IN THE IOWA SUPREME COURT

NO. 20-1124

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

Plaintiffs/Appellants,

VS.

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

Defendants/Appellees

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY, IOWA
Case No. LACL140875
THE HONORABLE DAVID PORTER

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

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ROUTING STATEMENT

(Appellants will be collectively referred to as Berrys in this Brief unless a specific person is necessary to context. Dr. Grossmann has been variously referred to as Dr. Grossmann and Dr. Grossman. He is one and the same.)

Appellants agree that the Trial Court committed fundamental error in granting this Motion for Summary Judgment on a ground that neither party argued for. The Ruling was basic error that should be corrected by the Court of Appeals. *Iowa R. App. P. 6.903(2)(d).*

PRESERVATION OF ERROR - ARGUMENT I

Berrys preserved error on Defendant Appellees Iowa R. Civ. P. 1.904(2) argument. The Iowa R. Civ. P. 1.904(2) argument was timely and the Notice of Appeal after ruling on same was timely.

I. APPELLANTS'(BERRYS) IOWA R. CIV. P. 1.904(2) MOTION WAS TIMELY AND PROPER AND THEREFORE THIS APPEAL IS TIMELY AND PROPER.

Berrys, who are the Appellants, filed their timely Iowa R. Civ. P. 1.904(2) Motion on July 31, 2020. (App. Pp. 242-255). It was filed fourteen (14) days after the Trial Court ruled on Defendants' Motion for Summary Judgment on July 17, 2020. (App. Pp. 226-241). The Motion was ruled upon August 22, 2020. (App. Pp. 264-265). Notice of Appeal was filed August 28, 2020. (App. Pp. 266-277).

Appellees assert that because this Notice of Appeal was filed over thirty days after the Ruling grieved on, it was not timely. Defendants lodge the argument that Berrys' Iowa R. Civ. P. 1.904(2) Motion was improper because it was simply "a rehash of the issues raised and decided adversely". (Appellee Appeal Brief p. 22).

However, it is clear the Trial Court decided the Motion for Summary Judgment not on any basis either party argued but based on a theory truly out of left field.

The Trial Court based its Ruling on a letter which Dr. Grossman agrees in his Statement of Undisputed Facts that he "issued" on October 6, 2009. (App. P. 78). This same letter was confirmed in Defendants' Answer to the Third Amended Petition when Defendants admitted, "On or about October 6, 2009, Defendant Grossmann *dictated and sent* a letter to Broadlawns Medical Clinic regarding treatment of Linda Berry". (App. P. 58). (emphasis supplied.)

Thirdly, Dr. Grossman never disavowed this letter and in fact, confirmed it in his testimony.

> "Q. And what would have been the purpose of dictating this note and addressing it to Broadlawns Family Clinic?
> A. Because I was 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." (App. P. 315).

It is difficult to envision more conclusive proof that factually, Dr. Grossman, of his own volition, dictated and sent a letter on October 6, 2009, that he selected the content and he intended it be relied upon by Linda Berry through her PCP. In fact, she was read the letter by her primary care physician. (App. P. 299).

Yet the Trial Court found that this letter was a nullity because it stated it was “mailed before doctor’s review.” (App. P. 239).

The Trial Court further gratuitously found as a basis for its grant of summary judgment that this letter referenced only the colitis treatment. (App. P. 239). The Ruling does not explain why that factual observation is significant to granting summary judgment but presumably it meant it could not be a misrepresentation if it did not say anything about the kidney lesion.

If this assumption is correct, this statement reflects a lack of consideration of the most basic principles of fiduciary duty. See *Cornell v. Wunschel, 408 N.W.2d 369 (Iowa 1987)* requiring disclosure of all material facts in a fiduciary relationship. One would wonder how knowledge of a potential cancerous condition would not be material in a patient physician relationship.

Mysteriously, the Trial Court did find that a fiduciary duty was owed by Dr. Grossman. "It is clear that Dr. Grossman and Ms. Berry were engaged in a fiduciary relationship as physician and patient." (App. P. 238). However, it appears the Court went on to find that a letter that was apparently not signed and not mentioning the kidney lesion, as a matter of law, could not be a fiduciary violation or a concealment.

This is fundamentally wrong. The Trial Court identified *Skadburg v. Gately, 911 N.W.2d 786 (2018),* as an authority in its Ruling. (App. P. 238). There, mere silence by an attorney in contact with a client, was found to be potentially a fraudulent concealment that would suspend the running of a statute of limitations for attorney negligence.

