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

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

Plaintiffs-Appellants,

vs.

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

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY, THE HONORABLE DAVID PORTER

FINAL BRIEF OF DEFENDANTS-APPELLEES PAUL GROSSMANN, M.D., and CATHOLIC HEALTH INITIATIVES IOWA, CORP. d/b/a MERCY MEDICAL CENTER, MERCY MEDICAL CENTER-WEST LAKES, and MERCY SURGICAL AFFILIATES

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STATEMENT OF THE ISSUES

I. WHETHER PLAINTIFFS-APPELLANTS' APPEAL IS TIMELY

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II. WHETHER THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN DETERMINING THE STATUTE OF REPOSE BARRED PLAINTIFFS' UNTIMELY CLAIMS

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Van Overbeke v. Youberg, 540 N.W.2d 273 (Iowa 1995)

VonAh v. Alexander, 680 N.W.2d 377 (Iowa Ct. App. 2004)

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III. WHETHER THIS COURT SHOULD DECIDE AN ISSUE ON APPEAL THAT WAS NOT DECIDED BY THE DISTRICT COURT

Cutter v. Wilkinson, 544 U.S. 709 (2005)

Goode v. State, 920 N.W.2d 520 (Iowa 2018)

Linge v. Ralston Purina Co., 293 N.W.2d 191 (Iowa 1980)

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UE Local 893/IUP v. State, 928 N.W.2d 51 (Iowa 2019)

Yee v. City of Escondido, 503 U.S. 519 (1992)

Iowa R. App. P. 6.903(2)(g)

ROUTING STATEMENT

This appeal should be transferred to the Court of Appeals, as it presents application of well-established and existing legal principals and may be appropriate for summary disposition. Iowa R. App. P. 6.1101(3). The district court appropriately determined that Plaintiffs' medical malpractice suit, filed nearly 9 years after the act or omission or occurrence at issue, was untimely and barred by the statute of repose. The district court thoroughly analyzed Iowa law, finding Plaintiffs' untimely claims were not saved by their baseless allegations of fraudulent concealment. Plaintiffs misunderstand and misrepresent the basis of district court's ruling, which was correctly decided in accordance with Iowa law and precedent. There is no error.

STATEMENT OF THE CASE

This is an untimely case, barred by the statute of repose, filed nearly 9 years after the care in question. Plaintiffs claim medical malpractice related to an alleged failure to disclose certain findings in a CT scan. (Plaintiffs Third Amended Petition; App. 36). In an effort to avoid the statute of repose as set forth in Iowa Code section 614.1(9), Plaintiffs asserted baseless and unsupported claims of fraudulent concealment. (*Id.*) The case was dismissed on summary judgment, which Plaintiffs now appeal. (Ruling: Order Granting Summary Judgment; App. 226).

Defendants are Dr. Paul Grossmann, a well-respected and long-serving Iowa surgeon, and Catholic Health Initiatives-Iowa Corp d/b/a Mercy Medical Center-Des Moines and affiliated entities. (Def. Answer to Third Amended Petition, App. 51). Defendants denied Plaintiffs' allegations of medical malpractice and fraudulent concealment. (*Id.*) Defendants moved for summary judgment on all of Plaintiffs' claims. (Def. Motion for Summary Judgment, App. 71). Defendants argued Plaintiffs lacked a legitimate basis for their claims because, as a preliminary matter, the documentary evidence of events which occurred almost 9 years before suit was filed established that, on October 1, 2009, Linda Berry was told by a then-Resident, Dr. Matthew Severidt, that she had a concerning CT scan result that would require follow-up care. (Def. Memorandum of Authorities in Support of Summary Judgment; App. 82). Evidence also established another Resident confirmed Ms.

Berry had already been told about the findings on October 4, 2009, after a second CT scan. (*Id.*). As such, Defendants argued there were no <u>genuine</u> issue of material fact as to whether Ms. Berry was aware of the findings on her CT scans. (*Id.*).

Despite the fact Linda Berry was made aware of concerning CT findings at the time they were identified in 2009, Defendants also argued that Plaintiffs' claims were barred by the statute of repose and could not be saved by Plaintiffs' unsupported allegations of "fraudulent concealment." (*Id.*). Defendants argued that, as a matter of law, Dr. Grossmann's negligence, if any, was an alleged failure to inform Linda Berry and her other care providers of an incidental finding on a CT scan, concurrent with his alleged failure to follow up. (*Id.*). As such, Defendants argued the "heart" of Plaintiffs' liability and fraudulent concealment allegations were one-in-the-same and there was no separation of Dr. Grossmann's alleged diagnostic negligence and his acts of alleged concealment, which were limited to an alleged non-disclosure of the CT results in communications with Linda Berry and her primary care clinic. (*Id.*).

