

IN THE IOWA SUPREME COURT

NO. 20-1124

ELIZABETH DOWNING and MARCELLA BERRY
as Co-Administratrix of the ESTATE OF LINDA BERRY,

Plaintiffs/Appellants,

VS.

PAUL GROSSMAN, M.D., and CATHOLIC HEALTH INITIATIVES
IOWA, CORP. d/b/a MERCY MEDICAL CENTER, MERCY
MEDICAL CENTER-WEST LAKES, and MERCY SURGICAL AFFILIATES,

Defendants/Appellees

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY, IOWA
Case No. LA CL140875
THE HONORABLE DAVID PORTER

FINAL BRIEF OF APPELLANTS
ELIZABETH DOWNING and MARCELLA BERRY
as Co-Administratrix of the ESTATE OF LINDA BERRY

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. WHETHER SUMMARY JUDGMENT WAS INAPPROPRIATE IN THIS CASE BECAUSE ALL ISSUES OF FACT AND INFERENCES THAT CAN BE REASONABLY DRAWN ARE IN FAVOR OF PLAINTIFFS.

Cases:

Banwart v. 50th Street Sports LLC, 910 N.W.2d 540 (Iowa 2018)
Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981)
Brubaker v. Barlow, 326 N.W.2d 314 (Iowa 1982)
C & J Vantage Leasing v. Wolfe, 795 Iowa 65 (Iowa 2011)
Hedlund v. State, 930 N.W.2d 720 (Iowa 2018)
Kragnes v. City of Des Moines, 714 N.W.2d 632 (Iowa 2006)
Linn v. Montgomery, 903 N.W.2d 337 (Iowa 2017)

Statutes:

ICA §614.1.(9)(a)

- A. WHETHER PLAINTIFFS PROVED FACTS ESTABLISHING A STANDARD OF CARE VIOLATION.

Cases:

Oswald v. LeGrand, 453 N.W.3d 634 (Iowa 1990)

- B. WHETHER THERE IS EVIDENCE THAT DEFENDANT GROSSMAN WILLFULLY CONCEALED LINDA BERRY'S POTENTIALLY CANCEROUS CONDITION BECAUSE OF SYSTEMIC ERRORS WITHIN THE MERCY SYSTEM. THEREFORE, PLAINTIFFS HAVE PRODUCED EVIDENCE OF CONCEALMENT SUFFICIENT TO AVOID THE IOWA STATUTE OF REPOSE IN IOWA CODE 614.1(9)(A).

Cases:

Christy v. Miulli, 692 N.W.2d 694 (Iowa 2005)
Cornell v. Wunschel, 408 N.W.2d 369 (Iowa 1987)
Estate of Anderson ex rel. Herren v. Iowa Dermatology
Clinic, PLC, 819 N.W.2d 408 (Iowa 2012)
Loghry v. Capel, 257 Iowa 285; 132 N.W.2d 417 (Iowa 1965)
Sheerin v. Holin Co., 380 N.W.2d 415 (Iowa 1965)
Skadburg v. Gately, 911 N.W.2d 786 (Iowa 2018)

Statutes:

ICA §614.1(9)(a)
Iowa R. Civ. P. 1.904(2)

II. WHETHER PLAINTIFFS' CLAIMS OF LOSS OF COMPANIONSHIP AND CONSORTIUM ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.

Cases:

Nelson v. Ludovissy, 368 N.W.2d 141 (Iowa 1985)

III. WHETHER THE STATUTE OF LIMITATIONS OF IOWA CODE 614.1(9) APPLIES.

Cases:

Murtha v. Cahalan, 745 N.W.2d 711 (Iowa 2008)

Statutes:

Iowa Code §614.1(9)

IV. WHETHER THERE IS SUFFICIENT EVIDENCE THAT DEFENDANT GROSSMAN'S CONDUCT WAS WILLFUL AND WANTON SUCH THAT PUNITIVE DAMAGES ARE SUBMISSIBLE.

Cases:

Banwart v. 50th Street Sports LLC, 910 N.W.2d 540 (Iowa 2018)

McClure v. Walgreen, 613 N.W.2d 225 (Iowa 2000)

Statutes:

ICA 668A.1(1)(a)

ROUTING STATEMENT

Plaintiffs believe this matter should be routed to the Iowa Court of Appeals because it presents no new issues for which the Supreme Court is the appropriate Court under Iowa R. Civ. P. 6.1101(3)(b). The Trial Court committed error when it failed to give any weight to a letter that was not signed but was dictated and sent by decedent Linda Berry's physician. In seeking avoidance of the Iowa statute of repose for medical negligence cases, plaintiff/patient must prove a concealment. The Trial Court held that a letter "dictated and sent" by Plaintiff decedent's physician five days after the negligent conduct was of no moment because the physician did not sign it even though he dictated and sent it that day and because it failed to address the cancer treatment that eventually took Linda Berry's life. This was plain error.

STATEMENT OF THE CASE

This is a case of professional negligence and willful professional misconduct brought by a patient, Linda Berry, and later her Estate. (App. Pp. 36-50) The Defendants are Dr. Paul Grossman, M.D., (a/k/a Dr. Grossmann) his surgical group, Mercy Surgical Affiliates, and Catholic Health Initiatives-Iowa Corp., his employer. (App. Pp. 36-50) Catholic Health Initiatives-Iowa operates Mercy Medical Center, a/k/a Mercy Hospital in downtown

Des Moines, Iowa. All references regarding care refer to Mercy Hospital downtown Des Moines, Iowa, unless otherwise noted.

Plaintiff Linda Berry filed her Petition at Law against the above parties. When she died of kidney cancer, her two adult daughters, Elizabeth Downing and Marcella Berry, were substituted as Plaintiffs.

The professional conduct provoking this suit happened in October 2009. Because suit was not brought until April 2018, all Defendants moved for Summary Judgment based upon the Iowa Statute of Repose for medical negligence found at Iowa Code §614.1(9)(a) which bars all suits brought more than six years after the act or occurrence of negligence. Defendants also claimed a general statute of limitations defense and a specific limitations defense to the timeliness of claims for loss of parental consortium advanced by Linda Berry's two adult daughters, Marcella Berry and Elizabeth Downing. (App. Pp. 71-72). Plaintiffs also claimed a level of conduct justifying punitive damages and Defendants moved for summary judgment on that claim as well. (App. Pp. 82-99).