In that case, the trial court granted Defendant Gately's motion for summary judgment holding the fraudulent concealment doctrine did not apply and therefore the statute of limitations had expired. Plaintiff Skadburg's Iowa R. Civ. P. 1.904(2) Motion was also denied.

Gately, an attorney, had apparently advised client, Skadburg, in December 2008, to use exempt funds to pay nonexempt estate general debts. When Skadburg apparently had second thoughts about this and later sent communications from

January 30, 2009 to March 26, 2010, blaming herself for her economic losses, Gately simply remained silent.

The Supreme Court found this silence standing alone to be enough to generate an issue of facts over violation of a duty to disclose and later concealment. In reversing the Trial Court on that issue, the Supreme Court stated:

> ”[W]e find a genuine issue of material fact exists as to element (1)-whether Gately made a false representation or concealed material facts from December 2008 to March 26, 2010.” Element 1 of course is whether “[t]he defendant has made a false representation or has concealed material facts.” 911 N.W.2d @ 786.

Here, neither party even came close to suggesting that the non-review or non-signing was a basis for Summary Judgment in their briefs, at the oral argument, (App. PP. 376-397) or at any other time. This is because the letter was conclusively dictated, issued and sent by Dr. Grossman on October 6 and everyone knew it.

Plaintiff Berry’s Iowa R. Civ. P. 1.904(2) purpose was classic, giving the Trial Court an opportunity to retract such an erroneous ruling and address the substantive arguments made by either side. Berrys cited *Homan v. Branstad, 887 N.W.2d 153 (Iowa 2016)* where the Supreme Court discussed identical arguments and explained the ramifications

of the motion and the effect on a timeliness of a notice of appeal.

”[T]he question turns on whether the plaintiffs filed the motion to enlarge or amend the district court ruling for a proper purpose.” 887 N.W.2d @ 160.

In their Iowa R. Civ. P. 1.904(2) Motion, Berrys argued that no one had ever questioned the communication in the October 6, 2009 letter. Berrys attached to their Iowa R. Civ. P. 1.904(2) Motion, Defendants’ Answer to Third Amended Petition wherein Defendants admitted that “On or about October 6, 2009, Defendant Grossman dictated and sent a letter to Broadlawns Medical Clinic regarding his treatment of Linda Berry.” (App. P. 245).

The *Homan* Court discussed the proper content of an Iowa R. Civ. P. 1.904(2) motion. “Ordinarily a proper 1.904(2) motion asks the district court to amend or enlarge either a ruling on a factual issue or a ruling on a legal issue raised in the context of an underlying factual issue based on the evidence in the record.” 887 N.W.2d @ 161.

Both of these inquiries were triggered by the bizarre trial court ruling. Argument I of Berrys’ Iowa R. Civ. P. 1.904(2) Motion (App. P. 244) argued that neither party made an issue of this letter because all viewed its authenticity as beyond question. The essence is Dr. Grossman

communicated and intended to communicate certain information and to omit other information. One can hardly "dictate" a letter without a volitional act of selecting and communicating certain content. This is what is so puzzling about the Trial Court's Ruling. Dr. Grossman never indicated in the least that the transcription of his letter was incorrect.

This most certainly is not a "rehash" of the original arguments.

The Trial Court declined all requests, filing a one line denial on August 22, 2020. (App. P. 264). Berry's filed their Notice of Appeal six days later on August 28, 2020. (App. P. 266).

Berrys submit that their filing of the Iowa R. Civ. P. 1.904(2) Motion was an appropriate and proper use of that Motion. *Sierra Club of Iowa v. Iowa DOT, 832 N.W.2d 636 (Iowa 2013).*

> "The rule can be used by a party with an appeal in mind. Similarly, it can be used to better enable a party to attack specific adverse findings or rulings in the event of an appeal by requesting additional findings and conclusions. . . Moreover if the movant asks the Court to examine facts it suspects the Court overlooked in view of that evidence, then the Motion is proper." citing *City of Waterloo v. Blackhawk Mutual Ins. Ass'n., 608 N.W.2d 442, 444 (Iowa 2000).*

That is precisely what Berrys did here.

II. THE IOWA MEDICAL STATUTE OF REPOSE DOES NOT APPLY TO THIS CASE BECAUSE DECEDENT LINDA BERRY'S TREATING PHYSICIAN, DR. PAUL GROSSMAN, COMMITTED AND CONCEALED MULTIPLE MEDICALLY NEGLIGENT ERRORS AND COVERED UP HIS ERRORS BY MISREPRESENTATION AND FRAUD, EVENTUALLY LEADING TO THE DEATH OF LINDA BERRY.

