IN THE SUPREME COURT OF IOWA

No. 20–1124

Submitted March 24, 2022—Filed April 22, 2022

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

Appellants,

vs.

PAUL GROSSMANN, and **CATHOLIC HEALTH INITIATIVES IOWA, CORP.** d/b/a **MERCY MEDICAL CENTER, MERCY MEDICAL CENTER WEST LAKES,** and **MERCY SURGICAL AFFILIATES,**

Appellees.

On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Polk County, David Porter, Judge.

The defendants seek further review of a court of appeals decision reversing the district court's grant of summary judgment in a medical malpractice action. **DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT AFFIRMED.**

Oxley, J., delivered the opinion of the court, in which all justices joined.

Steve Hamilton (argued) and Molly M. Hamilton of Hamilton Law Firm, P.C., Clive, for appellants.

Joseph F. Moser (argued) and Stacie M. Codr of The Finley Law Firm, P.C., Des Moines, for appellees.

OXLEY, Justice.

A benign cyst on Linda Berry's right kidney was first detected on a computerized tomography (CT) scan taken at Mercy Medical Center[1] in 2004. Ms. Berry visited Mercy over the next several years for a variety of reasons, and the cyst was noted as an incidental finding on subsequent CT scans, including one taken during a visit to the ER on October 1, 2009, when Dr. Paul Grossmann treated her for colitis. This time, a radiologist noted the mass had grown in size from the prior scans, suggesting the mass should be further evaluated. But, according to the plaintiffs, no one mentioned the growing cyst to Ms. Berry or her primary care physician until another CT scan was taken when she broke her shoulder seven years later. By then it was too late. Ms. Berry was treated for renal cancer in April 2016, the cancer metastasized to her bones, and she passed away from cancer in 2019.

Prior to her death, in 2018 Ms. Berry filed a medical malpractice action against Dr. Grossmann and the Mercy affiliates for failing to disclose the kidney mass in October 2009. But she ran up against Iowa's six-year statute of repose found in Iowa Code section 614.1(9) (2018), which barred her claims because she initiated her case more than six years after Dr. Grossmann's actions. Ms. Berry's estate asserts the defendants should be equitably estopped from raising the statutory bar under the doctrine of fraudulent concealment. Fraudulent

[1]Defendant Catholic Health Initiatives Iowa, Corp. operates hospital facilities known as Mercy Medical Center, Mercy Medical Center–West Lakes, and Mercy Surgical Affiliates. We refer to these entities collectively as "Mercy." Dr. Grossmann is an emergency room doctor affiliated with the Mercy entities. The claims against the Mercy entities are all derivative of the claims against Dr. Grossmann, and we consider the claims collectively against the defendants.

concealment requires just that—fraudulent, or intentional, concealment of the plaintiff's cause of action. And the concealment must be distinct from the underlying act being concealed. Otherwise, there would never be a time limit for failure-to-disclose-type claims. When the underlying cause of action is one for failure to disclose a medical condition, as here, a defendant's continued failure to disclose the condition that goes to the heart of the plaintiff's underlying claim does not meet the requirement for an independent and subsequent act of concealment to trigger equitable estoppel.

The court of appeals read the requirement for an independent act of concealment too narrowly. The acts of concealment claimed by the estate are the same acts by Dr. Grossmann that form the basis of the estate's underlying claims of negligence. The fraudulent concealment doctrine therefore does not apply, and the defendants are not estopped from asserting the statute of repose defense, which undisputedly applies to the facts of this case. For the reasons explained below, we reverse the court of appeals and affirm the district court's grant of summary judgment for the defendants.

I.

We recite the facts supported by the record in the light most favorable to the plaintiffs in considering whether the defendants were entitled to summary judgment on their statute of repose defense. Berry's primary care physician was with Broadlawns Family Medicine, and she used Mercy for emergency care. In 2004, Berry was hospitalized at Mercy for abdominal pain, and a CT scan showed a mass on her right kidney that was determined to be a benign cyst. Berry

received another CT scan at Mercy in December 2006 when she was seen for a urinary tract infection. This CT scan indicated her "right kidney is unchanged with a stable right renal cyst." Berry was not informed of the mass on her right kidney at either visit.

On October 1, 2009, Berry went to the Mercy emergency room complaining of constipation and nausea. Dr. Paul Grossmann, the on-call emergency room doctor, ordered a CT scan based on concerns Berry might have acute appendicitis, diverticulitis, or an incarcerated hernia. The initial CT scan reading revealed no abnormalities other than constipation, and Berry was sent home with medication for constipation. However, a final reading of the CT scan revealed that Berry had mild sigmoid colitis. Dr. Matthew Severidt, a Mercy resident working with Dr. Grossmann, called Berry's daughter, Elizabeth Downing, as they were driving home and told her, "You need to bring your mom back. Not everything was okay on the CT scan. Come back." Berry was prescribed an antibiotic for the colitis and again discharged with an appointment to follow up with Dr. Grossmann about the colitis on October 6.

The final reading of the CT scan also showed a large exophytic mass on Berry's right kidney that had increased in size from the scans taken in 2004 and 2006. Dr. Severidt wrote an addendum to Berry's chart noting the mass and stating: "Suggest MRI for evaluate." He also noted, "Patient will follow up with Dr. Grossmann in one week at which time further evaluation of right kidney can be undertaken." Although Dr. Severidt noted, "This was discussed with patient who voiced understanding," nothing was mentioned about the mass in Berry's

discharge papers, and Berry and Downing both denied ever being told about the mass despite the unusual request to return to the hospital because "not everything was ok" with the CT scan. We assume the mass was not discussed with Berry for purposes of reviewing the summary judgment ruling.

Berry went back to Mercy's emergency room late on October 3 with complaints of increased abdominal pain and constipation. Another CT scan showed the colitis was responding to the antibiotics, again depicting the mass on Berry's right kidney. Although the mass was deemed not to be the cause of Berry's pain, Dr. Roe, one of Dr. Grossmann's partners who was on call that night, wrote in his consultation notes: "Plan: Recommended follow up for R. kidney cystic mass with Dr. Grossmann, already discussed with patient on 10/1/09." A copy of the October 3 CT scan results in Berry's patient chart contained Dr. Grossmann's signature, indicating his acknowledgment of the results and recommendations for further testing. But again, Berry was not informed of the right kidney mass seen on the CT scan and was not informed that further testing was recommended.

On October 6, Berry saw Dr. Grossmann for her follow-up appointment concerning the colitis. Dr. Grossmann examined Berry and scheduled a colonoscopy. Dr. Grossmann's dictated notes made no mention of consulting with Berry about the kidney mass. Dr. Grossmann dictated and sent a letter to Berry's primary care physician at Broadlawns regarding his diagnosis and treatment of Berry's colitis. At his deposition, Dr. Grossmann explained that the letter was intended to inform Berry's primary care physician about the treatment

he provided. Dr. Grossmann claims he told Berry about the kidney mass at the October 6 appointment but he did not document it in his notes or the letter to her primary care physician because he was not consulted to treat the mass and it was a urology issue that was outside the scope of the treatment he could provide. Downing accompanied Berry to the October 6 appointment, and both she and Berry testified Dr. Grossmann never mentioned the mass, a fact we again accept as true. The estate's expert opines that Dr. Grossmann violated the standard of care because even incidental findings on a CT scan should be reported to a patient's primary care physician for follow-up.