Defendants filed Motions for Summary Judgment directed to all claims. Plaintiffs resisted all of these Motions contending that Dr. Grossman acted negligently and willfully in failure to advise Linda Berry of her condition of a potential kidney malignancy that had been identified on at least two previous occasions over several years by Mercy Hospital affiliates. He

declined to refer her for care for such condition when he first saw her on October 1, 2009, even though this refusal or denial was against his usual practice and below standard of care. Plaintiffs further allege he separately intentionally concealed his act of negligence when he "dictated and sent" a letter five days later on October 6, 2009, to Linda Berry's personal physician identifying a colitis condition but failing to warn or advise him about Linda's potential kidney cancer. Linda later died from this kidney cancer.

The reason Plaintiff Linda Berry sought punitive damages against Dr. Grossman is she had treated with Mercy Hospital and Mercy Surgical Affiliates for some years before the actionable negligent conduct. On July 6, 2004, she presented to Mercy Hospital operated by Defendant, Catholic Health Initiatives-Iowa Corp. In the course of her assessment on that date, she had a CT scan directed to her pelvic area which also showed a cyst on her right kidney. The radiologist identified a 1.0 x 1.5 cm nodular density. He recommended an ultrasound to confirm it was a simple cyst. (App. Pp. 165-166). However, this was never communicated to Linda and the ultrasound was never done. (App. Pp. 278-280).

On December 9, 2006, Linda presented again to Mercy Hospital with similar complaints of left flank and abdominal pain. She again had a CT scan directed to her stomach but also showing a "right renal cyst". (App. Pp. 167-168). This finding was also

never communicated to Linda and was never investigated. (App. Pp. 278-279).

On October 1, 2009, when Linda Berry reported to Mercy Hospital, she again submitted to a CT primarily for stomach pain and suspected blockage. When initially read by the radiologist at Mercy Hospital, it was reported to Dr. Grossman and his resident as benign and she left the hospital; driven home by her daughter, Elizabeth Downing. However, a short time later, the CT was reread by the radiologist to identify a "large exophytic cystic mass increased in size when compared to the previous exams of 12/9/2006 and 7/6/2004 and that the increase in size is worrisome for cystic renal cell neoplasm". The radiologist recommended further evaluation with contrast enhanced MRI to further evaluate the internal characteristics of this mass. (App. P. 224).

While still on her way home, Linda was called and returned to the hospital that same evening. Elizabeth Downing, her daughter who was driving her home, took the call. She was told, "You need to bring your mom back. Not everything was okay on the CT scan". (App. Pp. 290-292). Linda was not told about the significance of and need to investigate the radiologist's finding. (App. Pp. 292-297). Instead, this finding was concealed from her on that date and on October 6, 2009, when she attended an office visit with Dr. Grossman. (App. P. 109).

On October 4, 2009, due to recurrence of stomach pain, Linda again went to Mercy Hospital on an emergent basis. There she saw resident Dr. Rachel Fleenor, who ordered a CT which confirmed the same diagnosis, including the worrisome finding. (App. P. 108). She originally wrote in her note a referral of Linda to PCP or primary care physician. However, she crossed that out and remarked that Linda had already discussed with Dr. Grossman. (App. P. 107). Nothing in the record indicates she advised Linda Berry about the two previous CT scans and when Linda appeared to Dr. Grossman's office two days later on October 6, 2009, her admitting history only indicates colitis as the reason for seeing Dr. Grossman. (App. Pp. 170-171).

Dr. Grossman reviewed the CT scan in his office on October 5, 2009 when it was printed by his office nurse, Amanda Aswegan. (App. P. 163).

On October 6, 2009, when Linda attended Dr. Grossman's office, Linda did not report any kidney issues in her intake. (App. Pp. 170-171). As stated by Dr. James Lopes, this should alert a doctor as to whether the patient has been informed about a condition. (App. P. 189). Dr. Grossman in turn wrote nothing about a kidney CT or issue in his dictation of that date (App. P. 172) and he did not speak of any kidney issue with Linda that date. (App. Pp. 296-297). He instead "dictated and sent" but did not sign a letter to Linda Berry's primary care doctor at Broadlawns

Family Medicine a/k/a Broadlawns Medical Center Family Health Center advising of his treatment of her colitis and that he contemplated a colonoscopy for further investigation of the colitis. (App. Pp. 51-70). That letter says nothing about a kidney issue. (App. P. 109).

When Linda was in attendance at her family doctor's office at Broadlawns Medical Center Family Health Center on April 15, 2010, her daughter, Elizabeth Downing was present. Dr. Nikoueiha read the letter to them. (App. P. 299). As a consequence, they did not investigate the kidney condition since that letter made no mention of it.

All Defendants filed a Motion for Summary Judgment arguing a number of things: 1) they claimed there was no negligence, 2) they claimed there was a defense of limitations to all claims, 3) they claimed a defense of repose to all claims, and 4) they claimed there was not sufficient evidence to submit a punitive damage claim against Dr. Grossman.

Plaintiffs resisted the Motions.

The Trial Court per Judge David Porter granted the Motion for Summary Judgment, reasoning that the letter which Dr. Grossman admitted he dictated and sent, on October 6, 2009, five days after negligent treatment on October 1, 2009, could not fulfill the concealment requirement of the exception to the statute of repose

because the letter addressed only a colitis condition and not a known potential cancer condition. (App. P. 239).

Judge Porter also held that since the letter stated it was mailed before a doctor's review and was not signed, it also failed to rise to the level of concealment to avoid the statute of repose. (App. P. 239).

Plaintiffs filed a timely Motion for Expanded Findings and Reconsideration under Iowa Rule of Civil Procedure 1.904(2). (App. Pp. 242-253). Defendants resisted same. After the Trial Court denied same without explanation, Plaintiffs filed a timely Notice of Appeal.



SURGICAL AFFILIATES

A member of Mercy Medical Center - Des Moines

411 Laurel St., Suite 2160
Des Moines, IA 50314-3689
P 515-247-0266 F 515-643-6688

October 6, 2009

Broadlawns Family Medicine
1801 Hickman Road
Des Moines, IA 50314

RE: Linda Berry
DOB: 01/29/51

To Whom It May Concern:

I had the pleasure of seeing Linda Berry in my Mercy West office today for follow-up of her recent observation for lower abdominal pain and diarrhea. Her CT at that time showed evidence of a sigmoid colitis. We sent her home on Levaquin, as she could not have Flagyl because she is allergic to that. She says that since then, she has continued to have multiple loose stools with some jelly-like substance within them. She feels a lot of pressure in her lower abdomen and some pain, which radiates down to her rectum. She has had some nausea, although she says that is improving. She has felt some hot flashes, but she did not take her temperature. She came back to the emergency room on October 4, 2009 and had a repeat CT scan, which showed improvement of the sigmoid pericolic inflammatory changes.

On examination today, she continues to have some tenderness in the lower abdomen, but certainly no worse than before and I would say somewhat better. However, examination compromised due to the patient's size.