A. DEFENDANT DR. GROSSMAN COMMITTED AN ACT OF NEGLIGENCE ON OCTOBER 1, 2009.

Summary Judgment was granted in this case by Honorable David Porter. On summary judgment, all disputed facts and inferences from undisputed facts, must be resolved in favor of the resisting party. *Smith v. Shagnasty's, Inc., 688 N.W.2d 67 (Iowa 2004).*

In their brief, Defendants criticize Berrys for their "desperate effort to throw as many "facts" as possible at the court, . . ." (Appellee's Appeal Brief p. 26). Defendants' position seems to be, do not confuse me with the facts. Obviously, facts drive most cases, including this one, very powerfully.

Berrys must prove two things to succeed, an act of liability and a separate act of concealment to survive a statute of repose defense.

Here, Berrys will discuss the first requirement, failure to follow standard of care and negligence.

Linda Berry consulted an urgent care clinic in Des Moines, Iowa on October 1, 2009. She was then referred to

Mercy Hospital, Des Moines, Iowa for treatment. (App. P. 289). She was treated by Dr. Grossman, employee of Mercy Clinics Surgical Affiliates, a member of the Mercy Medical Center, and Mercy Hospital residents, Dr. M. Severidt and Dr. Rachel Fleenor. (App. P. 103).

Linda was seen that evening for what appeared to be a condition of constipation. However, in order to rule out more serious conditions, a CT scan was ordered by Dr Paul Grossman. The CT was originally read as benign by the radiologist. (App. Pp. 103-104, 354-366).

Linda was then released to return to her home in Adel with her daughter, Elizabeth Downing driving her there. (App. Pp. 290-291). Her original diagnosis was constipation. (App. P. 353). However, a radiologist reread a short time later raised significant concerns. As a result, Dr. Grossman directed Dr. Matthew Severidt, a third year resident at Mercy, to summon Linda back to the hospital, an action he claims he had taken only twice in twenty three years of practice. (App. Pp. 326, 345).

Drs. Severidt and Grossman had reviewed the radiologist report and it was concerning. “The fact he [the radiologist] says worrisome is the biggest tip off right there. A worrisome neoplasm, meaning he was worried could it be a malignant neoplasm I think is what he’s getting at.”

(App. P. 341). Dr. Grossman discussed this finding with resident Dr. M. Severidt. (App. P. 366-367).

Dr. Grossman further stated the standard of care where he meets conditions outside the scope of his practice, "[S]ince I am not in a position to be referring on to the radiologist—or the urologist, I would send it back to the primary care doctor." (App. P. 331). He further stated that even ordering the MRI that Dr. Mirsky recommended was out of his practice. (App. P. 330).

Notwithstanding these concerns and his practice, Drs. Severidt and Grossman sent her home the second time with a second written discharge instruction that referred only to "mild sigmoid colitis" despite his concern that attention to her kidney finding, identified by radiology second read, needed "reinforcement". (App. Pp. 162, 333-334, 337).

Even more concerning is the direction given to resident Dr. M. Severidt by supervising physician Dr. Grossman after the second concerning read.

> "Q. . . . I guess I'm still going back to the discharge instructions. If she needed further testing or follow-up, why would that not be provided on the discharge instructions in Plaintiffs' Exhibit 5?
> A. I am an agent for Dr. Grossmann, so I am writing instructions that come from him". (App. Pp. 372-373).

Grossman agrees that Severidt did call him and talk to him about the situation. (App. P. 339)

For clarity sake, there are two discharge documents for that date, October 1, 2009, which do not have a time. The earlier discharge refers to constipation. The later discharge instruction has the finding of "mild sigmoid colitis" (App. P. 162), but this was after the concerning finding by radiology.

The Mercy Hospital discharge instruction also recites that if there are "special tests such as an EKG and/or X-rays, they will be reviewed again within 24 hours by other medical specialists. We will call you if there are additional treatment recommendations." (App. P. 162). This was not done.

Dr. Grossman many times stated that where there is a presentation of a problem or condition he does not treat, he refers back to the primary care doctor. (App. P. 327). However, this is a standard of care violation as established by Dr. Grossman because he did not do that.

Dr. Grossman also cited the October 3, 2009 instance when Linda returned to the Mercy Hospital E.R. as an instance where referral to PCP was the standard of care.