After the colonoscopy and further evaluation of the colitis treatment, Dr. Grossmann discharged Berry from his care in December, informing her that her conditions had resolved. At an April 15, 2010 appointment, Berry's primary care physician read Dr. Grossmann's October 6 letter to Berry, which did not mention the right kidney mass or recommend further testing. Despite the notes in Berry's chart about the kidney mass, no additional testing was conducted.

Fast forward six years to April 24, 2016. Berry fell, severely injuring her shoulder and sending her back to Mercy's emergency room. Given Berry's bone abnormalities and her medical history, the ER doctor, Dr. Todd Peterson, recommended to Berry's primary care physician that Berry follow up with an orthopedic surgeon at the University of Iowa Hospitals and Clinics. As relevant here, a CT scan of Berry's chest, abdomen, and pelvis taken at the University Hospitals revealed that the right kidney mass had grown to 4.4 cm and was concerning for cystic renal cell neoplasm. Again, Berry was not informed of the

mass during her treatment, but a nurse discharging Berry happened to mention the kidney mass to her. Berry claims this was the first time anyone ever informed her of the mass on her kidney.

On April 29, Berry was diagnosed with metastatic renal cell carcinoma through a CT biopsy at the University Hospitals. In November 2016, Berry underwent a partial right nephrectomy to treat her renal cancer. Although the surgery was initially successful, a spinal tumor was discovered in July 2017. Berry underwent surgery, chemotherapy, and radiation treatment. Berry passed away on May 22, 2019, from renal cell carcinoma with metastasis to the bone.

Prior to her death, Berry sued Dr. Grossmann, Mercy Surgical Affiliates, and Catholic Health Initiatives Iowa, Corp. d/b/a Mercy Medical Center on April 10, 2018. She asserted medical malpractice claims related to Dr. Grossmann's alleged failure to disclose information about the kidney abnormalities revealed on the CT scans to Berry or her primary care physician, preventing Berry from seeking further testing and care. Her expert opined that even though the kidney mass was an incidental finding to Berry's treatment for colitis, the standard of care required Dr. Grossmann to inform Berry of the mass as well as follow up directly with Berry's primary care physician, neither of which was documented in Dr. Grossmann's notes. Berry alleged that having ordered the CT scans, Dr. Grossmann was responsible for all findings, including findings incidental to his treatment. Berry also alleged that Dr. Grossmann's failure to inform her about the nature of her medical issues amounted to fraudulent

misrepresentations. Following Berry's death in May 2019, her daughters, as coadministrators of her estate, were substituted as plaintiffs.

The defendants moved for summary judgment on the basis that the claims were precluded by the six-year statute of repose for medical malpractice claims. *See* Iowa Code § 614.1(9)(*a*). The estate argued that Dr. Grossmann's actions amounted to fraudulent concealment, such that the defendants should be estopped from raising the statute of repose defense. The district court granted the defendants' motion on July 17, 2020, rejecting the plaintiffs' reliance on fraudulent concealment to avoid the six-year bar to its claims. The estate appealed, and we transferred the case to the court of appeals. The court of appeals reversed the district court's grant of summary judgment, holding there was a genuine issue of material fact concerning whether Dr. Grossmann's fraudulent concealment precluded the medical professionals' statute of repose defense. We granted the defendants' application for further review.

II.

We review a district court's grant of summary judgment for correction of errors of law. *Skadburg v. Gately*, 911 N.W.2d 786, 791 (Iowa 2018). Summary judgment is proper if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Christy v. Miulli*, 692 N.W.2d 694, 699 (Iowa 2005). The moving party must show an absence of a genuine issue of material fact. *Skadburg*, 911 N.W.2d at 791. We view the facts in the record in the light most favorable to the nonmoving party, and we draw every legitimate inference in their favor. *Id.*

an architect for negligently designing a building constructed in 1971 that collapsed in 1991 even though there was no injury, and therefore no legal cause of action, until the building's collapse); *see also Albrecht v. Gen. Motors Corp.*, 648 N.W.2d 87, 91–94 (Iowa 2002) (holding that the fifteen-year statute of repose in section 614.1(2A) precluded products liability claims against General Motors premised on a defective seat belt that contributed to a minor's injuries in a car accident brought more than fifteen years after the car was purchased).

Iowa Code section 614.1(9) contains both a statute of limitations and a statute of repose for medical malpractice claims. A plaintiff can bring a medical malpractice action within two years from the time she knows, or through reasonable diligence should know, of the injury or death for which she claims damages. Iowa Code § 614.1(9)(*a*). This is a statute of limitations, measured from the accrual of the plaintiff's cause of action. If this was the only statutory limitation, Berry's claims would arguably have been timely since she filed this lawsuit within two years of being told about the mass on her kidney.

But section 614.1(9)(*a*) goes on to provide: "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," with an exception not relevant here. Iowa Code § 614.1(9)(*a*). This is a statute of repose, measured from the time of the defendant's actions. *See Est. of Anderson v. Iowa Dermatology Clinic, PLC*, 819 N.W.2d 408, 414 (Iowa 2012) ("Unlike the statute of limitations, under which a claim accrues for injuries caused by medical negligence when the plaintiff knew, or through the use of reasonable diligence

should have known, of the injury, a statute of repose runs from the occurrence of the act causing the injury."). The six-year bar 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). While the statute of repose can have harsh consequences by cutting off a cause of action before it is discovered or even arises, it "reflect[s] the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct." *Est. of Anderson*, 819 N.W.2d at 419 (quoting *Albrecht*, 648 N.W.2d at 91); *see also Schlote v. Dawson*, 676 N.W.2d 187, 194 (Iowa 2004) (recognizing the statute "severely restricts the rights of unsuspecting patients who may be injured because of unnecessary and excessive surgery" but "it is up to the legislature and not this court to address this problem"); *Albrecht*, 648 N.W.2d at 94 ("When a period of repose expires and bars a claim before it accrues (as occurred here), there is nothing a potential claimant—adult or minor—can do to avoid the bar.").

The statute of repose is an affirmative defense to a malpractice claim. And despite its rigid bar, certain equitable principles may prevent, or estop, a defendant from raising the defense. One such equitable doctrine, fraudulent concealment, arises "when by his own fraud [the defendant] has prevented the other party from seeking redress within" the applicable statutory period. *Est. of Anderson*, 819 N.W.2d at 414 (quoting *Christy*, 692 N.W.2d at 702) (noting that the doctrine of fraudulent concealment has been part of our jurisprudence for over a century and survived codification of the statute of repose in section

614.1(9)). Fraudulent concealment "is a form of equitable estoppel that . . . allows a plaintiff to pursue a claim that would be otherwise time barred under the statute of repose." *Id.* As we explained in *Christy v. Miulli*, "equitable estoppel has nothing to do with the running of the limitations period or the discovery rule; it simply precludes a defendant from asserting the statute as a defense when it would be inequitable to permit the defendant to do so." 692 N.W.2d at 701.

A plaintiff seeking to estop a defendant from raising a statute of repose defense must prove four things: "(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." *Id.* at 702 (quoting *Meier v. Alfa–Laval, Inc.*, 454 N.W.2d 576, 578–79 (Iowa 1990)). 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.*

Equitable estoppel is not premised on the fact that the defendant has harmed the plaintiff but on the fact that—having harmed the plaintiff—the defendant also concealed the existence of a cause of action. Recognizing this distinction, fundamental "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." *Id.* The existence of a fiduciary duty, such as that between a physician and his patient, "relaxes the requirement of *affirmative*

concealment," *Est. of Anderson*, 819 N.W.2d at 415 (emphasis added), such that silence can supply the concealment, but "the act of concealment must [still] be independent of and subsequent to the original wrongdoing establishing liability." *Skadburg*, 911 N.W.2d at 798.