IMPRESSION:

1. Abdominal pain with diarrhea and evidence of improving colitis on CT.

RECOMMENDATION/PLAN: Our plan is to continue her on Levaquin. I am going to check some stool cultures and hopefully this will resolve non-operatively, in which case I would recommend a colonoscopy in about three to four weeks.

Thanks again for allowing me to participate in the care of your patient.

Sincerely,

(Letter is mailed before doctor's review to expedite letter)
Paul A. Grossmann, M.D.

PAG/dlm RD: 100609



STATEMENT OF FACTS

Linda Berry was born in Wichita, Kansas in 1951. She has an eighth-grade education and later received a GED. She has two adult daughters, Elizabeth Downing and Marcella Berry, age 39 and 41. (App. Pp. 270-271). In early adult life, Linda lived in California and other states. She moved to the Des Moines area from California when Elizabeth was approximately 10 or 11 years old. As an adult, Linda worked various jobs including hotel desk clerk and maid, a vehicle verification manager at a car auction and at Prairie Meadows in the Des Moines area where she did housekeeping. (App. Pp. 270-274).

By the year 2000, she sought and was awarded social security disability benefits. (App. Pp. 273-274). However, she remained active doing grandma things with her grandchildren. (App. P. 274).

By the year 2002, she had sought care with Mercy Surgical Affiliates. (App. P. 164). On July 6, 2004, she was referred to Mercy Hospital in Des Moines where she had an abdominal CT scan. This scan showed a 1.0 by 1.5 cm nodular density on the right kidney. The report of the radiologist recommended further evaluation with renal ultrasound. (App. Pp. 167-168). No ultrasound was ever administered, and Linda was only told about her kidney condition that "everything was negative or okay". (App. Pp. 278-279).

On December 9, 2006, Linda again had a CT scan at Mercy Hospital in Des Moines, Iowa, which showed a right renal cyst. (App. Pp. 167-168). She was never informed of the 2004, 2006 or 2009 scans until a hospitalization in 2016 after she had fallen and injured her shoulder and arm. (App. Pp. 300-303).

Dr. James Lopes indicates that Dr. Whitmer, an associate of Dr. Grossman, sent a general surgical consultation regarding a hernia surgery in 2006. However, the renal nodule was excluded from an active problem list. Consequently, there was no relay of the finding to the patient or her PCP. (App. P. 190). Dr. Grossman agreed that he had known Linda was a patient of Dr. Whitmer in the past. (Supp. App. P. 6).

On October 1, 2009, Linda Berry went to an urgent care clinic in Clive, Iowa, with stomach pain. (App. P. 289). She was again referred to Mercy Medical Center in downtown Des Moines. The on-call surgery physician was Dr. Paul Grossman of Mercy Surgical Affiliates and a Mercy Hospital resident named Dr. Matthew Severidt. (App. P. 291). Fearing a possible appendicitis, incarcerated hernia or other complication, Dr. Grossman ordered an abdominal CT scan.

Initially the scan was read as benign condition of constipation. (App. P. 290). However, after Linda Berry left Mercy Medical Center to return home with her daughter, Elizabeth Downing, they received a call on Liz's cell phone where she was told by Dr.

Severidt, "you need to bring your mom back, not everything was ok on the CT scan." (App. Pp. 291-292). They returned and while at the hospital, Linda was given a prescription for Levaquin and advised to fill it at Walgreen's because her pharmacy was closed. She was told the scan showed colitis. (App. Pp. 293-294). She was not told about the right kidney growth or what it showed nor was she told anything about the kidney that had been investigated in 2004 or 2006. None of the two discharge documents provided to her that day identify any treatment other than colitis. (App. P. 106 and P. 162). Linda's discharge instructions state that "If you have had special tests, such as EKG and/or X-rays, they will be reviewed again within 24 hours by other medical specialists. We will call you if there are additional treatment recommendations." (App. Pp. 162). No call occurred.

Dr. Grossman's dictation for that date states nothing about the kidney scan or neoplasm. (App. Pp. 225).

Before Linda was called back to Mercy Hospital on October 1, 2009, the radiologist did a reread of the CT scan. (App. Pp. 291-292).

Dr. Grossman agreed that he and Dr. Severidt discussed Linda's kidney situation as described in the discharge instructions before and after Linda and Liz returned to Mercy Hospital on October 1, 2009. (App. Pp. 337-339). Dr. Severidt agrees with this. (App. Pp. 366-367). He agreed that after Linda

returned, pursuant to Dr. Severidt's call, no additional information was added to the discharge instructions concerning the renal CT finding other than she had a diagnosis of mild sigmoid colitis and that she should follow up with Dr. Grossman. (App. Pp. 335-339).

Dr. Grossman testified that was one of only two instances in twenty-three years where a patient was called back to the hospital after release. (App. P. 345).

(Apparently it was so important that no written record of the follow up for the renal mass was made.)

Dr. Severidt wrote that Dr. Grossman will see her in one week "at which time further evaluation of R kidney can be undertaken." (App. P. 104).

Dr. Grossman on the other hand states that he does not treat kidneys and would not even order an MRI. "A kidney cyst is not something I treat or work up, then I would refer them on to a primary care doctor." ((App. P. 327).

In describing his usual procedure, Dr. Grossman stated:

"A lot of times we would just have her go see her primary care doctor for something I don't work up, which a kidney mass would be that. And if you look in the record, you'll see that's the second time she came to the emergency room, that's exactly what they wrote. They wrote follow up with primary care doctor for the right kidney mass. And then they crossed it out and said that she already has a follow up with me." (App. Pp. 327-328).

The final read of the CT scan on October 1, 2009, had a note from Dr. Mirsky to do an enhanced MRI to evaluate the kidney mass. Dr. Grossman stated that was outside his scope of practice. (App. P. 330). He reinforced that he would refer the matter back to Linda Berry's primary care doctor. (App. P. 331). However, one of the ways this is done is in the discharge instructions. There was no such notification in any of those documents. (App. Pp. 335-337).

Patient Name: BERRY, LINDA MARIE
Date of Birth:

MRN:
FIN:

* Transcribed *



Mercy Medical Center-Emergency Department
1111 -6th Avenue
Des Moines, IA 50309
(515) 247-3211

Mercy Capitol-Emergency Department
603 E. 12th Street
Des Moines, IA 50314
(515) 643-0011

BERRY, LINDA M

Patient: Linda Berry

Discharge Instructions

IMPORTANT: We examined and treated you today on an emergency basis only. In most instances, you will need to be re-examined by your family doctor. Tell your doctor about any new or lasting problems. Also, it is often times impossible to recognize and treat all injuries or illnesses in a single Emergency Department visit. If you have had special tests such as an EKG and / or X-rays, they will be reviewed again within 24 hours by other medical specialists. We will call you if there are additional treatment recommendations. After leaving the Emergency Department, you should FOLLOW THE INSTRUCTIONS BELOW.

