IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 20-1124
(Polk County No. LACL140875)

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 FOR POLK COUNTY, THE HONORABLE DAVID PORTER

DEFENDANTS-APPELLEES PAUL GROSSMANN, M.D., and CATHOLIC HEALTH INITIATIVES IOWA, CORP. d/b/a MERCY MEDICAL CENTER, MERCY MEDICAL CENTER-WEST LAKES, and MERCY SURGICAL AFFILIATES APPLICATION FOR FURTHER REVIEW

/s/ Joseph F. Moser
Stacie M. Codr, AT0001502
Joseph F. Moser, AT0011413
THE FINLEY LAW FIRM, P.C.
699 Walnut Street, 1700 Hub Tower
Des Moines, IA 50309
Tel No.: (515) 288-0145
Fax No.: (515) 288-2724
scodr@finleylaw.com
jmoser@finleylaw.com

QUESTIONS PRESENTED FOR FURTHER REVIEW

Defendants-Appellees submit the following questions presented for review by this Court pursuant to Iowa R. App. P. 6.1103(1):

Question 1: Did the Court of Appeals err in reversing summary judgment in favor of Defendants on the application of the statute of repose, where reversal would contradict standing Iowa Supreme Court precedent and effectively eliminate application of the statute of repose in any failure to diagnose/disclose medical negligence case simply by virtue of a Plaintiff's allegation of fraudulent concealment, including where the "heart" of Plaintiff's medical negligence failure to diagnose/disclose claim is the same as the basis of Plaintiff's fraudulent concealment allegations.

TABLE OF CONTENTS

STATEMENT SUPPORTING FURTHER REVIEW

In support of their Application for Further Review, Defendants state:

1. This Court should review the Court of Appeals reversal and remand of the district court's grant of summary judgment on the application of the statute of repose because the Court of Appeals ruling substantively conflicts with Iowa law and precedent applying the statute of repose in the context of medical negligence failure to diagnose/disclose cases and effectively eliminates the statue of repose in such cases. *See Van Overbeke v. Youberg*, 540 N.W.2d 273 (Iowa 1995); *VonAh v. Alexander*, 680 N.W.2d 377 (Iowa Ct. App. 2004).

2. This Court should review the Court of Appeals decision because it has decided a case involving an issue of broad public importance (statute of repose) that, if allowed to stand, would constitute a significant change in Iowa law, eliminating the statue of repose in failure to diagnose/disclose cases.

3. This Court should review the Court of Appeals decision because it includes clear errors in application of law to facts, including insofar as it misstates the record and status of undisputed material facts, and it fails to follow the guidance of existing Iowa Supreme Court precedent. *See Van Overbeke v. Youberg*, 540 N.W.2d 273 (Iowa 1995); *VonAh v. Alexander*, 680 N.W.2d 377 (Iowa Ct. App. 2004).

BRIEF

I. PROCEDURAL AND FACTUAL BACKGROUND

This is an untimely case, barred by the statute of repose, filed nearly 9 years after the care in question. Plaintiffs claim medical malpractice related to an alleged failure to disclose certain findings in a CT scan. (Plaintiffs Third Amended Petition; App. 36). In an effort to avoid the statute of repose as set forth in Iowa Code section 614.1(9), Plaintiffs asserted baseless and unsupported claims of fraudulent concealment. (*Id.*) After summary judgement was granted by the district court, the Court of Appeals erroneously reversed and remanded, failing to follow controlling precedent and effectively eliminating the application of the statute of repose in any failure to diagnose/disclose case where subsequent treatment by the same provider(s) exists. *See* Court of Appeals Opinion, No. 20-1124, filed October 6, 2021, attached.