A review of our cases demonstrates the distinction between an underlying liability-producing act and a subsequent, independent act of concealment. In *Christy*, a doctor who caused a brain bleed during a biopsy procedure reported in the patient's medical records that the procedure was performed without complications and told the patient's spouse the bleed occurred away from the biopsy site, suggesting it was caused by an unrelated infection. 692 N.W.2d at 698–99. The acts of concealment—misleading the wife about the location of the bleed relative to the biopsy and recording the procedure was completed without complications in the medical records—were independent and subsequent to the liability-creating act of negligently performing the biopsy. *Id.* at 700–04. In *Skadburg v. Gately*, an attorney erroneously told his client, who was the administrator of her mother's estate, to use proceeds from life insurance and 401(k) accounts to pay the estate's debts even though those assets were exempt and the estate's debts exceeded its assets. 911 N.W.2d at 790. The attorney's silence in response to the client's later communications lamenting that she had used exempt assets to pay the estate's debts satisfied the requirement for an act of concealment that was independent and subsequent to the underlying negligence of improperly advising the client to use exempt assets to pay the estate's debts. *Id.* at 799–800.

On the other hand, where a physician unnecessarily removed a patient's voice box and failed to tell the patient that other less intrusive treatments were available, we held that "failure to make those disclosures lies at the heart of the Schlotes' claims" so that the "failure was not an independent, subsequent act of concealment." *Schlote*, 676 N.W.2d at 195. In *Van Overbeke v. Youberg*, an obstetrician failed to give RHoGAM to a pregnant patient who was RH negative to prevent blood sensitization before delivering her baby. 540 N.W.2d 273, 274–75 (Iowa 1995), *abrogated on other grounds by Christy*, 692 N.W.2d at 701–02. In the patient's subsequent medical malpractice action, we explained that where "the doctor's failure to disclose to the plaintiff that she needed the RHoGAM injection lies at the heart of her claim," the "[f]ailure to disclose that need, as a ground of liability, cannot [also] be the basis for fraudulent concealment." *Id.* at 276–77. "If it could be, there would effectively be no statute of limitations for negligent failure to inform a patient." *Id.* at 277. This reasoning follows from cases addressing the application of fraudulent concealment to a fraud claim. Absent "evidence of false or misleading conduct by [the defendant], other than the alleged fraud itself, that dissuaded the [plaintiffs] from investigating a possible claim or that caused them to refrain from filing suit," fraudulent concealment does not preclude a statute of limitations defense to a fraud claim. *Hallett Const. Co. v. Meister*, 713 N.W.2d 225, 231–32 (Iowa 2006).

This case follows the pattern of *Schlote* and *Van Overbeke* rather than *Christy* and *Skadburg*. The liability-producing conduct was Dr. Grossmann's alleged failure to disclose to Berry the concerning findings on her CT scan and

to inform her primary care physician about the recommendation for further evaluation of the kidney mass. But the plaintiffs then rely on these same acts—Dr. Grossmann's failure to tell Berry about the mass when she returned to the hospital on October 1 or saw him in his office on October 6 as well as Dr. Grossmann's October 6 letter to Berry's primary care physician—as his acts of concealment. The court of appeals concluded these separate opportunities to disclose the kidney mass provided the necessary temporal separation between the initial failure to disclose the Mercy radiologist's October 1 recommendation for further evaluation of the mass, and the later concealment by Dr. Grossmann after gaining actual knowledge of the mass but concealing the information from Berry in subsequent direct interactions. The court of appeals similarly determined that Dr. Grossmann's October 6 letter to Berry's primary care physician constituted a further act of concealment.

The court of appeals' focus on the temporal separation overlooks the requirement that the concealment also be independent of the liability-producing act. Fraudulent concealment comes into play when a defendant conceals a cause of action against him. That Dr. Grossmann had multiple opportunities to disclose the kidney mass just means he acted negligently on successive occasions—a point made by Berry's expert. This is not like *Skadburg*, where the attorney first gave his client bad advice about paying the estate's debts with exempt assets and then stood silently by when she lamented the loss of funds from the estate. *See* 911 N.W.2d at 799–800. The silence in *Skadburg* was independent of the prior negligent advice. Rather, this is like *Schlote v. Dawson*,

where "failure to make those disclosures lies at the heart of [Berry's] claims; such failure was not an independent, subsequent act of concealment." 676 N.W.2d at 195; *see also Van Overbeke*, 540 N.W.2d at 276–77 ("Failure to disclose that need, as a ground of liability, cannot [also] be the basis for fraudulent concealment.").

Berry is essentially asserting a substantive claim of fraudulent concealment premised on a duty by Dr. Grossmann to disclose the incidental results of her CT scan. But she brought her claim more than six years after Dr. Grossmann failed to make that disclosure. To allow her claim to go forward would effectively eviscerate the statute of repose for claims of failure to inform a patient. *See Van Overbeke*, 540 N.W.2d at 276–77. To avoid the statute of repose, Berry must identify some act of concealment that is independent of the duty to disclose the CT scan results. Unable to do so, Berry cannot rely on fraudulent concealment to estop defendants from asserting the six-year statute of repose as a defense to Berry's claims.

Berry brought her claims more than six years after the defendants' conduct, and the claims are barred by the statute of repose. *See* Iowa Code § 614.1(9)(*a*). The district court properly granted summary judgment, and the court of appeals erred in reversing.

IV.

For the foregoing reasons, we vacate the court of appeals decision and affirm the district court's grant of summary judgment in favor of the defendants.

DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT AFFIRMED.

State of Iowa Courts

Case Number	Case Title
20-1124	Estate of Berry v. Grossman

Electronically signed on 2022-04-22 13:35:17

IN THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY

ELIZABETH DOWNING and MARCELLA BERRY, as Co-Administratrix of the ESTATE OF LINDA BERRY, *Plaintiffs,* v. PAUL GROSSMAN, M.D., and CATHOLIC HEALTH INITIATIVES IOWA CORP d/b/a MERCY MEDICAL CENTER, MERCY MEDICAL CENTER—WEST LAKES & MERCY SURGICAL AFFILIATES, *Defendants.*	Case No. LACL140875 **ORDER:** Ruling on Defendants' Motion for Summary Judgment

On March 13, 2020, this matter came before the Court for hearing on Defendants' Motion for Summary Judgment. Plaintiffs Elizabeth Downing and Marcella Berry, as co-administratrix of the Estate of Linda Berry (collectively "Plaintiffs"),[1] were represented by attorneys Steve Hamilton and Molly Hamilton. Defendants Paul Grossman, M.D. ("Dr. Grossman"), Catholic Health Initiatives Iowa Corp d/b/a Mercy Medical Center–West Lakes, and Mercy Surgical Affiliates (collectively "Defendants") were represented by attorney Joseph Moser. Having considered the parties' respective pleadings, the written and oral arguments of counsel, and the relevant law, the Court makes the following ruling:

I. INTRODUCTION

A. FACTUAL BACKGROUND

Linda Berry ("Ms. Berry") had two adult daughters, both of whom are plaintiffs in this case.[2] In 2004, Ms. Berry sought treatment at Mercy Hospital after experiencing abdominal pain.[3] At that time, Doctor of Osteopathic Medicine Josh Smith, a general

[1] For clarity, when the Court refers to each plaintiff individually, it references them as "Ms. Downing" and "Marcella," the latter by her first name because she shares the same surname as the decedent, Linda Berry.