You were treated today by Dr. Grossmann

THIS INFORMATION IS ABOUT FOLLOW UP CARE
Call Dr. Grossmann or your doctor if you do not get better. Call sooner if you feel worse. You can reach your doctor by calling their clinic phone number.

YOUR DIAGNOSIS IS:
Mild sigmoid colitis

THIS INFORMATION IS ABOUT YOUR ACTIVITY
We recommend the following for you: Take antibiotics as prescribed. See Dr. Grossmann in clinic in 1-2 weeks for evaluation of your digestive health, temp, stool or intractable nausea, vomiting or diarrhea

YOU ARE THE MOST IMPORTANT FACTOR IN YOUR RECOVERY. Follow the above instructions carefully. Take your medicines as prescribed. Most important, see a doctor again as discussed. If you have problems that we have not discussed, call or visit your doctor right away. If you cannot reach your doctor, return to the Emergency Department.
"I understand the above instructions, and have discussed them in the Emergency Department"

Linda M Berry
Patient or Responsible Person

[Signature]
Physician

7210-088-2pt 6-15-04

TO OUR PATIENTS
Your evaluation of the care you received while a patient at Mercy Medical Center is very important. You may receive a phone call within two weeks following discharge. Please take a few moments to answer our telephone survey. Your participation will provide physicians and hospital staff with information that contributes to improved patient satisfaction. Thank you.

Domestic Violence can occur in any relationship. If you feel you are being emotionally and/or physically abused there are resources available to help you. The Family Violence Center can provide confidential shelter, counseling, and supportive services to victims of domestic abuse. Trained staff is available 24 hours a day. Local phone number: 243-6147; State-Wide Hotline: 1-800-942-0333.

SEATBELTS
There is no doubt that seatbelts save lives. Every day in the Mercy Medical Center Emergency Department we see how people who do not wear seatbelts are more severely injured. We care about you, so PLEASE BUCKLE-UP!
PORTIONS COPYRIGHTED 1987-2000, LOGICARE Corporation.

White - Medical Record Yellow - Patient Copy

Dr. Grossman became aware of the significance of the kidney mass the night of October 1, 2009. It is clear he had a discussion with Dr. Severidt about it by telephone. (App. Pp. 338-339).

In the October 1, 2009, radiology report, the radiologist mentions the previous 12/9/2006 study and the 7/6/2004 study. In that report the radiologist stated that it was worrisome for renal cell neoplasm. (App. P. 340). Dr. Grossman knew that a neoplasm is a growth that can be malignant. (App. P. 341). It was significant enough that the patient was called back to the hospital. (App. P. 345). However, it was not significant enough that Dr. Grossman wrote anything about it in his dictation for that date. (App. P. 225).

Linda returned to Mercy Medical Center on October 3, 2009, with essentially the same symptoms. (App. P. 107). There she saw a resident, Dr. Rachel Fleenor. A CT scan was done again, and the same opinion and conclusion was rendered by yet another radiologist, to wit an exophytic mass "that increased in size compared with 12/9/2006". (App. Pp. 163). Inexplicably, the discharge instructions she received do not mention the kidney concern. (App. P. 105) and she received no further direction about the kidney.

Dr. Rachel Fleenor initially wrote the encounter record where it was recommended f/u for R. kidney cystic mass with PCP.

However, that was crossed out and Linda was directed to Dr. Grossman. (App. P. 107). This direction would have to come from Dr. Grossman.

This document, (App. P. 163) was printed by Amanda Aswegan, an employee of Surgical Affiliates, at 14:41 at Mercy Surgical Affiliates' office or 2:41 p.m. on October 5, 2009 which would have been at Dr. Grossman's office. The signature that is scribbled is Dr. Grossman's signature that he reviewed it. (App. P. 163)

Linda's next encounter with Dr. Grossman was on October 6, 2009, at his office. There she filled out a patient intake which was marked as Ex. 9 at Dr. Grossman's Deposition. (App. Pp. 310-311 and 170-171). Notably, Linda did not indicate anything regarding a kidney mass on her intake.

Dr. Grossman also completed a note in Linda's medical chart for that date, October 6, 2009. He describes it in his deposition. It fails to confirm in any way that Linda was advised of her kidney condition. (App. P. 172).

Dr. Grossman "dictated and sent" a letter to Linda's personal physician at Broadlawns the same day. (App. P. 58). Obviously, it does not mention the kidney condition.

Months later, on April 15, 2010, Linda Berry had an appointment with her primary care physician, Dr. Nikoueiha at Broadlawn's Medical Center. At her appointment, Dr. 'Nik' read

the October 6, 2009, letter to Linda and Elizabeth Downing, her daughter who was in attendance with her. (App. Pp. 304-305).

Linda did not discover anything was amiss regarding her kidney tumor until a medical encounter in April of 2016. (App. Pp. 301-302). A nurse was worried about her kidney and asked about a kidney tumor that was on CT scans in 2004 and 2006 to which she replied, "What kidney tumor?" and the nurse replied, "The one you had on your CT scans back in '04 and '06." (App. P. 301). Neither Dr. Grossman, Dr. Severidt, nor Dr. Fleenor ever documented that they asked Linda about her previous kidney scans or anything related to them.

Linda eventually died on May 22, 2019, from metastatic renal cell carcinoma caused by the deficient medical care she received. (App. Pp. 190, 198)

ARGUMENT I

SUMMARY JUDGMENT WAS INAPPROPRIATE IN THIS CASE BECAUSE ALL ISSUES OF FACT AND INFERENCES THAT CAN BE REASONABLY DRAWN ARE IN FAVOR OF PLAINTIFFS.

Defendants filed their Motion for Summary Judgment Plaintiffs resisted same. (App. Pp. 110-111). The standard of review on Motion for Summary Judgment is for errors of law.

This case was resolved by Summary Judgment in favor of Defendants based upon a Statute of Repose defense ICA §614.1.(9)(a) that was inappropriate.

In Summary Judgment, all factual disputes and inferences are to be resolved in favor of the nonmoving party. Applying such law, this case could not have been resolved by summary judgment. "The sole function of a Motion for Summary Judgment is to determine if there is an issue of fact." Brubaker v. Barlow, 326 N.W.2d 314 (Iowa 1982), citing Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981).