> "A lot of times we would just have her go see her primary care doctor for something I don't work up, which a kidney mass would be that. And if you look in the record, you'll see that's the second time she came to the

> emergency room, that's exactly what they wrote. They wrote follow up with primary care doctor for the right kidney mass. And then they crossed it out and said that she already has a follow up with me." (App. Pp. 327-328).

Plaintiff's expert witness, Dr. James Lopes establishes the violations of standard of care. (App. Pp. 189-190). There are multiple violations of standard of care within these two treatment visits. No written discharge was provided in either instance advising Linda about the kidney lesion or even confirming she had been told about it in any direct and specific way.

A physician can establish his own violation of standard of care. *Oswald v. LeGrand, 453 N.W.2d 634 (Iowa 1990).*

Defendants argue passionately for a factual proposition, namely that the "record" demonstrates that Dr. Severidt and Grossman communicated appropriate information to Linda and Elizabeth. However, the appropriate "record" states only conclusory ambivalent language, "Pt. will f/u with Dr. Grossman in 1 week @ which time further evaluation of R. kidney can be undertaken. This was discussed with the pt. who voiced understanding and agreed." (App. P. 104).

Finally, there is uncontradicted proof of causation here. Dr. Lopes opines that Linda's untreated kidney cancer

metastasized eventually causing her death. (App. P. 190). This is unrebutted.

B. THERE IS SUFFICIENT EVIDENCE IN THIS RECORD FOR THE JURY TO INFER THAT DR. GROSSMAN INTENTIONALLY CONCEALED LINDA BERRY'S POTENTIAL CANCER CONDITION FULFILLING THE SECOND REQUIREMENT OF A PLAINTIFF SEEKING TO AVOID THE MEDICAL STATUTE OF REPOSE.

A defendant in a medical negligence action has a special liability protection in the form of a statute of repose which prohibits any action which is based on a negligent incident from being brought more than six years after its occurrence, Iowa Code 614.1(9)(a), with certain exceptions that do not apply here.

This defense is mitigated by his or her duty as a fiduciary. *Cornell v. Wunschel, 408 N.W.2d 369 (Iowa 1987)* requires a fiduciary to "make a full and truthful disclosure of all material facts within that party's knowledge." 408 N.W.2d @ 375. *Wunschel* further states a fiduciary has a duty "to know the truth or falsity of the representation . . . and to disclose all material facts of which he is aware." 408 N.W. 2d @374. We submit that advising a patient that he or she presently carries a risk of cancer known by his or her physician is knowledge a patient would require. This is not rocket science.

A plaintiff in a medical negligence case who seeks to bring a suit regarding medical care occurring over six

years prior to filing must demonstrate an act of concealment separate and apart from the causal negligence of the defendant. Negligence claims concealed by fraud, have clearly survived the passage of the statute of repose. *Koppes v. Pearson, 384 N.W.2d 381 (Iowa 1986).* That has been affirmed over the course of time. *Christy v. Miulli, 692 N.W.2d 694 (Iowa 2005).* It has recently been applied to attorney negligence. *Skadburg v. Gately, 911 N.W.2d 786 (Iowa 2018).*

In order to take advantage of this avenue, there are certain requirements. *Estate of Anderson ex rel. Herren v. Iowa Dermatology Clinic, PLC, 819 N.W.2d 408 (Iowa 2012).*

> "Ordinarily, the plaintiff must prove the defendant engaged in affirmative conduct to conceal the plaintiff's cause of action. (authority omitted) The affirmative conduct of concealment must be independent of and subsequent to the liability-producing conduct. . . However, our caselaw recognizes an exception that relaxes the requirement of affirmative concealment when a fiduciary or confidential relationship exists between the party concealing the cause of action and the party claiming fraudulent concealment." 819 N.W. 2d @ 415.

The *Anderson* Court went on to explain the reason for the relaxation.

"The close relationship of trust and confidence between patient and physician gives rise to duties of disclosure which may obviate the need for a patient to prove

an affirmative act of concealment" citing *Koppes v. Pearson, 384 N.W.2d 381 (Iowa 1985).*

The most recent case, *Skadburg v. Gately, 911 N.W.2d 786 (Iowa 2018)*, discusses the proof required.

> ". . .[T]he plaintiff must show by clear and convincing preponderance of the evidence (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 intended the plaintiff to act upon such representations; and (4) the plaintiff did in fact rely upon such representation to his [or her] prejudice. 911 N.W.2d @ 798.