[2] Pls.' Third Amended Pet. at ¶¶ 67-68 (hereinafter "Pet."); Berry Depo. at p. 8:22-25; Pls.' App. at 61.

[3] Pet. at ¶¶ 9-14

surgeon, was asked to consult on the case.[4] Dr. Smith, D.O., subsequently ordered a computed tomography scan ("CT") of Ms. Berry's abdomen and pelvis, which revealed, among other things, a mass on her right kidney.[5] Specifically, the CT revealed an "approximately 1.0 x. 1.5 cm nodular density arising from the lower pole of the right kidney."[6] The radiologist noted the presence of this mass and recommended a "renal ultrasound to confirm that this represents a simple cyst."[7] According to Plaintiffs' expert report, Ms. Berry subsequently received a renal ultrasound, which determined the mass was, in fact, a cyst.[8] These results were documented and provided to Ms. Berry's primary care physician at Broadlawns Medical Clinic.[9] Ms. Berry was then discharged from Mercy Hospital and returned home.[10] Plaintiffs allege neither Dr. Smith, D.O., nor any Mercy staff disclosed or informed her of the mass on her right kidney.[11]

In February 2006, Ms. Berry returned to Mercy Surgical Affiliates for consultation of a ventral hernia.[12] Dr. Dennis Whitmer consulted on her case and subsequently performed the necessary surgical repair.[13] As alleged, at no point during the course of this treatment did Dr. Whitmer or any of the hospital staff inform Ms. Berry of the cystic mass on her kidney or of the potential need for further testing related to the mass.[14]

Approximately ten months later, on December 9, 2006, Ms. Berry sought treatment at Mercy Medical Center after experiencing pain related to "malaise, fever, and left flank

---

[4] Pet. at ¶ 10.

[5] Pet. at ¶¶ 11-12.

[6] Pls.' App. at 94 (capitalization altered for readability); Pet. at ¶¶ 11-12.

[7] Pet. at ¶ 12; Pls.' App. at 94-95.

[8] Pls.' App. at 118 (marked as Pls.' Ex. 8, p. 2) (Pls.' Expert Rep.) ("The only written documentation that was sent to Ms. Berry's primary doctor came in 2004, [which] mentions 'CT with renal nodule- found to be a cyst on [ultrasound].'").

[9] *Id.*

[10] Pet. at ¶¶ 13-14.

[11] Pet. at ¶ 13; Berry Depo. at pp. 32:14-33:11; Pls.' App. at 67-68.

[12] Pet. at ¶ 15.

[13] Pet. at ¶ 16.

[14] Pet. at ¶ 17.

pain."[15] Dr. Josh Smith, M.D., then consulted her for treatment, ordering another CT scan.[16] This CT, as before, revealed the cystic mass on Ms. Berry's right kidney.[17] She was then treated for a urinary tract infection, which was believed to have caused her aforementioned symptoms.[18] As alleged, at no point did Dr. Smith, M.D., or any of the hospital staff inform Ms. Berry of the cystic kidney mass.[19]

On October 1, 2009, Ms. Berry returned to Mercy Hospital after experiencing lower abdominal pain, nausea, and constipation.[20] Dr. Grossman was then asked to consult on the case.[21] Pertinent to this proceeding, Dr. Grossman supervised a group of general surgery residents, including one Dr. Matthew Severdit ("Dr. Severidt").[22] Dr. Grossman ordered a CT to determine whether Ms. Berry's pain required surgical intervention, specifically based on his concerns that Ms. Berry might have an acute appendicitis, diverticulitis, or an incarcerated hernia.[23] Immediately after the CT, an initial radiological evaluation determined there were no abnormalities other than signs of constipation.[24] Based on those initial findings, Ms. Berry was recommended and was, in fact, discharged from the Mercy emergency room with medication to treat her constipation.[25]

Ms. Berry's CT scan was then evaluated again in order to complete the final radiological report.[26] Upon further examination, the radiologist issued his report noting the CT showed a "large exophytic cystic mass" on Ms. Berry's right kidney that had increased in size since the 2004 and 2006 CT scans, as well as a finding that Ms. Berry had

---

[15] Pet. at ¶ 18.

[16] Pet. at ¶¶ 19, 21.

[17] Pet. at ¶¶ 19-20.

[18] Pet. at ¶¶ 21-22.

[19] Pet. at ¶¶ 20-22; Berry Depo. at pp. 32:14-33:11; Pls.' App. at 67-68.

[20] Pet. at ¶ 23; Defs.' Undisputed Material Facts at ¶ 6; Marcella Depo. at p. 32:9-25; Pls.' App. at 81.

[21] Pet. at ¶ 24; Defs.' Undisputed Material Facts at ¶ 7; Berry Depo. at pp. 13:14-14:8; Pls.' App. at 63.

[22] Pet. at ¶¶ 26-27; Defs.' Undisputed Material Facts at ¶¶ 9-19, 22-27.

[23] Pet. at ¶ 25; Defs.' Undisputed Material Facts at ¶¶ 8, 17; Grossman Depo. at pp. 64:11-65:18, 71:7-21 (Defs.' Ex. *I* at pp. 16-18); Berry Depo. at p. 15:6-15; Pls.' App. at 63.

[24] Defs.' Undisputed Material Facts at ¶¶ 11-12.

[25] Pet. at ¶ 26; Defs.' Undisputed Material Facts at ¶ 13; Defs.' Ex. H (previously marked Pls.' Ex. 4) (Oct. 1, 2009 Initial Discharge Instructions); Downing Depo. at pp. 32:13-33:4; Pls.' App. at 39-40.

[26] *See* Pet. at ¶ 25; Defs.' Undisputed Material Facts at ¶¶ 14-17.

"mild sigmoid colitis of infections or inflammatory etiology."[27] Based on these findings, it was recommended to Dr. Grossman and Dr. Severidt that Ms. Berry undergo further testing to determine if the mass was cancerous.[28]

Dr. Severidt, after consulting Dr. Grossman, was directed to call Ms. Berry and ask her to return to the Hospital to discuss the findings of the final radiology report.[29] Dr. Severidt then contacted Ms. Downing, who was Ms. Berry's emergency contact and with her at the time, asking them to return immediately to Mercy Hospital.[30] According to the appendices in Ms. Berry's medical records and Dr. Severidt's deposition testimony, although it is disputed, Dr. Severidt advised Ms. Berry of the findings, providing that the CT found she had sigmoid colitis, and that she needed to schedule a follow-up appointment with Dr. Grossman to undergo treatment for colitis and discuss the discovered kidney mass.[31] According to the deposition testimony of both Dr. Grossman and Dr. Severidt, as general surgeons, they do not treat and are not experts in treating kidney masses that are malignant or otherwise.[32] According to the same appendices dictated by Dr. Severidt and approved by Dr. Grossman as the supervising physician, Ms. Berry confirmed that she understood the directions provided.[33] She then scheduled the follow-up appointment with Dr. Grossman, as directed, for October 6, 2009. Plaintiffs allege now that Ms. Berry was not informed at this time of the mass on her kidney on October 1.[34]

On October 3, 2009, prior to her follow-up appointment with Dr. Grossman, Ms. Berry returned to the Mercy Medical Center emergency room due to continued abdominal

---

[27] Pet. at ¶ 25; Defs.' Undisputed Material Facts at ¶ 17.