"If there is, the case must stand for trial. (citations omitted) The summary judgment court cannot pass on the merits of that question. Even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw different inferences from them and reach different conclusions." Hedlund v. State, 930 N.W.2d 720 (Iowa 2018), citing Banwart v. 50th Street Sports LLC, 910 N.W.2d 540 (Iowa 2018).

"We examine the record in the light most favorable to the nonmoving party and we draw all legitimate inferences the evidence bears in order to establish the existence of questions of fact." Kragnes v. City of Des Moines, 714 N.W.2d 632, 637 (Iowa 2006).

"Even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw different inferences from them and thereby reach different conclusions." Banwart v. 50th Street Sports, L.L.C., 910 N.W.2d 540 (Iowa 2018). The evidence is to be viewed in the light "most favorable to the nonmoving party". Linn v. Montgomery, 903 N.W.2d 337 (Iowa 2017).

"We draw all legitimate inferences the evidence bears that will establish a genuine issue of material fact." C & J Vantage Leasing v. Wolfe, 795 Iowa 65 (Iowa 2011).

In Banwart supra, the Trial Court reasoned that "serving three beers over four hours, absent something more, cannot create

an inference that Draught House knew or should have known that that Campbell was intoxicated or would become intoxicated." The Supreme Court held such an inference was reasonable and would be for the jury.

Facts and inferences in this case will clearly preclude Summary Judgment.

A. PLAINTIFFS PROVED FACTS ESTABLISHING A STANDARD OF CARE VIOLATION.

Plaintiffs restate their position on preservation of errors of law because Defendants filed their motion for summary judgment and Plaintiffs resisted same. (App. Pp. 110-111).

Since this case was decided on a Motion for Summary Judgment, the Court must apply the standards cited above. First among these is that all factual issues are construed in favor of the nonmoving party. Since this is a medical negligence case, Plaintiffs must prove a standard of care violation. Plaintiffs submit that Dr. Paul Grossman did so, as did Plaintiffs' expert witness, Dr. James Lopes (App. Pp. 189-191).

Dr. Grossman saw Linda Berry on October 1, 2009 at Mercy Medical Center. Initially the purpose of the visit was Linda's stomach pain and the possibility of appendicitis or diverticulitis. However, after the order of a CT scan, Dr. Grossman clearly became aware that the CT scan that evening as well as two prior scans, established that Linda Berry had a

concerning mass on her kidney. He knew that it was suspicious as a possible cancerous tumor. It is also clear that he became aware the same growth was demonstrated on a July 6, 2004, CT scan (App. Pp. 165-166) and a December 9, 2006 CT scan, (App. Pp. 167-168) that she likely was never told about previously by any Catholic Health Initiative or Mercy personnel or his surgical group, Mercy Surgical Affiliates.

Linda Berry was seen by Dr. Josh Smith on December 9, 2006, for pain. He ordered a CT scan. (App. P. 9). That scan showed the kidney mass. (App. P. 9). Linda was never informed of this condition. (App. Pp. 278-279).

When Linda Berry had a CT scan on October 1, 2009, the first reading was interpreted by the radiologist as benign. However, CT reread was stated by the reading radiologist to show a "large exophytic cystic mass" on the right kidney that had increased in size since the 2004 and 2006 CT scans. The radiologist recommended to Drs. Grossman and Severidt that she undergo further testing to determine if the mass was cancerous.

Admit/Discharge Date: 10/1/2009
10/1/2009

Financial Number: HQ5755389274

BERRY, LINDA MARIE

History And Physical-Consultation

Request for Electronic Authentication By:

GROSSMANN, PAULElectronically Authenticated On: 10/05/2009 10:06 am

GROSSMANN, PAULElectronically Authenticated On: 10/05/2009 10:06 am

Diagnostic Imaging Historical

DOCUMENT TYPE:	CT Abdomen Pelvis W
SERVICE DATE/TIME:	10/1/2009 19:11 CDT
RESULT STATUS:	Auth (Verified)
PERFORM INFORMATION:	
SIGN INFORMATION:	MIRSKY,ROMAN (10/2/2009 16:40 CDT)

CT ,ABD PELVIS W/ CONTRAST
CT ABDOMEN AND PELVIS WITH CONTRAST:

COMPARISON: 12/9/2006

HISTORY: PAIN

FINDINGS: SMALL HIATUS HERNIA. LIVER, SPLEEN, LEFT KIDNEY, ADRENALS, PANCREAS ARE UNREMARKABLE. EXOPHYTIC 6.2 CM CYST LOWER POLE RIGHT KIDNEY, PREVIOUSLY MEASURING 4.8 CM. APPENDIX IS UNREMARKABLE. MILD SEGMENTAL WALL THICKENING OF THE MID SIGMOID COLON OVER A LENGTH OF APPROXIMATELY 12-15 CM WITH HAZY SURROUNDING INFLAMMATORY CHANGE IN THE MESOSIGMOID. APPENDIX IS UNREMARKABLE. NO ASCITES OR LYMPHADENOPATHY.

IMPRESSION:

1. MILD SIGMOID COLITIS, MOST LIKELY OF EITHER INFECTIOUS OR ISCHEMIC ETIOLOGY.
2. LARGE EXOPHYTIC CYSTIC MASS LOWER POLE RIGHT KIDNEY, INCREASED IN SIZE COMPARED TO THE PREVIOUS EXAMS OF 12/9/2006 AND 7/6/2004. NO SUSPICIOUS IMAGING FEATURES SUCH AS THICK SEPTAE OR SOFT TISSUE ENHANCEMENT ARE IDENTIFIED, HOWEVER THE INCREASE IN SIZE IS WORRISOME FOR CYSTIC RENAL CELL NEOPLASM. CONSIDER FURTHER EVALUATION WITH CONTRAST ENHANCED MRI TO FURTHER EVALUATE THE INTERNAL CHARACTERISTICS OF THIS MASS.
3. SMALL HIATUS HERNIA.

END OF REPORT

Signs and Symptoms: ABDOMINAL PAIN

Lab Legend: # - Corrected ** Abnormal L - Low H - High C - Critical ** Footnote @ - Referred to Reference Lab

Print Date/Time: 6/21/2016 07:36 CDT

Report Request ID: 87582013

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Based upon this reread, Dr. Grossman instructed Dr. Severidt to recall Linda Berry. Dr. Severidt communicated with Elizabeth Downing. Elizabeth testified that they were only told that there was something not right on the CT scan and they needed to return. On the record based upon the testimony of Elizabeth Downing, they were told nothing more.

On Summary Judgment, Elizabeth's testimony regarding the conversation must be taken as true as opposed to Dr. Severidt's testimony which is denied by Elizabeth.

