateral mammogram, which was performed on May 28, 2002. Pamela had a follow-up appointment with Dr. Warhank on June 3, 2002, where Dr. Warhank palpated the left breast, located the lump, and told Pamela the mammogram was normal and not to worry about the lump. Sometime on June 3 or 4, 2002, the Radiology Group called Pamela and requested she come in for additional views of the right breast. Pamela went to the Center for Breast Health on June 4 and had additional views of the right breast taken. Pamela stated in an affidavit that a technician told her that what they had seen in the earlier mammogram was no longer present, so they did not need an ultrasound. Pamela was concerned at this point that there was confusion over the breast in

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<sup>1</sup> No appearance or answer was made on behalf of Blue Grass Family Medical Center in the district court

which the lump existed, and told the technician that the lump was in her left breast and not the right breast. The technician assured Pamela at that time that they did not see anything on the film in the left breast so she shouldn't worry about it anymore. In addition, Dr. Hartung reviewed the radiology report of the right breast and advised Pamela by letter dated June 5, 2002, that the breast exam did not show any sign of cancer.

Still harboring concerns of a mix-up, Pamela felt she needed reexamination of her left breast in September 2002. She saw Dr. Kelly at Blue Grass, and testified in her deposition that Dr. Kelly told her at that time that the lump was probably benign. Dr. Kelly did recommend Pamela have a surgical consult to make certain the lump was not cancerous, and referred her to Dr. Daniel Congreve. Dr. Congreve performed a fine-needle aspiration on September 25, 2002, called Pamela two days later, and told her the test was not normal and she needed a biopsy of the left breast. Following a biopsy of the left breast on October 8, 2002, Dr. Congreve diagnosed Pamela with breast cancer.

Pamela and her husband Keith filed a petition against the above-named defendants<sup>2</sup> on October 5, 2004, alleging malpractice against Dr. Warhank and Dr. Hartung and loss of consortium. The suit alleged that Dr. Warhank and Dr. Hartung failed to properly examine, diagnose, and treat the cancer in Pamela's left breast, resulting in the spread of the cancer to six of twelve lymph nodes and in physical disfigurement. Blue Grass, the Center for Breast Health and Genesis Medical Center were sued under the doctrine of respondeat superior, as Dr. Warhank was employed by or contracted with Blue Grass and Dr. Hartung was

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<sup>2</sup> The suit also asserted a claim of negligence against Dr. Raymond Harre, who was dismissed from the suit by the Rocks prior to summary judgment.

employed by or contracted with the Center and Genesis. The defendants filed individual motions for summary judgment in June 2005, all alleging the Rocks' claims were barred by the two-year statute of limitations on medical malpractice. The motions argue that Pamela knew or should have known of a potential problem still existing with her left breast as early as June 4, 2002, when additional views were taken of her right breast instead of the left. At the latest, the defendants argue that on September 19, 2002, when Dr. Kelly referred her to a surgeon for further consult on the left breast, or September 27, 2002, when Pamela was told the aspiration of the lump in her left breast was suspicious and required further biopsy, began the running of the statute of limitations. Therefore, the applicable two-year limitation had expired by the time the Rocks filed suit on October 5, 2004.

The Rocks resisted the motion for summary judgment, contending that the starting date for statute-of-limitations purposes should be the date of Pamela's diagnosis, October 8, 2002, when she actually knew of the alleged misdiagnosis by the defendants. The district court found the following:

The Court finds the alleged "injury" for which plaintiffs seek damages in this case occurred in May and June 2002, when defendants, as Pamela's physicians, were examining her and evaluating the lump in her left breast. She alleges they failed to properly diagnose and treat a cancerous lesion in her left breast, eventually discovered by other physicians. The alleged physical harm to Pamela resulted from the cancer remaining in her left breast, untreated, following the alleged wrongful acts or omissions of [the] defendants while she was their patient in May and June 2002. . . . [T]he Court finds reasonable minds could draw only one conclusion: Pamela was aware in June 2002 that a problem existed and that she had knowledge sufficient to put her on inquiry at that time. In fact, with reasonable diligence, she pursued an investigation of her condition by seeking a second opinion concerning the lump in her left breast.