On or about October 1, 2009, Linda Berry was admitted to Mercy Medical Center with complaints of lower abdominal pain, constipation, and nausea. (Plaintiffs' Third Amended Petition at ¶ 23; App. 36). On October 1, 2009, Dr. Grossmann was consulted regarding Linda Berry's condition. (*Id.* at ¶ 24; App. 40). On October 1, 2009, a computerized tomography ("CT") scan was performed on Linda Berry. (*Id.* at ¶ 25; App. 40). On October 1,

2009, Dr. Matthew Severidt was a third-year surgical resident for Mercy Medical Center. (Deposition of Dr. Matthew Severidt (hereinafter "Severidt Depo.") p. 47; ln. 1–5; App. 371). On October 1, 2009, Dr. Severidt discussed the CT scan with Linda Berry. (Plaintiffs' Third Amended Petition at ¶ 27; App. 40; Severidt Depo, p. 29; ln. 18 –p. 30; ln. 12; App. 355; Ex. E; App. 103, Ex. F; App. 104). Dr. Severidt testified "the initial or preliminary report on her CT scan did not mention anything related to her bowel, no surgical problem. It did mention that—that she was constipated, so she was discharged under those conclusions." (Severidt Depo, p. 28; ln. 15–19; App. 354). Dr. Severidt's October 1, 2009 handwritten note states: "Addendum 10/1, 1930", "CT equals no evidence appendicitis. No bowel centered pathology. Impression equals constipation." (Ex. E; App. 103; Severidt Depo, p. 25; ln. 23–25; App. 352). Based on said preliminary findings, Dr. Severidt discharged Linda Berry. Ex. G; App. 105; Ex. H; App. 106).

Dr. Severidt subsequently received the "final" reading of the CT scan. (Severidt Depo, p. 36; ln. 4–22; App. 362). Dr. Severidt testified "the radiologist then reviewed the images further and generated a final report, which prompted me to write at the bottom of the page, "see next page addendum, and then what I wrote on that note." (*Id.* p. 28; ln. 20–24; App. 354). Dr. Severidt testified "I'm thinking the preliminary read was obtained

approximately 7:30. Then I went back and reviewed the final report which had some significant changes, and that prompted this written addendum." (*Id.* p. 31; ln. 2–6; App. 357). The addendum states:

> 10-1-09, time 2020, surgery, addendum. Final read on CT was inconsistent with initial verbal radiology report. No acute appendicitis was found; however, CT does demonstrate mild sigmoid colitis of infections or inflammatory etiology, as well as a large exophytic cystic mass on right kidney which has increased in size. Suggest MRI for evaluate. Patient with completely benign exam, no fever or obstructive symptoms. We will treat as outpatient with oral antibiotics for ten days. She has extensive allergy list, thus per pharmacy suggestion will treat with Levaquin alone. Patient will follow up with Dr. Grossman in one week at which time further evaluation of right kidney can be undertaken. ***This was discussed with patient who voiced understanding and agreed.*** Discussed with Dr. Grossmann 2000 hours.

(Ex. F; App. 104; Severidt Depo. p. 29; ln. 18–p.30; ln. 12; App. 355)(emphasis added). With respect to the conversation noted in the foregoing addendum, Dr. Severidt testified that he personally called Linda Berry and asked her to come back to the hospital so he could speak with her regarding the final read on the CT scan. (Severidt Depo, p. 44; ln. 3–7; App. 368). He testified that he requested Linda Berry come back to the hospital to discuss, rather than over the telephone, because he is "never going to tell a patient, even as a resident, that they have a concerning finding on a CT scan that could be a malignancy." (*Id.*, p. 45; ln. 2–7; App. 369).

Dr. Grossmann testified it would "definitely not" be typical for a general surgeon to call a patient all the way back to a hospital to merely relay a finding of colitis. (Deposition of Dr. Paul Grossmann (hereinafter "Grossmann Depo."), p. 114; ln. 19–23; App. 344). Dr. Grossmann testified that radiographic findings suggestive of a cystic mass on a kidney is a reason for a general surgeon to actually have a patient come back for discussion stating, "that would be a concerning finding that you would definitely want to discuss with them." (*Id.*, p. 115; ln. 5–6; App. 345).

Linda Berry returned to the hospital shortly after Dr. Severidt's telephone call. (Severidt Depo., p. 45; ln. 14–22; App. 369). Dr. Severidt confirmed that "the addendum states what we discussed, which would be the findings on the final read of the CT scan." (Severidt Depo., p. 45; ln. 14–22; App. 369). Dr. Severidt testified he has "no doubt" whatsoever as to whether or not he advised Ms. Berry of the findings on the CT scan, which included the mass on the kidney. (*Id.*, p. 46; ln. 1–5; App. 370). Dr. Severidt testified that he verbally reported to Ms. Berry on October 1, 2009 "that she had colitis and she needs to take an antibiotic to treat it and that there is a concerning finding of a lesion on her kidney that will require follow-up." (*Id.*, p. 50; ln. 11–20; App. 374). Dr. Severidt testified that he verbally recommended Linda Berry follow up with Dr. Grossmann in one week, as he was directed to by

Dr. Grossmann, "for treatment of her colitis and evaluation of her renal mass." (*Id.*, p. 38; ln. 18 –p. 39; ln. 7; App. 364).