Berrys will now discuss the factual support for the rejection of the statute of repose in this case.

When Linda Berry went to Mercy Hospital on October 1, 2009, her initial evaluation was fairly innocuous. She was believed to have constipation but with risks of appendicitis or other more perilous conditions. Consequently, Dr. Paul Grossman, as her treating physician, ordered a CT scan. The initial CT read by the radiologist was benign and Linda and her daughter, Liz, were released to go home.

When they had not yet reached their home in Adel, they received a phone call to return from Dr. Severidt who said "You need to bring your Mom back. Not everything was okay on the CT scan." (App. P. 292). Prior to leaving that

first time, they had been told “everything looked good on the CT scan except it showed Mom had mild constipation”. (App. Pp. 292-293).

This telephone statement by Dr. Severidt, of course, imparted no information regarding a kidney issue. Elizabeth took the call and this is her representation, a representation that must be taken to be true at this stage of review.

Once the concerning CT scan was disclosed, it would be apparent and surprising to a physician that Linda did not know about the previous two scans in 2004 and 2006. One would expect that Drs. Severidt, Grossman or Dr. Fleenor might have simply asked her if she was aware of the two prior CT’s and whether anything had been done about them. There is nothing of this nature in the record.

Second, despite this lack of prior knowledge and past communication failures, Dr. Grossman did not provide any documentation in his dictation that Linda had any kidney concerns or that she had prior CT scans. Granted his dictation (App. P. 225) was done before the CT scan reread, he claims no attempt to add information regarding the kidney issue.

Third, Drs. Grossman and Severidt did not write any information in the second discharge instructions about the kidney lesion.

At Dr. Grossman's direction, Dr. Severidt only wrote of the "mild sigmoid colitis" in the discharge instruction. (App. Pp. 162, 372-373).

Dr. Severidt's testimony is quite nuanced and should be reviewed. When asked why nothing was written about her kidney in Linda's second discharge instruction, Dr. Severidt stated, "I am an agent for Dr. Grossmann so I am writing instructions that come from him". (App. P. 373).

When asked whether Dr. Grossman told him not to write anything about the kidney mass in the discharge instruction, he responded, "I do not recall", a very strange response. (App. P. 373).

Fourth, the medical lesson a physician would learn immediately on October 1, 2009, is that the prior scans were not disclosed or explained to Linda in a way that she retained. So despite the fact of their potential danger, Dr. Grossman's version of facts is he chose the least effective means of communication, an alleged oral statement, when it would have taken no time to write a strongly worded directive into the discharge summary dictated by Dr. Severidt urging the patient to secure care from her primary care doctor or otherwise.

When Linda saw Dr. Rachel Fleenor on October 3, 2009, Dr. Fleenor initially wrote that Linda would see her

PCP, but this was crossed out and she was directed to Dr. Grossman. (App. P. 197). This is a violation of the standard of care that Dr. Grossman had testified to.

Again, there is no written discharge instruction to seek care for a potentially cancerous kidney lesion.

By this time, Linda had seen three physicians at Mercy Hospital over the span of three days. All three would have been aware of the two prior and one recent C.T. scans disclosing a potential cancer. Not a one of the three asked, “Patient, are you aware of the two and now three CT’s that show a potentially cancerous condition in your kidney?”

When Linda appeared at Dr. Grossman’s office as directed on October 6, 2009, she filled out a patient history. For the reason she was seeing her doctor, she wrote “colitis”. (App. Pp. 170-171).

A minimally alert physician would have concluded two things. She was not sufficiently aware of her kidney issue and more importantly, the past methods of communication to patient, to wit, oral referral had utterly failed over the last five years. Yet what did Dr. Grossman claim to have done in the ordinary course of his care? He claims another oral referral. Dr. James Lopes readily pointed this out as a standard of care violation. (App. Pp. 189-190).

We submit that by this time, the claim of mistake had run out. We submit that a jury may reasonably infer that the letter written on October 6, 2009, mentioning the colitis but omitting the potential cancer was not a mistake or an established practice. It was an active act of concealment. Who at this point in time would believe a physician claiming that his oral communication of a potential cancer condition was standard of care compliant when he clearly knew that Mercy had failed her in July 2004, December 2006, October 1, 2009 and October 3, 2009. The proof is conclusive in the form of the patient history chart filled out by Linda with her daughter, Elizabeth, on October 6, 2009, when she listed the reason for seeing Dr. Grossman as colitis. (App. Pp. 170-171). Yet he wrote nothing about it in the letter of October 6, 2009 and there is no other written record.