The district court subsequently found the limitation period had expired before suit was filed, granted the motions for summary judgment, and dismissed the claims against Dr. Warhank, Dr. Hartung, the Center for Breast Health, and Genesis Medical Center. The Rocks appeal the grants of summary judgment.

## **II. Scope and Standards of Review.**

We review the district court's ruling on a motion for summary judgment for correction of errors of law. *Schlote v. Dawson*, 676 N.W.2d 187, 188 (Iowa 2004). Summary judgment is appropriate

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

*Christy v. Miulli*, 692 N.W.2d 694, 699 (Iowa 2005) (citing Iowa R. Civ. P. 1.981(3)). We, like the district court, are obliged to view the record in a light most favorable to the nonmoving party and must "indulge in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a fact question." *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000).

## **III. Statute of Limitations.**

Iowa Code section 614.1 (2001) reads in part:

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

Iowa Code § 614.1(9)(a).

In ruling on the motion for summary judgment, the district court focused on the interpretation of the term "injury" in this particular statute to pinpoint the start

of the limitation period. Our supreme court has stated that “the inescapable conclusion [regarding section 614.1(9)(a)] is that the legislature had in mind physical harm when using the word “injury” rather than the wrongful act that caused the injury. *Schlote v. Dawson*, 676 N.W.2d 187, 193 (Iowa 2004). Therefore, under the medical malpractice statute of limitations, which contains the legislature’s discovery rule, the statute of limitations begins to run when the patient knew, or through the use of reasonable diligence should have known, of the physical harm for which damages are sought—not the negligence that caused the harm. Our supreme court has also concluded that the statute of limitations continues to run even if the patient is unaware of the physician’s negligence, as section 614.1(9) no longer requires that the plaintiff be aware of the defendant’s wrongful conduct before the clock starts to run. *Langner v. Simpson*, 533 N.W.2d 511, 517 (Iowa 1995). The district court was correct in finding the “injury” to Pamela was the cancer remaining in her body undiagnosed as of June 2002, not the wrongful act of the misdiagnosis or failure to treat. The court correctly rejected Pamela’s argument that the limitation period should begin with her actual diagnosis and knowledge of the cancer on October 8, 2002.

Here, by Pamela’s own admission she had suspicions that some mix-up had been made regarding her examinations in June 2002, when she believed the concern requiring a second set of mammography views was regarding the wrong breast. That is precisely why she continued to seek another opinion a few months later in September, which eventually led to the correct diagnosis and treatment of her breast cancer in her left breast. As the injury or physical harm occurred in June 2002 with the cancer remaining in Pamela’s body, the statute of

limitations began running at that time and expired in June 2004. The Rocks did not file their petition for malpractice against the defendants until October 5, 2004, even though they had actual knowledge of Pamela's correct diagnosis and the defendants' likely negligence by October 8, 2002, well within the limitation period. The petition was thus untimely under the statute of limitations.

As we have stated before, we cannot say that the district court erred when it applied the current state of the law regarding medical malpractice limitations periods in Iowa, even though Pamela did exercise diligence in seeking the advice of several physicians to alleviate her medical problem. It appears that in recent years there has been confusion over the malpractice limitation and the use of the discovery rule. See *Schlote*, 676 N.W.2d at 194 (stating that "we recognize that our interpretation of section 614.1(9) eliminates the discovery rule for medical malpractice claims as we have known."); *but cf. Ratcliff v. Graether*, 697 N.W.2d 119, 124 (Iowa 2005) (applying discovery rule when the patient was informed of the possible negligent medical care as the source of the injury and physical harm). Our supreme court has also stated in *Schlote*, "the statute [614.1(9)(a)] severely restricts the rights of unsuspecting patients who may be injured because of unnecessary and excessive surgery. However, it is up to the legislature and not this court to address this problem." *Schlote*, 676 N.W.2d at 194. We conclude that the status of our current case law and the Iowa Code are clear and compel this result. We affirm the grant of summary judgment in favor of the defendants.

**AFFIRMED.**