Dr. Severidt explained that nothing regarding Ms. Berry's kidney mass was addressed in discharge instructions because he and Dr. Grossmann "were consulted as a general surgery service to deal with general surgery issues. Colitis falls under that umbrella. That is what Dr. Grossmann was asked to take care of, and that's what was provided in her written instructions." (*Id.*, p. 39; ln. 14–21; App. 365). Dr. Severidt further explained that a kidney mass is not a general surgery issue, "it's a urologic issue." (*Id.*, p. 39; ln. 22–24; App. 365).

On October 3, 2009, at approximately 10:35 p.m. (2235), Linda Berry returned to the emergency department with symptoms including increased abdominal pain. (Grossmann Depo., p. 112; ln. 20–24; App. 342; Ex. J; App. 107). Another CT scan was ordered and results were received on the morning of October 4, 2009. Ex. K; App. 108). The records for this encounter reflect the following plan: "Plan: Recommended follow up for R kidney cystic mass (~~with PCP~~) with Dr. Grossman, already discussed with patient on 10/1/09. . . ." (Ex. J; App. 107). Dr. Grossmann was not present and did not treat Ms. Berry on October 3 or 4, 2009. (Grossmann Depo. p. 112, ln. 10–p. 113; ln.

10; App. 342–43). Rather, Dr. Grossmann's partner, Dr. Roe, was on-call. (*Id.*; App. 342–43).

On October 6, 2009, Dr. Grossmann saw Linda Berry for the first time since the "final" CT results were obtained on October 1 and October 4, 2009. (Ex. L; App. 109). On October 6, 2009, the date of his evaluation, Dr. Grossmann issued a letter to Linda Berry's primary care provider, describing his treatment of Linda Berry's colitis and the results of the CT scan in relation thereto. (*Id.*; App. 109). The letter does not discuss the other findings on the CT scan. (*Id.*; App. 109). Dr. Grossmann explained the purpose of dictating this note and addressing it to Broadlawns Family Clinic was: "Because I was as a general surgeon, I treat colitis. And I was informing them what I was up to and what we were planning to do in regards to that." (Grossmann Depo, p. 49; ln. 15–18; App. 315).

When asked "how is [Linda Berry's] primary care physician expected to adequately follow up on the CT finding when the renal mass is not part of the letter you dictated?", Dr. Grossmann answered:

> If we had told her from the emergency room to follow up with her primary care doctor, then it would be up to the patient to call her primary care doctor. If she had not seen me in the clinic, there wouldn't be a letter like that. There would still be a follow-up. So the same way that she followed up with me, she made the appointment to come see me, she would have to make the appointment to go see them. If I put that in my note, it doesn't help the primary

> care doctor because I'm not offering any advice unless the patient makes the appointment. So it doesn't tell them what I'm doing and what I'm treating.

(*Id.* p. 89; ln 16–p. 90; ln. 9; App. 331). Dr. Grossmann testified "if somebody comes into my office and it's—they have an issue brought up that's out of the scope of what I do, which a kidney cyst is not something I treat or work up, then I would refer them on to a primary care doctor. . . . 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. . . . So I would have to say I probably told Dr. Severidt that I wanted to see her back to reinforce that that has to be done. And I would explain to her at that point that I do not treat that an that's beyond the scope of my practice, but she will have to go see her primary care doctor for that." (Grossmann Depo., p. 84; ln. 7–p. 85; ln. 8; App. 327).

Dr. Grossmann was asked if he would typically document that the kidney mass found needed to be followed up by someone other than himself, to which he responded: "I did not document that. I frequently have people bring up issues that I don't typically treat or are beyond the scope of my practice. And if I'm not offering any advice to the primary care doctor about how to treat it or what to treat it, I wouldn't necessarily document that. At this point based on the records that I see, I knew that she already knew about this and so I was not focused on that. I was focused more on what she was in my

office that I do treat." (Grossmann Depo, p. 85; ln 24–p. 86; ln. 19; App. 328–29).