[28] Pet. at ¶ 25; Defs.' Undisputed Material Facts at ¶ 17.

[29] Pet. at ¶ 27; Defs.' Undisputed Material Facts at ¶¶ 18-20; Grossman Depo. at pp. 114:5-115:18 (Defs.' Ex. I at p. 29); Severidt Depo. at p. 31:14-20; Downing Depo. at 33:5-36:9; Pls.' App. at 40.

[30] Downing Depo. at pp. 37:21-39:2; Pls.' App. at 41.

[31] Pet. at ¶ 26; Defs.' Undisputed Material Facts at ¶¶ 22-27; Defs.' Ex. F (previously marked as Pls.' Ex. 3) (Dr. Severidt's Oct. 1, 2009, Addendum to Ms. Berry's Patient Chart) (stating "Patient will follow-up [with] Dr. Grossman" regarding her kidney mass and colitis, and that "this was discussed with the patient who voiced understanding and agreed."); Severidt Depo. at pp. 29:18-30:12; *see also* Pls.' App. at 58.

[32] Defs.' Undisputed Material Facts at ¶ 26-27.

[33] Defs.' Undisputed Material Facts at ¶¶ 22-27; Defs.' Ex. F; Severidt Depo. at pp. 29:18-30:12.

[34] Pet. at ¶ 26; Downing Depo. at pp. 34:15-36:9; Berry Depo. at pp. 32:14-33:11; Pls.' App. at 40, 67-68; *but see* Grossman Depo. at pp. 80:7-85:15 (Defs.' Ex. *I* at pp. 20-22).

pain and constipation.[35] During this visit, on the day after being admitted, she received another CT scan in order to determine the cause of Ms. Berry's ailments.[36] The CT noted the presence of the same mass on Ms. Berry's right kidney and that there was improvement of the sigmoid colon pericolonic inflammation that was being treated with antibiotics by Dr. Grossman.[37] Dr. Roe was one of Dr. Grossman's partners and the physician on-call the night of Ms. Berry's admittance. Dr. Grossman did not consult and was not present during this hospital stay.[38] However, Dr. Roe noted the following in his consultation notes: "Plan: Recommend [follow-up] for [right] kidney cystic mass. [Contact] Dr. Grossman, already discussed [appointment] on 10/1/09."[39] Ms. Berry was discharged on October 4.[40] Neither Ms. Downing nor Marcella drove Ms. Berry to the Hospital, and Ms. Downing was only at the appointment between the hours of midnight and four in the morning.[41] According to their deposition testimony, Marcella does not recall being present during Ms. Berry's October 3-4 stint in the Hospital at all, and Ms. Downing did not speak with any physicians regarding her mother's treatment or testing.[42] Plaintiffs now allege, again, that Ms. Berry was not informed on the mass on her kidney during this visit.[43]

On October 6, 2009, Ms. Berry, along with Ms. Downing, arrived for her scheduled follow-up with Dr. Grossman regarding her colitis.[44] At this appointment, Dr. Grossman directly examined Ms. Berry.[45] However, nothing in his dictated notes from this

---

[35] Pet. at ¶ 28.

[36] *See* Pet. at ¶ 29; Pls.' App. at 59 (radiology report for Oct. 4, 2009 CT ordered by resident Dr. Rachel Fleenor).

[37] Pet. at ¶ 29; Defs.' Ex. K (previously marked as Pls.' Ex. 19) (Oct. 4, CT Radiology Rep.); Pls.' App. at 59.

[38] Defs.' Undisputed Material Facts at ¶ 31-32.

[39] Defs.' Ex. J (previously marked as Pls.' Ex. 20) (Dr. Roe's Patient Chart Notes for Oct. 3-4, 2009 consultation).

[40] Defs.' Ex. G (previously marked as Pls.' Ex. 1) (Ms. Berry's Oct. 4, 2009 Discharge Instructions).

[41] *See* Downing Depo. at pp. 40:11-43:4; Marcella Depo. at pp. 30:19-34:5; Pls.' App. at 41-42, 81-82.

[42] Downing Depo. at pp. 40:11-43:4; Marcella Depo. at pp. 30:19-34:5; Pls.' App. at 41-42, 81-82.

[43] Pet. at ¶ 31; Berry Depo. at pp. 32:14-33:11; Pls.' App. at 67-68.

[44] Pls.' App. at 99 (Ms. Berry's Patient Form, stating the reason for seeing Dr. Grossman and her current symptoms are for "colitis") (marked as Pls.' Ex. 12); Defs.' Undisputed Facts at ¶¶ 33-34; Downing Depo. at pp. 43:5-44:5; Berry Depo. at pp. 18:3-20:12; *see* Pls.' App. at 42, 64.

[45] Pls.' App. at 99; Pet. at ¶ 32; Defs.' Undisputed Material Facts at ¶ 33.

appointment expressly state he consulted with Ms. Berry regarding her kidney mass.[46] Ms. Berry was then scheduled for a colonoscopy, which was to be performed by Dr. Grossman.[47]

In a letter sent by Dr. Grossman's office to Ms. Berry's primary care physician, Dr. Mahmoud Nikoueiha ("Dr. Nikoueiha"), dated the same day as her follow-up appointment, Ms. Berry's colitis was noted, as well as her treatment plan for colitis.[48] Importantly, the letter states that it was not reviewed by Dr. Grossman prior to being sent.[49] Even so, at his deposition, Dr. Grossman claims he did, in fact, discuss the discovered kidney mass with Ms. Berry, but he did not note it in his dictated notes or the letter, as it was outside the scope of treatment he could provide her, and he was not consulted to treat the mass, as it is a urology issue and a consideration for Ms. Berry's primary care physician.[50] Like before, Plaintiffs now claim that Dr. Grossman did not discuss the mass with Ms. Berry at this time.[51] In particular, and of significance to this proceeding, Plaintiffs rely on this letter as an act of concealment by Dr. Grossman.[52]

On November 10, 2009, Ms. Berry underwent a colonoscopy by Dr. Grossman.[53] Dr. Grossman's notes and report reflected that "[t]he entire examined colon appeared normal."[54] Then after, Ms. Berry was asked to follow-up at a later date with Dr. Grossman to ensure her colitis was properly treated.[55] After consultation and final testing, Dr.

---

[46] *See* Defs.' Undisputed Material Facts at ¶¶ 34-40

[47] Pls.' App. at 64, 99; Pet. at ¶ 38; Defs.' Undisputed Material Facts at ¶ 41; Berry Depo. at p. 20:10-22.

[48] Pls.' App. at 110; Pet. at ¶¶ 32-35; Defs.' Undisputed Material Facts at ¶¶ 34-36; Defs.' Ex. L (previously marked as Pls.' Ex. 11) (Oct. 6, 2009 Letter from Dr. Grossman to Broadlawns Family Medicine); Grossman Depo. at pp. 48:6-51:14 (Defs.' Ex. I at pp. 12-13).

[49] Pls.' App. at 110 (stating "Letter is mailed before doctor's review to expedite letter."); Defs.' Ex. L.