First of all, the written discharge instructions after the reread and return to Mercy Hospital do not advise Linda Berry of any concern regarding her kidney. (App. P. 162). She was advised of sigmoid colitis, but nothing about the kidney. (App. Pp. 162, 360-361). Dr. Severidt testified he had given verbal direction to Linda regarding her kidney but had no independent recollection of any verbal conversation regarding any follow-up care other than the written direction of follow-up care concerning colitis. (App. Pp. 363-367). When asked why Linda was not provided more specific written instruction regarding the kidney mass, Dr. Severidt explained that was Dr. Grossman's call because he (Severidt) was acting as Dr. Grossman's agent. (App. Pp. 372-373). Furthermore, when asked during his deposition if Grossman directed him (Severidt) to specifically omit the kidney mass from the discharge instructions Severidt's answer was "I do not recall."

(App. P. 373). Yet when asked if any Mercy physician ever specifically told him (Severidt) to not inform Linda about her kidney cyst or document in Linda's medical record about the kidney cyst Severidt could unequivocally respond "no," (App. P. 373). It is a very reasonable inference that if Linda were called back to the hospital about something important, and was then given a discharge instruction that it only had to do with her colitis, that was the condition shown on the reread of the CT scan.

There is no question that Linda was given written documentation of her stomach issue that was not life threatening.

Dr. Grossman directed Dr. Severidt to call them back to Mercy Hospital, something he claims to have done only twice in 23 years of practice. (App. P. 345). Linda's daughter, Elizabeth Downing, was with Linda during all of the relevant contacts after the reread of a CT scan disclosed the concerning mass. She denied any information about same was conveyed to either of them by Dr. Severidt, other than "You need to bring your mom back. Not everything was okay on the CT scan." (App. P. 292).

Dr. Grossman himself establishes a standard of care violation. In addition, Dr. James Lopes, Plaintiffs' consulting surgeon, supports same. (App. Pp. 189-191). He indicated that there is no written documentation that would indicate that Ms. Berry was explained in understandable layman's terms regarding her kidney lesion, which is standard of care. He further observed that in

filling out her intake forms, she was quite meticulous, but she did not ever indicate a kidney issue on any forms that she identified which would confirm she had not been told about the kidney. (App. P. 189). He remarked that this should be considered with Elizabeth Downing's testimony that the only thing they were ever told about the kidney lesion is to return to Mercy because "everything was not ok on the CT scan."

For the proposition that a physician-defendant can establish the standard of care and breach, see Oswald v. LeGrand, 453 N.W.2d 634 (Iowa 1990). Dr. Grossman himself, when speaking of the lesion found on the kidney in the October 1, 2009 reading, stated "That would be a concerning finding that you would definitely want to discuss with them." He did not do that on October 1, 2009. There was no discussion. Dr. Lopes supports that failure to communicate the need for further evaluation of the kidney lesion and to refer to another care provider was below standard of care. (App. Pp. 189-191)

Defendants argued heatedly in their Brief that the written record and Dr. Severidt's testimony establish standard of care and compliance. Elizabeth, however, states that the only statement was, "You need to bring your mom back. Not everything was okay on the CT scan." and she said that to her Mom. (App. P. 292). She was always with her mother when Dr. Severidt talked to her after they returned that evening. (App. Pp. 293-294). Finally,

the discharge instruction fails to give any significance to Linda's kidney condition.

Clearly, Plaintiffs have made a case of violation of standard of care. Linda was not told of her condition nor was a proper referral made. Dr. Lopes so establishes. (App. P. 189).

Dr. Grossman established a standard of care violation because he affirms that a referral is his usual practice. "A lot of times we would just have her go see her primary care doctor for something I don't work up, which a kidney mass would be that". (App. P. 327). He confirmed he would not treat her for the kidney lesion when he anticipated seeing her on October 6, 2009. (App. P. 327).

B. THERE IS EVIDENCE THAT DEFENDANT PAUL GROSSMAN WILLFULLY CONCEALED LINDA BERRY'S POTENTIALLY CANCEROUS CONDITION BECAUSE OF SYSTEMIC ERRORS WITHIN THE MERCY SYSTEM. THEREFORE, PLAINTIFFS HAVE PRODUCED EVIDENCE OF CONCEALMENT SUFFICIENT TO AVOID THE IOWA STATUTE OF REPOSE IN IOWA CODE 614.1(9)(a).

Plaintiffs have preserved error because the Defendant filed this claim in their Motions for Summary Judgment. Plaintiffs resisted same. Review in this matter is for errors of law.

Iowa has adopted various statutes of repose. In the field of medicine, Iowa has adopted ICA 614.1(9)(a).

Actions may be brought within the times limited as follows, respectively, after their cases accrue, and not afterwards, except when otherwise specially declared:

"9. Malpractice.

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

Here the statute of repose shall apply unless Plaintiffs shall show otherwise.

Plaintiffs can avoid the statute of repose by demonstrating that there has been a fraudulent concealment by a physician. Christy v. Miulli, 692 N.W.2d 694 (Iowa 2005). Estate of Anderson ex rel. Herren v. Iowa Dermatology Clinic, PLC, 819 N.W.2d 408 (Iowa 2012) Skadburg v. Gately, 911 N.W.2d 786 (Iowa 2018).

These cases determine the elements to prove fraudulent concealment.

The plaintiff must prove by a clear and convincing preponderance of the evidence the following:

"(1) The defendant has made a false representation or has concealed material facts; (2) the plaintiff lacks knowledge of the true facts; (3) the defendant intended the plaintiff to act upon such representations; and (4)

the plaintiff did in fact rely upon such representations to his [or her] prejudice." Skadburg v. Gately, 911 N.W.2d @798.

This case and all others discussing fraudulent concealment emphasize that the act of liability and the concealment are two separate acts. There must be some degree of temporal separation and they cannot be the same act otherwise there could never be a repose limitation.

The Court in Skadburg went on to say where there is a fiduciary relationship, the burden is lightened. "When one of the parties has superior knowledge or a special situation, such as an attorney-client relationship, we have required the party to make a full and truthful disclosure of all material facts within that party's knowledge."

In Skadburg supra, mere silence of the defendant attorney in the face of certain oral statements by the client, was sufficient concealment for a jury issue.

Here the Trial Court properly found there was a fiduciary relationship between Linda Berry and Dr. Grossman. (App. P. 238). It does not take a brain surgeon to conclude that identification of the colitis condition in the October 6, 2009, letter, an admittedly unpleasant condition, but omitting a life threatening condition which could and did take Linda's life, was less than a "full and truthful disclosure of all material facts within that party's knowledge."

In this case, the Trial Court indicated that it understood that there were two acts claimed by Plaintiffs, one of liability and one of concealment. However, inexplicably, the Trial Court stated that because Dr. Grossman did not review the October 6, 2009, letter prior to sending it, it was not a fraudulent statement.