Dr. Grossmann's subsequent care of Linda Berry was limited to treatment of colitis, consistent with his plan of care, and included review of testing of stool samples and a colonoscopy performed in November 2009. (Ex. L; App. 109; Grossmann Depo, p. 50; ln. 2–p.59; ln. 21; App. 316). Dr. Grossmann did not treat Linda Berry after 2009. (Defendants' Answer to Third Amended Petition, ¶ 42; App. 61).

Almost nine years later, on April 10, 2018, Plaintiff Linda Berry filed suit, alleging medical malpractice in Defendants' failure to diagnose and disclose information regarding her CT scan. (Plaintiff Linda Berry's Petition at Law; App. 7). Following her death in May 2019, Linda Berry's daughters substituted the Estate and asserted consortium claims for the first time. (Plaintiffs' Third Amended Petition; App. 36).

II. THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S SUMMARY JUDGMENT RULING AS ALL CLAIMS ARE TIME-BARRED BY THE STATUTE OF REPOSE

This Court should accept further review, reverse the Court of Appeals, and affirm the district court's correct application of Iowa precedent to the undisputed facts of the case. To permit the Court of Appeals erroneous opinion to stand would eviscerate the statute of repose in any failure to

diagnose/disclose case and change the state of the law in Iowa. Allowing the Court of Appeals ruling to stand is tantamount to saying there is no statute of repose in any failure to diagnose or disclose case, overruling this Court's 1995 decision in *Van Overbeke*, 540 N.W.2d 273. This would be a substantial change to Iowa law, directly in conflict with existing Iowa Supreme Court precedent and the purpose and plain language of the statute of repose. The district court properly held Plaintiffs' claims are untimely and they are time-barred from advancing them. It also properly found that, because the heart of Plaintiffs' liability claim is the same as the basis of their fraudulent concealment allegations, their baseless fraud allegations failed to save their untimely claims from dismissal. Upon further review, this Court should find the same, reverse the Court of Appeals, and affirm the district court's dismissal.

The statute of repose, the outside limit for all cases, is established by Iowa Code section 614.1(9). It provides, "**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." Iowa Code § 614.1(9)(a)(emphasis added). This "statute of repose" provides "an outside limitation for all lawsuits, even though the

injury had not been discovered." *Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 455 (Iowa 2008). The purpose of Iowa's statute of repose is to "close the door after six years on belated-discovered claims." *VonAh v. Alexander*, 680 N.W.2d 377, *1 (Iowa Ct. App. 2004) (citing *Koppes v. Pearson*, 384 N.W.2d 381 (Iowa 1986). "In effect, the mere passage of time prevents the legal right from ever arising. *Id.* Statutes of repose have "harsh consequences," which "reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct." *Estate of Anderson ex rel. Herren v. Iowa Dermatology Clinic, PLC*, 819 N.W.2d 408, 419 (Iowa 2012) (*citing Albrecht v. General Motors Corp.*, 648 N.W.2d 87, 91 (Iowa 2002)).

Limitation periods "are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay." *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d 405, 410 (Iowa 1993) (*citing Schulte v. Wageman,* 465 N.W.2d 285, 287 (Iowa 1991)). Their intended purpose is to close the door after six years on belatedly discovered claims. *Koppes,* 384 N.W.2d at 387. This is necessary, in part, to address "the lapse of time," between the allegedly negligent act and initiation of suit, which "often results in the unavailability of witnesses, memory loss and a lack of adequate

records." *Bob McKiness Excavating*, 507 N.W.2d at 410. Statutes of repose are "designed to prevent the trial of stale claims because evidence gathering is usually made more difficult by the passage of time." *Albrecht*, 648 N.W.2d at 91 (*citing Fisher v. McCrary–Rost Clinic, P.C.,* 580 N.W.2d 723, 725 (Iowa 1998)). In addition, statutes of repose "reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct." *Id.* (*citing* 51 Am. Jur.2d *Limitation of Actions* § 18, at 463). Such statutes "avoid the difficulties in proof and recordkeeping that suits involving older claims impose ... and protect certain classes of persons ... from claims that are virtually indefensible after the passage of time." *Id.* In effect, the mere passage of time prevents the legal right from ever arising. *Bob McKiness Excavating*, 507 N.W.2d at 410.