[50] Defs.' Undisputed Material Facts at ¶¶ 36-40; Grossman Depo. at pp. 49:15-18, 84:7-85:8, 89:16-90:9.

[51] *See* Berry Depo. at pp. 32:14-33:11; Pls.' App. at 67-68.

[52] Pls.' App. at 110; Pet. at ¶ 35; Defs.' Ex. L.

[53] Pet. at ¶¶ 38-39; Pls.' App. at 101-03 (Dr. Grossman's Colonoscopy Rep.) (marked as Pls.' Ex. 14); Berry Depo. at pp. 23:6-25:21; *see* Pls.' App. at 65-66.

[54] Grossman Depo. at pp. 56:1-59:25 (Defs.' Ex. I at pp. 14-15); *see* Downing Depo. at 47:16-48:21; Berry Depo. at p. 25:3-6; Pls.' App. at 43, 66, 103.

[55] Pet. at ¶¶ 40-42; Grossman Depo. at pp. 57:12-59:17 (Defs.' Ex. I at p. 15).

Grossman discharged Ms. Berry from his care and terminated any further treatment between November 10 and December 30, 2009.[56]

Seven years later, on April 24, 2016, Ms. Berry had difficulty standing up while in the bathroom of her home.[57] Because of this, she fell and seriously injured her shoulder.[58] Ms. Berry was then rushed to the Mercy Medical Center—West Lakes emergency room for treatment, where she was diagnosed with a "displaced fracture of the left humeral head and a lytic lesion involving the humeral head and neck."[59] Relevantly, at this time Ms. Berry received a CT scan of her chest, abdomen, and pelvis, which revealed the cystic kidney mass that had changed from the 2009 CT scans and potentially indicated a "cystic renal cell neoplasm."[60] Due to the CT results, Ms. Berry was referred for further treatment at the University of Iowa Hospital ("UIHC") in Iowa City.[61] Plaintiffs claim at this time no physician gave a reason for the CT scan or informed Ms. Berry of the results of the CT scan.[62] When she was preparing to be discharged, Plaintiffs allege that she was informed by a Mercy Hospital nurse of her kidney mass for the first time.[63]

On April 29, 2016, Ms. Berry underwent testing at UIHC where she was diagnosed with metastatic renal cell carcinoma.[64] Nearly three weeks later, her fracture was surgically repaired and her shoulder replaced due to the tumor within her shoulder.[65] Approximately four months after her shoulder replacement, Ms. Berry underwent another surgery, a partial right nephrectomy, at UIHC in order to treat her renal cell carcinoma.[66] Subsequent testing after her partial nephrectomy did not indicate a need for additional treatment for

---

[56] Pet. at ¶ 42; Grossman Depo. at p. 59:19-25 (Defs.' Ex. I at p. 15).

[57] Pet. at ¶ 43; Berry Depo. at pp. 27:13-28:3; Pls.' App. at 66.

[58] Pet. at ¶¶ 43-54; Berry Depo. at p. 28-4-13; Pls.' App. at 66.

[59] Pet. at ¶¶ 44-45, 47; *see also* Berry Depo. at pp. 29:3-30:7; Pls.' App. at 67.

[60] Pet. at ¶ 50.

[61] Pet. at ¶ 48; Berry Depo. at p. 29:3-18; Pls.' App. at 67.

[62] Pet. at ¶ 51; Berry Depo. at p. 29:3-12; Pls.' App. at 67.

[63] Pet. at ¶ 52; Downing Depo. at pp. 54:11-55:21; Berry Depo. at pp. 28:22-29:12; Pls.' App. at 45, 66-67.

[64] Pet. at ¶ 53; *see* Marcella Depo. at p. 44:21-25; Pls.' App. at 84.

[65] Pet. at ¶ 54.

[66] Pet. at ¶ 55; Berry Depo. at p. 30:8-18; Pls.' App. at 67.

cancer.[67] She was then discharged from UIHC's care and her renal cell carcinoma was to be treated by regular testing and monitoring.[68]

In July 2017, a spinal tumor was found that required Ms. Berry to undergo surgical remediation and additional oncologic treatment, including chemotherapy and radiation.[69] Following her spinal tumor surgery, was determined that Ms. Berry's renal cell carcinoma had spread.[70] On May 22, 2019, Ms. Berry died as a result of "Renal Cell Carcinoma with Metastasis to the Bone."[71]

B. PROCEDURAL BACKGROUND

Plaintiffs filed the Petition in this case on April 10, 2018.[72] Plaintiffs' claims are for medical negligence, loss of parental consortium, and punitive damages with regard to only Dr. Grossman arising specifically from her 2009 treatment and consultations with Defendants.[73] In their collective Pre-Answer Motion to Dismiss and subsequent Answers, Defendants raised defenses based on the statute of limitations and statute of repose, arguing this action is barred by the general two-year statute of limitations as well as the six-year statute of repose applicable to medical negligence claims.[74] Movants thereafter filed the present Motion for Summary Judgment on February 12, 2020, asserting the same affirmative defenses.[75] Plaintiffs responded, arguing that the statutes of limitations and repose are inapplicable to this case based on Dr. Grossman allegedly fraudulently concealed

---

[67] Pet. at ¶ 56.

[68] *Id.*

[69] Pet. at ¶ 57; Berry Depo. at pp. 30:19-32:13, 33:21-25; Pls.' App. at 67-68.

[70] Pet. at ¶ 58.

[71] Pls.' App. at 126 (Ms. Berry's Death Certificate) (marked as Pls.' Ex. 20).

[72] *See gen.* Pet.; Defs.' Statement of Undisputed Material Facts at ¶ 1.

[73] Pet. at ¶¶ 59-70, 72-74; Defs.' Undisputed Material Facts at ¶¶ 2, 4-5.

[74] *See* Iowa Code § 614.1(9)(a) (2020); Defs.' Answer to Third Am. Pet. At Law, Affirmative Defenses, & Jury Demand, Polk Cty. Case No. LACL140875, *18-19 (July 19, 2019); Defs.' Pre-Answer Mot. to Dismiss, Polk Cty. Case No. LACL140875, ¶¶ 4-7 (May 14, 2018); Defs.' Undisputed Material Facts at ¶ 3.

[75] *See* Defs.' Mot. for Summ. J., Polk Cty. Case No. LACL140875 (Feb. 12, 2020).

Ms. Berry's renal mass, thereby estopping Defendants from asserting such affirmative defenses.[76] The matter came before the Court for hearing on March 13, 2020.[77]

II. STANDARD OF REVIEW

"Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."[78] "An issue is genuine if the evidence in the record is such that a reasonable jury could return a verdict for the nonmoving party."[79] Summary judgment is only appropriate if the case presents only legal issues for review.[80] "A fact issue is generated if reasonable minds can differ on how the issue should be resolved."[81] "The burden is on the moving party to demonstrate the nonexistence of a material fact question."[82]

The Court views the record in the light most favorable to the nonmoving party and "will grant that party all reasonable inferences that can be drawn from the record."[83] To resist summary judgment, the nonmoving party must set forth facts constituting competent evidence that establish a prima facie claim.[84] In doing so, the nonmoving party "may not rest upon the mere allegations or denials of the pleadings" and, instead, "must set forth specific facts showing that there is a genuine issue for trial."[85] While "All reasonable

---

[76] Pls.' Resistance to Defs.' Mot. for Summ. J., Polk Cty. Case No. LACL140875 (Feb. 27, 2020); Pls.' Mem. & Br. of Authorities in Resistance to Defs.' Mot. for Summ. J., Polk Cty. Case No. LACL140875, * 6-12 (Feb. 27, 2020).