Defendants' own Statement of Undisputed Facts in this Motion states: "On October 6, 2009, the date of his evaluation Dr. Grossman issued a letter, describing his treatment of Linda Berry's colitis and the results of the CT scan in relation thereto." (App. P. 78).

Plaintiffs pled in their Third Amended Petition that Dr. Grossman "dictated and sent" a letter. (App. P. 41). Defendant admitted that. (App. P. 59).

Plaintiffs addressed this erroneous finding by an IRCP 1.904(2) Motion for Enlargement of Findings and Judgment. It appeared that because neither party argued about the signature or lack of same in the October 6, 2009 letter, the Trial Court drew the conclusion it was in issue because of lack of a signature. While it did not have a signature, it was uncontested that Dr. Grossman dictated and sent it on October 6, 2009. This was admitted in pleadings and consequently is a conclusively established fact. Sheerin v. Hollin Co., 380 N.W.2d 415 (Iowa 1965).

In determining whether concealment has been established to avoid Summary Judgment, it is appropriate to review the facts and occurrences and draw all favorable inferences and conclusions in favor of the nonmoving party.

To make this clear, Plaintiffs contend that Dr. Grossman actively concealed Linda Berry's condition of a kidney lesion from her. There is evidence of this. At the time of the reread of the CT scan on October 1, 2009, the radiologist advised that there had been two prior kidney scans that were performed by Mercy Hospital. (App. P. 224). It would soon be apparent to Dr. Grossman that Linda Berry likely had never been properly apprised of same. Her intake on October 1, 2009, did not disclose any "PMX" of a kidney lesion or positive CT finding. (App. P. 103) Dr. Lopes opined that despite her lack of education, she identified her medical history well, "she demonstrates on multiple ER and outpatient Mercy office visits, however, she seemingly fails to disclose that she has a kidney mass on all medical history questionnaires." (App. P. 189). Elizabeth, her daughter, who took her on many medical visits, confirmed this as well. Linda herself confirmed this when she was first advised by a nurse that she had a kidney tumor that was visible in "04 and "06. Linda expressed surprise stating, "What kidney tumor?". (App. P. 301). It would be strongly evident as of the time of the re-read on October 1, 2009, that Linda did not know of the prior CT scans. Even though Defendant Grossman claims

that he called Linda back to Mercy the night of October 1, 2009, he did not, nor did Dr. Severidt, claim Linda was informed of the two prior CT scans. Linda was excused with no written documentation of the CT finding with respect to her kidney despite written documentation of her colitis.

Even more mysterious is Dr. Grossman's dictation for the October 1, 2009, Mercy Hospital visit. (App. P. 225). It contains no mention whatsoever of the kidney finding.

The discharge instruction references only the colitis, not the kidney lesion or the prior CT scans. (App. P. 162).

When Linda Berry again went to the Mercy Hospital on October 4, 2009, there was no communication to her of the CT findings or of the prior CT scans. (App. P. 105).

Her discharge instruction said nothing about CT scans or a kidney. (App. P. 105)

At 14:41 pm October 5, 2009, a day prior to Linda Berry's visit on October 6, 2009, Dr. Grossman had his nurse, Amanda Aswegan, print the CT scan report from October 4, 2009 visit to Mercy Hospital. (App. P. 108). It identifies a 6.1 cm mass of the right kidney which was larger than it was in December 2006. It suggests magnetic resonance imaging for further evaluation. That was never disclosed to Linda and was never done. This was a clear violation of a fiduciary duty of full and complete disclosure.

Dr. Fleenor makes no mention that this was ever made known to Linda.

On October 6, 2009, Elizabeth Downing accompanied her mother, Linda Berry, to her visit with Dr. Grossman (App. Pp. 295-297). He did not discuss the CT scan or prior CT scans or any condition related to Linda's kidney. He did "dictate and send" on that date, October 6, 2009, a letter to Linda's primary care physician at Broadlawns Family Medicine. (App. P. 109).

Despite the absence of a signature, the letter is an actual representation and in fact, a concealment. This letter was read to Linda Berry and Elizabeth Downing at a later time and relied upon by them. (App. Pp. 298-299).

There are two subtle but significant narratives that support that this was not a case of "I forgot to tell her." First, the silence of these physicians is thunderous. Not a single one, Dr. Grossman, Dr. Severidt nor Dr. Fleenor had the curiosity to say, "By the way, what do you know about this kidney mass that we have found?" It is particularly damning because when she saw a nurse at Mercy West in April 2016 after fracturing her arm, that nurse asked her if she knew about the 2004 or 2006 kidney scans, to which she said no. Secondly, Dr. Fleenor saw Linda on October 4, 2009, because Linda's significant stomach pain had returned, and she visited Mercy Hospital again. Dr. Fleenor wrote initially that she would be referred to her PCP which Dr. Grossman

established as the standard of care, but she crossed that out and wrote Linda would see Dr. Grossman. There was no question of Linda whether she knew about the prior CT scans.

One wonders why Dr. Fleenor did that. If the standard of care is to refer a patient outside of one's practice area, then there were multiple violations of that standard.

Secondly, the lack of a single person inquiring of Linda about the CT results suggests that they did not want to raise the possibility and that Dr. Grossman who sought to conceal was reluctant to disclose them. The reasonable inference is that Dr. Grossman did not want to arouse concern in Linda Berry. There is no other excuse for not at least asking her about the prior scans. A physician in particular would be expected to inquire. Yet he did not.

"Concealment of or failure to disclose a material fact can constitute fraud in Iowa." Cornell v. Wunschel, 408 N.W. 2d 369, 374 (Iowa 1987), citing Loghry v. Capel, 257 Iowa 285; 132 N.W.2d 417 (Iowa 1965). One could scarcely argue that a physician written letter referring to colitis, a usually nonfatal condition, while omitting a possible cancerous condition, is a concealment or omission of a material fact.

Finally, one may infer that a physician who dealt with the multiple missteps found in this series of treatments would be most attentive to cover his behind from a future suit by advising

in writing and preserving a record of same. A jury may well infer from that absence of confirmation that there is concealment by Dr. Grossman. That would be a reasonable inference when considered under all other evidence under the Banwart standard.

II. PLAINTIFFS CLAIMS OF LOSS OF COMPANIONSHIP AND CONSORTIUM ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.

Plaintiff preserved error on this claim as well because Defendants filed a Motion for Summary Judgment. (App. P. 71 et seq.). Plaintiffs filed their resistance. (App. P. 110 et seq.). Review is for errors of law.