This suit was filed nearly 9 years beyond the dates on which occurred the act, omission, or occurrence alleged in the action to have caused Plaintiffs'-Appellants' alleged injury. *Compare* Petition (filed April 2018, App. 7) *to* Petition, ¶ 89 (alleging relevant injury occurred in "2004, 2006, and/or 2009", App. 19). It is precisely the type of case which the legislature intended to prevent from being litigated. It is time barred. The Plaintiffs recognize this fact and do not argue their suit was timely. Instead, to avoid

application of the statute of repose, Plaintiffs present a wholly unsupported and baseless conspiracy theory of fraudulent concealment.

The fraudulent concealment doctrine is a form of equitable estoppel that estops a party from raising a statute of repose defense in certain circumstances. *Estate of Anderson ex rel. Herren v. Iowa Dermatology Clinic, PLC*, 819 N.W.2d 408, 414–15 (Iowa 2012). Consequently, if proven, a party's fraudulent concealment allows a plaintiff to pursue a claim that would be otherwise time barred under the statute of repose. *See Koppes,* 384 N.W.2d at 386. A party seeking shelter under the doctrine of fraudulent concealment must plead and prove:

> (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 prejudice.

Christy v. Miulli, 692 N.W.2d 694, 702 (Iowa 2005) (citation and internal quotation marks omitted). The party alleging fraudulent concealment has the heavy burden to prove each of the elements by "a clear and convincing preponderance of the evidence." *Id.*

Both before the district court and on appeal, the Plaintiffs failed to establish any of the elements of fraudulent concealment. First:

> With respect to the first element, a party relying on the doctrine of fraudulent concealment **must prove the defendant did some affirmative act to conceal the plaintiff's cause of action independent of and subsequent to the liability-producing conduct**…Furthermore, the plaintiff's reliance must be reasonable…The circumstances justifying an estoppel end when the plaintiff becomes aware of the fraud, or by the use of ordinary care and diligence should have discovered it…The plaintiff bears the burden to prove equitable estoppel by a clear and convincing preponderance of the evidence.

Christy, 692 N.W.2d at 702 (emphasis added, internal quotations and citations omitted). Plaintiffs did not demonstrate any such affirmative act. There can be no *genuine issue* of fact as to whether Dr. Severidt informed Linda Berry of the concerning findings on her CT scan. He documented that discussion the same day. Dr. Grossmann also testified her reviewed the issues with her. The fact that Dr. Grossmann issued a letter to her primary care provider explaining his treatment relative to the condition he was actually asked to evaluate, and which was within the scope of his practice, is not an affirmative act concealing her cause of action. Plaintiffs presented no evidence of any act to conceal the cause of action independent of the allegedly liability-producing conduct, nor evidence of lack of knowledge of the true facts.

Regardless, what is readily apparent is that the fraudulent concealment doctrine cannot not apply under the circumstances alleged by Plaintiffs. Even if their tortured version of the "facts" were true, the allegation of concealment is the same act alleged to constitute negligence—that is a failure to disclose

the incidental CT finding to Linda Berry or her primary care provider(s). This is what the district court correctly found and where the Court of Appeals erred.

Failure to disclose such information to a patient ***cannot*** be the basis for fraudulent concealment. *Van Overbeke*, 540 N.W.2d at 276–77, *abrogated on other grounds by Christy*, 692 N.W.2d 694; *see also Skadburg v. Gately*, 911 N.W.2d 786 (Iowa 2018). "If it could be, there would effectively be no statute of limitations for negligent failure to inform a patient (fraud as basis of liability cannot also be basis for finding of fraudulent concealment.)." *Id.* While the Court of Appeals correctly cited these cases, it erred in applying their holdings to the undisputed facts of this case on appeal and erred in reversing and remanding this untimely matter to the district court. There appears to be disagreement between the district court and Court of Appeals as to how "broadly" the alleged medical negligence and concealment is to be viewed. *See* Court of Appeals Opinion, No. 20-1124, filed October 6, 2021, attached, at p. 11. This case presents an opportunity for this Court to provide lower courts and litigants instruction and guidance in applying existing precedent.