[77] *See* Ct. Rep. Erin Weitl's Memo. & Certificate for Hr'g, Polk Cty. Case No. LACL140875 (Mar. 13, 2020).

[78] *Homichi v. Valley View Swine, L.L.C.*, 914 N.W.2d 223, 230 (Iowa 2018); Iowa R. Civ. P. 1.981(3) (2020).

[79] *Homichi*, 914 N.W.2d at 230.

[80] *Kucera v. Baldazo*, 745 N.W.2d 481, 483 (Iowa 2008); *Wilson v. Farm Bureau Mut. Ins. Co.*, 714 N.W.2d 250, 255 (Iowa 2006) (citing *Farms Nat'l Bank of Winfield v. Winfield Implement Co.*, 702 N.W.2d 465, 466 (Iowa 2005)); *see* Iowa R. Civ. P. 1.981(3) (2020) ("The judgment sought shall be rendered forthwith 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.").

[81] *Schlueter v. Grinnell Mut. Reins. Co.*, 553 N.W.2d 614, 616 (Iowa Ct. App. 1996) (internal citation omitted).

[82] *Banwart v. 50th St. Sports, L.L.C.*, 910 N.W.2d 540, 545 (Iowa 2018).

[83] *Homichi*, 914 N.W.2d at 230; *see also Estate of Gray ex rel. Gray v. Baldi*, 880 N.W.2d 451, 455 (Iowa 2016) (citing *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 806 N.W.2d 282, 286 (Iowa 2011).

[84] *Hoefer v. Wisconsin Educ. Ass'n Ins. Trust*, 470 N.W.2d 336, 339 (Iowa 1991).

[85] *Susie v. Family Health Care of Siouxland, P.C.*, 942 N.W.2d 333, 336 (Iowa 2020) (citing *Banwart*, 910 N.W.2d at 545); Iowa R. Civ. P. 1.981(5) (2020).

inferences arising from the undisputed facts should be made in favor of the nonmovant, [an] inference based on speculation and conjecture is not reasonable."[86] Thus, "the proof in any case must be such that the fact finder is not left to speculate about who the negligent culprit is."[87] Consequently, "[s]peculation is not sufficient to generate a genuine issue of fact."[88]

III. ANALYSIS

Defendants assert that the dispositive issue in this action turns on the question of the statute of repose. Iowa Code section 614.1(9) contains the relevant statutes of limitation and repose for medical negligence cases. It provides:

> Actions may be brought within the times limited as follows, respectively, after their causes 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, podiatric 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.[89]

The Statute, thus, provides two relevant provisions: first, a two-year statute of limitations that runs from the date the patient-plaintiff knew or should have known of their injury; and, second, the emphasized portion, which reflects Iowa's statute of repose operates to

---

[86] *Castro v. State*, 795 N.W.2d 789, 795 (Iowa 2011); *Hlubek v. Pelecky*, 701 N.W.2d 93, 96 (Iowa 2005).

[87] *Susie*, 942 N.W.2d at 337 (quoting *Walls v. Jacob N. Printing Co.*, 618 N.W.2d 282, 284 (Iowa 2000) (en banc)).

[88] *Id.* (quoting *Hlubek*, 701 N.W.2d at 96)).

[89] Iowa Code § 614.1(9)(a) (2020) (emphasis added).

bar any malpractice claim brought after six years of the act or omission that allegedly caused the plaintiff-patient's injury.[90] The crux of this case is the latter provision.

Iowa law recognizes that, while the statute of limitations and the statute of repose are similar at first glance, the doctrines are distinguishable:

> Statutes of repose are different from statutes of limitation, although they have comparable effects." A statute of limitations bars, after a certain period of time, the right to prosecute an accrued cause of action.
>
> By contrast, a statute of repose "terminates any right of action after a specified time has elapsed, regardless of whether or not there has as yet been an injury."
>
> A statute of repose period begins to run from the occurrence of some event other than the event of an injury that gives rise to a cause of action and, therefore, bars a cause of action before the injury occurs.
>
> Under a statute of repose, therefore, the mere passage of time can prevent a legal right from ever arising.[91]

Unlike the statute of limitations, the statute of repose focuses "not on the claimed injury, but rather on 'the act or omission or occurrence' and does not require that a claim have accrued or that an injury have been discovered."[92] Consequently, because the focus is not on Ms. Berry's alleged injury, but is, instead, based on some act or omission purportedly committed by Dr. Grossman, the "injury" that is relevant to consideration of the statute of

---

[90] *Id.*

[91] *Armour v. Hermanson*, 2009 WL778107, *2 (Iowa Ct. App. Mar. 26, 2009) (quoting *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d 405, 408 (Iowa 1993)); *see Speight v. Walters Dev. Co.*, 744 N.W.2d 108, 115 (Iowa 2008) (same).

[92] *Armour*, 2009 WL778107 at *3 (citing *Albrecht v. Gen. Motors Corp.*, 648 N.W.2d 87, 92 (Iowa 2002) (citing *Bob McKiness Excavating*, 507 N.W.2d at 408)); *see Estate of Anderson ex rel. Herren v. Iowa Dermatology Clinic, P.L.C.*, 819 N.W.2d 408, 414 (Iowa 2012) (citing *Albrecht* for same) ("Unlike the statute of limitations, under which a claim accrues for injuries caused by medical negligence when the plaintiff knew, or through the use of reasonable diligence should have known, of the injury, a statute of repose runs from the occurrence of the act causing the injury.").

limitations serves no purpose when evaluating whether Plaintiffs' claims are potentially barred by the statute of repose.[93]

Dr. Grossman treated Ms. Berry between October 1 and December 30, 2009. The alleged negligent treatment provided by Dr. Grossman—based on his claimed failure to disclose the presence of Ms. Berry's cystic mass on her kidney—occurred on October 1 and/or October 6, 2009. Thus, when considered facially, in order for Plaintiffs' claims to avoid the statute of repose, those claims needed to be filed by October 6, 2015. Even considering the latest date of care provided by Dr. Grossman to Ms. Berry, December 30, 2009, Plaintiffs would have needed to commence their case against Defendants by December 30, 2015. As this action was not filed until April 10, 2018, it is *prima facie* time-barred under the statute of repose.[94]

Of course, as is true with many laws, there are exceptions to this hard-and-fast rule. Iowa law provides for two express exceptions to the statutes of limitations and repose: (1) the foreign object limitation included by statute; and (2) the common law fraudulent concealment doctrine.[95] Only the latter is relevant to the Court's decision, as it is undisputed that no foreign object was left in Ms. Berry. In short, Plaintiffs allege Dr. Grossman fraudulently concealed information pertaining to Ms. Berry's cystic mass, thereby contending Defendants are now barred from asserting the statutes of limitations and repose as defenses.

To establish fraudulent concealment on the part of Dr. Grossman that would estop his assertion of the statutes of limitations and repose as defenses, Plaintiffs must show by a clear and convincing preponderance of the evidence that:

> (1) [t]he defendant has made a false representation or has concealed material facts; (2) the plaintiff lacks knowledge of the true facts; (3) the defendant

---

[93] *Estate of Anderson*, 819 N.W.2d at 414 (citing *Albrecht*, 648 N.W.2d at 92; *Bob McKiness Excavating*, 507 N.W.2d at 408) ("Because the period of repose begins running when the injury-causing act occurs, the statute of repose can . . . prevent a claim for medical negligence from arising before the patient even knows or should know she has been injured.").