Under Iowa law, the consortium claims of adult children can be brought by the parent or parent's Estate. These claims were first identified in the original Petition at Law filed on April 10, 2018, Para. 98 (App. P. 20) and not for the first time in the Amended Petition filed June 14, 2019 as Defendant states. (App. Pp. 7-21). In any event, Linda joined her daughters' claims with hers in the April 10, 2018 Petition. This is the proper method of bringing suit for adult children. See Nelson v. Ludovissy, 368 N.W.2d 141 (Iowa), which holds that where adult children bring consortium claims due to injury to a parent, the parent is the party to bring claims unless it is impractical for the adult child to bring same. Plaintiffs make no claim here that it is impractical for the children of Linda Berry to bring their claims. Therefore, Linda and then her Estate, were proper parties to bring the claims of Linda's adult daughters.

III. THE STATUTE OF LIMITATIONS IN IOWA CODE
614.1(9) DOES NOT APPLY.

Plaintiffs preserved error on this matter because Defendants filed their Motion for Summary Judgment on this claim. Defendants cited no authority and made no significant argument. Plaintiffs resisted same. Review is for errors of law.

Defendants argue without citing authority that the Estate's claims are barred by the Iowa statute of limitations found at Iowa Code 614.1(9).

The statute of limitations has a discovery interpretation. Plaintiff must discover the "injury" and factual cause of same. Murtha v. Cahalan, d/b/a Surgical Affiliates, 745 N.W.2d 711 (Iowa 2008).

Murtha, like this, was an "inquiry" case. A plaintiff must have knowledge of an injury and knowledge or imputed knowledge of factual causation. Here Linda and Elizabeth relied upon the letter written by Dr. Grossman. They had no imputed knowledge beyond that and it would be a jury issue as to reasonableness or reliance on same. However, Linda and Elizabeth did not even discover the "injury," Linda's cancer condition until later April 2016. Her filing on April 10, 2018 would therefore be timely.

Appellants Elizabeth Downing and Marcella Berry incorporate their factual and legal arguments that address the Summary Judgment standards in prior parts of this Brief.

There is a factual issue whether Linda and her Estate were misled regarding her condition in the October 6, 2009 letter from Dr. Grossman to Broadlawns Family Medicine. (App. P. 109).

This letter was read to Linda Berry and her daughter, Elizabeth Downing, at Linda's medical appointment on April 10, 2010 for her yearly physical with Dr. Nik. (App. P. 305).

Plaintiffs Berry and Downing submit they have generated a factual issue on the application of summary judgment. It is a reasonable inference for the jury whether Linda or Elizabeth and a further duty to investigate any kidney issue from that date. Banwart v. 50th Street Sports, LLC, 910 N.W.2d 540 (Iowa 2018).

Linda did not find out that things were not so good until she fell and broke her arm. (App. Pp. 276-277). She was always told everything was negative or okay with her prior scans in 2004 and 2006. (App. Pp. 278-279). Linda Berry's Petition at Law was filed on April 10, 2018. (App. Pp. 7-21). The injury to her left arm and shoulder occurred on April 24, 2016. (App. P. 13).

IV. THERE IS SUFFICIENT EVIDENCE THAT DEFENDANT GROSSMAN'S CONDUCT WAS WILLFUL AND WANTON SUCH THAT PUNITIVE DAMAGES ARE SUBMISSIBLE.

Plaintiffs preserved error on this claim. At the hearing on oral argument, Plaintiffs specifically advised the Court that they believed evidence would support a jury finding of an act of active concealment. Review is for errors of law.

The Defendants moved for summary judgment on the issue of punitive damages. As quoted by Defendants' counsel, the

submission of punitive damages is governed by ICA 668A.1(1)(a) as follows: Willful and wanton conduct is shown when an "actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probably that harm would follow, and which is usually accompanied by a conscious indifference to the consequences."

Plaintiffs claim that Dr. Grossman either terminated or abandoned his care of Plaintiff Linda Berry at the time of the October 1, 2009 visit or shortly thereafter. His conduct after that time is very suspicious. He knew or should have known that Mercy Surgical Affiliates had ordered a CT scan in both 2004 and 2006. Those scans showed a right kidney cyst that had clearly not been reported to Linda Berry. This CT scan was printed on October 5, 2009, at 14:41 hours in Dr. Grossman's office. Dr. Grossman admitted that it is his signature on this report and this report was in Linda Berry's medical record in his office. This report also refers back to earlier CT scans in 2006, which aligns with treatment records of Linda Berry by his partners. Dr. Grossman saw her the next day. (App. P. 172). Dr. Grossman stated about the calling back of Linda and Elizabeth on October 1, 2009 that it was one of only two times in his professional career that he had done that. Linda received no call from Mercy about her CT scan after the October 1, 2009 scan, contrary to the statement in her

discharge documents. Three doctors never asked Linda if she knew about her kidney condition and the prior scans.

Dr. Grossman wrote a letter concealing the CT result which clearly required further kidney evaluation. The jury clearly could infer that Dr. Grossman chose to "bury" this CT result so that his clinic would not be embarrassed for his failure to refer Linda in 2006.

These repeated concealments certainly can generate a punitive damage claim. See McClure v. Walgreen, 613 N.W.2d 225 (Iowa 2000).

As stated above, all reasonable inferences that flow from uncontested facts must be viewed in favor of the party resisting Motion for Summary Judgment. Banwart v. 50th St. Sports, LLC, 910 N.W.2d 540 (Iowa 2018).

CONCLUSION

The Iowa District Court acted prematurely in dismissing Plaintiff's case on certain principles because there was sufficient evidence that Dr. Grossman intentionally concealed medical conditions and treatment from Linda Berry. Linda reasonably relied on Dr. Grossman's letter to her primary care physician and did not investigate or discover that concealed kidney condition. When she did, she filed suit timely.

This case should be returned for trial on all issues including loss of consortium and punitive damages against Dr. Grossman.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Appellants, Elizabeth Downing and Marcella Berry as Co-Administratrix of the Estate of Linda Berry, request oral argument in this matter.

Respectfully submitted,

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CERTIFICATE OF FILING

I, Steve Hamilton, hereby certify that I have filed the foregoing "Final Brief of Appellants" with the Clerk of the Supreme Court of Iowa through the ECF/EDMS System on the 29th day of March 2021.

 /s/ Steve Hamilton
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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, Steve Hamilton, hereby certify that on this same date, I served the attached "Final Brief of Appellants" through the ECF/EDMS System on the following:

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs.App.P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

This brief has been prepared in a monospaced typeface using Courier New in 12 characters per inch and contains 837 number of lines of text, excluding the parts of the brief exempted by Iowa R.App.P.6.903(1)(g)(2).

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