For example, this Court should emphasize its prior precent, including this Court's 1995 ruling in *Van Overbeke*. 540 N.W.2d 273, to which this case is virtually identical. In *Van Overbeke*, the plaintiff asserted various acts of

diagnostic negligence. *Id.* This Court, however, noted that the "heart" of the Plaintiff's claim was an alleged failure to disclose to the plaintiff that she needed a RHoGAM injection. *Id.* at 276–77 ("the doctor's failure to disclose to the plaintiff that she needed the RHoGAM injection lies at the heart of her claim."). This Court held that such a failure to disclose could not be the basis for the Plaintiff's fraudulent concealment, stating, "the failure to disclose such information cannot be the basis for fraudulent concealment because, "***if it could be, there would effectively be no statute of limitations for negligent failure to inform a patient***." *Id.* (emphasis added). Likewise, here, the Plaintiffs assert various acts of diagnostic negligence, but the doctor's alleged failure to disclose to Linda Berry that she had a kidney abnormality on her CT scan lies at the heart of her claim. Failure to disclose that abnormality cannot also form the basis of Plaintiffs fraudulent concealment claim. As in *Van Overbeke*, the failure to disclose such information to Linda Berry cannot be the basis for her fraudulent concealment because, "***if it could be, there would effectively be no statute of limitations for negligent failure to inform a patient***." *Id.* (emphasis added).

Van Overbeke is not the only case that is directly on point. In fact, this case is no different from a litany of other Iowa cases dismissed and later upheld on appeal because they were beyond the statute of repose. In addition

to the comparison to *Van Overbeke*, 504 N.W.2d at 276–77, this case is also nearly identical to *VonAh v. Alexander*, 680 N.W.2d 377 (Iowa Ct. App. 2004). There, the Iowa Court of Appeals held that the plaintiffs' claim accrued, and six-year statute of repose began to run, when a doctor allegedly failed to disclose to a patient a bone tumor allegedly discovered in x-ray of the patient's left knee and then allegedly failed to schedule or recommend follow up. *VonAh*, 680 N.W.2d 377. There, much like here, the plaintiff sought treatment for a knee injury. *Id.* at *1. Almost seven years later, the knee was found to be cancerous. *Id.* Plaintiff VonAh brought a medical malpractice claim arguing "X-rays of her left knee revealed stippling within the shaft of the distal diaphysis of her left femur, which was felt most likely to be an enchondroma.[1] *Id. This was not mentioned to Julia, and no follow up was scheduled or recommended.*" *Id.* (emphasis added). Under circumstances unequivocally similar to those in this case, the case was dismissed pursuant to the statue of repose and affirmed on appeal. *Id.*

Caswell v. Yost, 671 N.W.2d 553 (Iowa Ct. App. 2003), provides another guiding example. There, the court held that the plaintiff's claims were

[1] A bone tumor which, according to the plaintiff in that case, carries a "risk that it will transform into a malignant chondrosarcoma." *VonAh*, 680 N.W.2d 377.

barred by the statute of repose and that the fraudulent concealment doctrine did not function to save the plaintiff's untimely claim. *Id.* at *3. In *Caswell*, the plaintiff sought treatment from her family practitioner for a rash. *Id.* at *1. Her family practitioner referred her to a dermatologist. *Id.* The dermatologist authored a letter back to the family practitioner, stating the rash was suspicious of lupus. *Id.* Both the family practitioner and the dermatologist told the plaintiff she likely had lupus. *Id.* A few weeks later, the plaintiff followed up with the dermatologist. *Id.* Four days after that follow up, the dermatologist wrote a letter to the family practitioner, explaining that the rash might be a drug reaction related to the seizure medication the family practitioner prescribed to the plaintiff. *Id.* The family practitioner did not disclose that letter or the dermatologist's opinion to the plaintiff. *Id.* Instead, the plaintiff found out approximately 1 year later, when the dermatologist told her about the letter. *Id.* She brought suit approximately two years later. *Id.*

The district court dismissed Caswell's case on the statute of limitations. *Id.* On appeal, the plaintiff argued fraudulent concealment to save her case, alleging that the family practitioner fraudulently concealed that the drug reaction was causing the rash to persist, not lupus. *Id.* The Court of Appeals agreed with the district court that the plaintiff's fraudulent concealment claim was based upon the same act as her medical malpractice claim—the

defendant's failure to disclose what caused her rash. *Id.* at *3. Once again, these circumstances directly guide the outcome in this case. Plaintiffs' fraudulent concealment claim is based upon the same act as the medical malpractice claim—an alleged failure to disclose the results of a CT scan. As such, the court must similarly reject Plaintiffs-Appellants' argument that the doctrine of fraudulent concealment is applicable to the facts in this case and affirm the district court's grant of summary judgment on the statute of repose.