Berrys submit that this communication is not a treatment record because a reasonable jury could infer by this time it was a concealment. Similarly, a jury may infer it is not part of the "heart of treatment." *Iowa R. App. P. 6.904(2)(q).* This is a reasonable inference for the jury.

Here is the litany of failure and wrongdoing perpetrated on Linda Berry:

1. Linda had a CT scan showing a kidney lesion at Mercy in July 2004. She was never advised about it despite

the radiologist's recommendation that it be further evaluated.

2. She had a CT scan of the same kidney in December 2006. The same Mercy radiologist made no recommendation at that time. There is no evidence Linda was ever advised about the findings in the CT scan nor the earlier scan in 2004.
3. Linda had a CT scan of the same kidney in connection with a visit to Mercy ER on October 1, 2009. That scan indicated that the comparison of the 2004 and 2006 and 2009 scans would compel further investigation. She was never advised nor referred.
4. Linda's discharge document given to her on October 1, 2009, advised her that there would be further review by other specialists if she had tests done. She would be contacted by phone with treatment options. This was never done.
5. Drs. Severidt and Grossman would have discovered on October 1, 2009, that the past practice of disclosure, whatever it was, was not sufficient because Linda obviously did not know about these scans. Yet neither did anything but make a conscious decision to continue the same ineffectual practice.
6. Knowing this previous failure and in violation of their fiduciary duty, they chose not to tell her about the previous scans and did not communicate in writing about her present concerning scan, even though they communicated in writing about her colitis. Further, what Dr. Severidt wrote about this encounter is suspicious, "I am an agent for Dr. Grossman, my instructions came from him". (App. P. 373).
7. On October 3, 2009, Mercy resident Dr. Fleenor became aware of the kidney lesion on scan. She initially said refer to PCP, which Dr. Grossman said was standard of care. However, that was crossed out and she was referred to Dr. Grossman which was not standard of care. Dr. Fleenor did not mention the kidney lesion nor prior scans.
8. When Linda went to Dr. Grossman's office on October 6, 2009, she wrote her reason for being there was colitis. A minimally competent physician would have concluded she had not ever been sufficiently apprised of her kidney scans and that they had utterly failed Linda in the methods of communication.

9. Dr. Grossman claims he relied on oral communication about the potential cancerous kidney and wrote a letter failing to mention the kidney when he communicated with her PCP. He further claims an oral discussion on October 6, 2009. However, Elizabeth Downing, who was present with her mother Linda, states that did not happen. (App. Pp. 295-297).

A minimally competent physician would have concluded that once again, he and others under his supervision had failed to advise Linda in a way she could understand that her concern would be her kidney. Despite all he had learned prior to October 6, 2009, he continued down the same path of claiming to rely on a separate undocumented oral communication about a potentially life-threatening condition.

He is no longer entitled to an inference he acted in the best interest of his patient. The jury should be allowed to infer his October 6, 2009, dictation was no kind of medical dictation, but simply a disguise for a concealment.

Juries are entitled to make reasonable inferences. *Smith v. Shagnasty's, Inc., 688 N.W.2d 67 (Iowa 2004)* allowing jury to infer knowledge of intoxication on part of bar patron when bar personnel allowed that person to leave before law enforcement personnel arrived; *Banwart v. 50th Street Sports L.L.C., 910 N.W.2d 540 (Iowa 2018),* allowing a jury to infer knowledge of impairment by bar employees when patron who left

is apprehended a short distance and time away from bar; *McIlravy v. North River Ins. Co., 653 N.W.2d 323 (Iowa 2002)* allowing jury to infer bad faith from company's refusal to reconsider its denial after receipt of additional medical records.

The jury here clearly has the evidence it needs to conclude that Dr. Grossman wrote a letter intended to conceal Linda Berry's cancer condition when he wrote to her PCP at Broadlawn's Hospital on October 6, 2009.

CONCLUSION

The Ruling of the Trial Court should be reversed and this case should be remanded for trial.

Respectfully submitted,

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RENEWED REQUEST FOR ORAL ARGUMENT

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

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CERTIFICATE OF FILING

I, Steve Hamilton, hereby certify that I have filed the foregoing "Final Reply Brief of Appellants" with the Clerk of the Supreme Court of Iowa through the ECF/EDMS System on the 24th day of March, 2021.

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CERTIFICATE OF SERVICE

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

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CERTIFICATE OF COMPLIANCE

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

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