[94] *See* Iowa Code § 614.1(9)(a) (2020).

[95] *Id.*; *Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 458 (Iowa 2008).

> intended the plaintiff to act upon such representations; and (4) the plaintiff did, in fact, rely upon such representations to his [or her] prejudice.[96]

"The party alleging fraudulent concealment must prove each of the elements by a 'clear and convincing preponderance of the evidence.'"[97]

It is clear that Dr. Grossman and Ms. Berry were engaged in a fiduciary relationship as physician and patient. As a result, the general requirement that a plaintiff must show "some affirmative act to conceal the cause of action" is "relaxed."[98] Because of the nature of their relationship, Plaintiffs are not required to prove an affirmative act of concealment and Dr. Grossman's "mere silence supplies the affirmative-act requirement."[99] Likewise, a plaintiff's duty of diligent investigation is also "relaxed" due to the underlying fiduciary relationship.[100]

Regardless, even when a fiduciary relationship exists, "the act of concealment must be independent of and subsequent to the original wrongdoing establishing liability.[101] Additionally, '[t]he 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.'"[102]

The *Skadburg* Court relied on the prior case, *Van Overbeke v. Youberg*,[103] when interpreting the fraudulent concealment exception.[104] In *Van Overbeke*, our Supreme Court reiterated that "the acts of concealment must nevertheless be independent of the alleged

---

[96] *Christy v. Miulli*, 692 N.W.2d 694, 702 (Iowa 2005) ((alteration in original) (quoting *Koppes v. Pearson*, 384 N.W.2d 381, 386 (Iowa 1986) (en banc), abrogated by *Christy*, 692 N.W.2d at 701)); *see Skadburg v. Gately*, 911 N.W.2d 786, 798 (Iowa 2018) (citing *Christy* for the same).

[97] *Estate of Anderson*, 819 N.W.2d at 414 (citing *Christy*, 692 N.W.2d at 702).

[98] *Skadburg*, 911 N.W.2d at 798 (referencing *Christy*, 692 N.W.2d at 701).

[99] *Id.* (citing *Pride v. Peterson*, 173 N.W.2d 549, 555 (Iowa 1970); *cf. Hook*, 755 N.W.2d at 526).

[100] *Id.* (internal citations omitted).

[101] *Id.* (quoting *Christy*, 692 N.W.2d at 702).

[102] *Id.* (quoting *Christy*, 692 N.W.2d at 702 ((second and third alterations in original) (quoting *Faust v. Hosford*, 119 Iowa 97, 100, 93 N.W. 58, 59 (1903))).

[103] *Van Overbeke v. Youberg*, 540 N.W.2d 273 (Iowa 1995), *abrogated on other grounds by Christy*, 692 N.W.2d at 701.

[104] *Skadburg*, 911 N.W.2d at 798-99 (discussing *Van Overbeke*, 540 N.W.2d at 276).

acts relied on to establish liability."[105] There, faced with a medical negligence claim against a physician for failure to diagnose and provide the certain diagnostic tests, the Court reaffirmed its prior holding that "the alleged concealment was the basis of the original fraud charge, and . . . therefore, could not be an independent basis for finding fraudulent concealment; to recognize the concept of fraudulent concealment in that case would effectively wipe out the statute of limitations on the fraud claim."[106] "There must also be a *temporal* separation of the acts of negligence and the acts of alleged concealment; the concealment must take place after the alleged acts of negligence occurred."[107] As indicated by the appellate courts of this State, the "heart" of a plaintiffs' failure to disclose or inform claim is what is examined when determining temporal separation.[108]

At hearing, Plaintiffs clarified their contention of the separate acts that allegedly constitute fraudulent concealment by Dr. Grossman. Plaintiffs argue the liability-creating event, or the initial fraud, by Dr. Grossman was the October 1 failure to disclose the complete findings of Ms. Berry's CT scan. The alleged subsequent event was the failure of Dr. Grossman to disclose or refer Ms. Berry for further testing or treatment for her kidney mass in the letter sent to Dr. Nikoueiha.

There are two primary issues with this argument. First, the letter specifically states that it was not reviewed by Dr. Grossman prior to being sent.[109] Second, the letter sent to Dr. Nikoueiha and Broadlawns Family Medicine references only the intended treatment for which Ms. Berry was scheduled to follow-up with Dr. Grossman—that is, treatment of her sigmoid colitis.[110] Thus, the heart of Plaintiffs' claims is the alleged act of nondisclosure by Dr. Grossman on October 1, 2009, regarding Ms. Berry's kidney mass, as seen on the CT

---

[105] *Van Overbeke*, 540 N.W.2d at 276.

[106] *Id.* (citing *Cole v. Hartford Accident Indem. Co.*, 242 Iowa 416, 428-29, 46 N.W.2d 811, 818 (1951)).

[107] *Id.* (citing *Woods v. Schmitt*, 439 N.W.2d 855, 862 (Iowa 1989); *Langner v. Simpson*, 533 N.W.2d 511, 522–23 (Iowa 1995)) (emphasis in original).

[108] *Id.* at 276-77 (citing *Cole*, 242 Iowa 248-49, 46 N.W.2d at 818); *Schlote v. Dawson*, 676 N.W.2d 187, 195 (Iowa 2004); *see Skadburg*, 911 N.W.2d at 799 (quoting *Van Overbeke* for same and summarizing its holding as the "[f]ailure to disclose [the need for treatment], as a ground of liability, cannot be the basis for fraudulent concealment.").

[109] Pls.' App. at 110 (Pls.' Ex. 16, p. 6).

[110] *Id.*; *See* Pls.' App. at 99 (reflecting Ms. Berry's reason for her appointment with Dr. Grossman as "colitis").

scan. The failure to refer this finding to Ms. Berry's primary care doctor or Ms. Berry herself, or to order further testing, is the ground of liability and, as a result, it cannot also be the basis for fraudulent concealment.[11]

Plaintiffs do not allege that Dr. Grossman had any duty to continue to monitor the cystic mass, nor a duty to provide treatment for it as an ailment that falls outside his practice. Likewise, Plaintiffs do not raise any claim that the continuous treatment doctrine applies in this action, as it is undisputed that the physician-patient relationship between Dr. Grossman and Ms. Berry terminated on December 30, 2009, at the latest. Consequently, the statute of repose now bars Plaintiffs' claims filed against these defendants.

In sum, Plaintiffs' claims are barred by the statute of repose included within Iowa Code section 614.1(9)(a). The Court does not address the merits of the remaining claims regarding that statute of limitations and punitive damages, as such claims are incidental to the time-barred medical negligence claim. Accordingly, Defendants are entitled to judgment as a matter of law.

ORDER

IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment should be and is **GRANTED.**

IT IS FURTHER ORDERED that claims raised by Plaintiffs against Defendants in this action should be and are hereby **DISMISSED.**

Costs assessed to Plaintiffs.

So Ordered.

[11] *Van Overbeke*, 540 N.W.2d at 276.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACL140875	LINDA BERRY VS PAUL GROSSMAN MD ET AL

So Ordered

David Porter, District Court Judge,
Fifth Judicial District of Iowa