This case is distinguishable from the only case to which Plaintiffs cited to the district court and almost exclusively relied upon on appeal, *Skadburg v. Gately*, 911 N.W.2d 786 (Iowa 2018). *Skadburg*, is a legal malpractice case, in which the court found the doctrine of fraudulent concealment tolled the statute of limitations. *Id.* There, attorney Gatley allegedly told his client, the plaintiff-administrator of an estate, to pay certain debts of the estate. *Id.* at 790. On Gatley's advice, the administrator allegedly paid debts out of the proceeds of a life insurance policy and 401k fund. *Id.* Gatley allegedly failed to tell the administrator that the life insurance proceeds were exempt from any claims against the estate. *Id.* The Court held Gately's alleged negligence was advising the plaintiff to pay the debts with the respective life insurance policy and 401k funds even though the funds were exempt from claims against the estate. *Id.* at 799. It then found Gately's alleged concealment was his silence

after the plaintiff told him she had paid all the bills and sent the three communications over the course of more than a year, allegedly blaming herself for the economic loss, while thinking Gately did "the best" that he could for her. *Id.* In other words, the plaintiff's contention concerning fraudulent concealment was that Gately should have told her that he gave incorrect legal advice concerning the administration of the estate *once he realized he had given her bad advice* based upon her multiple follow up communications, but instead he knowingly concealed the known error from her. *Id.* at 799–800.

Here, there is no such subsequent act of concealment to which Plaintiffs can—or do—point. Dr. Grossmann's Plaintiffs' allegations are focused on the same set of events in October 2009—which Plaintiffs assert are both the negligent act and the fraudulent concealment. This case is precisely the type of case intended to be barred by the statute of repose. If the Court of Appeals decision is allowed to stand, the statute of repose will almost never apply in failure to diagnose/disclose cases, as any plaintiff can simply allege fraudulent concealment. Any subsequent treatment would reset the clock and serve as the basis for a Plaintiff to claim the undisclosed/undiagnosed issue was concealed. As this Court has previously advised, this simply cannot be or there would be no statute of limitations or repose on such cases.

The negligence forming the foundational basis of their liability claim—Dr. Grossmann's alleged failure to disclose Linda Berry's concerning CT scan findings—is the same conduct to which they point as constituting fraudulent concealment. Failure to disclose information to a plaintiff ***cannot*** be the basis for fraudulent concealment. *Van Overbeke*, 540 N.W.2d at 276–77; *see also Skadburg*, 911 N.W.2d 786. "If it could be, there would effectively be no statute of limitations for negligent failure to inform a patient (fraud as basis of liability cannot also be basis for finding of fraudulent concealment.)." *Id.* As such, this Court should reverse the Court of Appeals and follow its own precedent, which requires affirmation of the district court's order granting summary judgment and dismissing this untimely case.

CONCLUSION

Defendants-Appellees respectfully request the Court accept further review to address the errors of the Court of Appeals and confirm the state of the law in Iowa by affirming the district court and finding Plaintiffs' claims time-barred pursuant to the statute of repose.

CERTIFICATE OF COST

I, Joseph F. Moser, certify that there was no cost to reproduce copies of the preceding Brief because the appeal is being filed exclusively in the Appellate Courts' EDMS system.

CERTIFICATE OF COMPLIANCE

This application complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.1103(4) because:

This application has been prepared in a proportionally spaced typeface using Times New Roman size 14 font and contains 5,180 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/Joseph F. Moser October 26, 2021

CERTIFICATE OF FILING AND SERVICE

I hereby certify:

That I filed the foregoing Final Brief with the Clerk of the Supreme Court of Iowa by EDMS on October 26, 2021, which constitutes service on all other parties to this appeal pursuant to Iowa Ct. R. §16.315(1)(b).

/s/Joseph F. Moser