After considering these arguments, Judge David Porter of the Iowa District Court for Polk County agreed. (Ruling: Order Granting Summary Judgment; App. 226–241). The district court first determined that Plaintiffs' claims were prima facie time barred under the statute of repose. (*Id.*). The district court then properly addressed and dismissed Plaintiffs' effort to save their case under a theory of

fraudulent concealment. (*Id.*). The Court appropriately analyzed Iowa law, including *Van Overbeke v. Youberg*, 540 N.W.2d 273 (Iowa 1995), and pointed out that the "heart" of Plaintiffs' failure to disclose or inform claim is what is examined when evaluating allegations of fraudulent concealment. (*Id.*). After providing substantive legal analysis, the Court correctly determined "the heart of Plaintiffs' claim is the alleged act of nondisclosure by Dr. Grossmann on October 1, 2009, regarding Ms. Berry's kidney mass, as seen on the CT scan," and held "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." (*Id.*). Based on this finding, the district court granted summary judgment. Having found Plaintiffs' claims time barred by the statute of repose, the district court did not address Defendants' remaining arguments in favor of summary judgment, including as to Plaintiffs' remaining, *derivative* claims. (*Id.*).

Thereafter, Plaintiffs filed a "Motion for Enlargement." (Plaintiffs' Motion for Enlargement; App. 242). Plaintiffs' Motion simply reiterated the same arguments advanced in Resistance to Defendants' Motion for Summary Judgment, asking the district court to change its ruling. (*Id.*). Defendants resisted this effort. (Defendants' Resistance to Motion to Enlarge; App. 256). The district court appropriately denied Plaintiffs' Motion in a single line. (Order: Ruling Denying Motion to Reconsider; App. 264).

In the interim, Plaintiffs did not file a Notice of Appeal. Instead, Plaintiffs waited until the district court denied their Motion to Enlarge and Amend. (Notice of Appeal, filed August 28, 2020; App. 266). Because Plaintiffs' Motion to Enlarge and Amend simply sought reconsideration of the district court's ruling, it was improper and, Plaintiffs' Notice of Appeal is untimely.

STATEMENT OF THE FACTS

On or about October 1, 2009, Linda Berry was admitted to Mercy Medical Center with complaints of lower abdominal pain, constipation, and nausea. (Plaintiffs' Third Amended Petition at ¶ 23; App. 36). On October 1, 2009, Dr. Grossmann was consulted regarding Linda Berry's condition. (*Id.* at ¶ 24; App. 40). On October 1, 2009, a computerized tomography ("CT") scan was performed on Linda Berry. (*Id.* at ¶ 25; App. 40). On October 1, 2009, Dr. Matthew Severidt was a third-year surgical resident for Mercy Medical Center. (Deposition of Dr. Matthew Severidt (hereinafter "Severidt Depo.") p. 47; ln. 1–5; App. 371). On October 1, 2009, Dr. Severidt discussed the CT scan with Linda Berry. (Plaintiffs' Third Amended Petition at ¶ 27; App. 40; Severidt Depo, p. 29; ln. 18 –p. 30; ln. 12; App. 355; Ex. E; App. 103, Ex. F; App. 104). Dr. Severidt testified "the initial or preliminary report on her CT scan did not mention anything related to her bowel, no surgical problem. It did mention that—that she was constipated, so she was discharged under those conclusions." (Severidt Depo, p. 28; ln. 15–19; App. 354).

Dr. Severidt's October 1, 2009 handwritten note states: "Addendum 10/1, 1930", "CT equals no evidence appendicitis. No bowel centered pathology. Impression equals constipation." (Ex. E; App. 103; Severidt Depo, p. 25; ln. 23–25; App. 352). Based on said preliminary findings, Dr. Severidt discharged Linda Berry. Ex. G; App. 105; Ex. H; App. 106).

Dr. Severidt subsequently received the "final" reading of the CT scan. (Severidt Depo, p. 36; ln. 4–22; App. 362). Dr. Severidt testified "the radiologist then reviewed the images further and generated a final report, which prompted me to write at the bottom of the page, "see next page addendum, and then what I wrote on that note." (*Id.* p. 28; ln. 20–24; App. 354). Dr. Severidt testified "I'm thinking the preliminary read was obtained approximately 7:30. Then I went back and reviewed the final report which had some significant changes, and that prompted this written addendum." (*Id.* p. 31; ln. 2–6; App. 357). The addendum states:

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

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

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

Linda Berry returned to the hospital shortly after Dr. Severidt's telephone call. (Severidt Depo., p. 45; ln. 14–22; App. 369). Dr. Severidt confirmed that "the addendum states what we discussed, which would be the findings on the final read of the CT scan." (Severidt Depo., p. 45; ln. 14–22; App. 369). Dr. Severidt testified he has "no doubt" whatsoever as to whether or not he advised Ms. Berry of the

findings on the CT scan, which included the mass on the kidney. (*Id.*, p. 46; ln. 1–5; App. 370). Dr. Severidt testified that he verbally reported to Ms. Berry on October 1, 2009 "that she had colitis and she needs to take an antibiotic to treat it and that there is a concerning finding of a lesion on her kidney that will require follow-up." (*Id.*, p. 50; ln. 11–20; App. 374). Dr. Severidt testified that he verbally recommended Linda Berry follow up with Dr. Grossmann in one week, as he was directed to by Dr. Grossmann, "for treatment of her colitis and evaluation of her renal mass." (*Id.*, p. 38; ln. 18 –p. 39; ln. 7; App. 364).

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

On October 3, 2009, at approximately 10:35 p.m. (2235), Linda Berry returned to the emergency department with symptoms including increased abdominal pain. (Grossman Depo., p. 112; ln. 20–24; App. 342; Ex. J; App. 107). Another CT scan was ordered and results were received on the morning of October 4, 2009. Ex. K; App. 108). The records for this encounter reflect the following plan:

"Plan: Recommended follow up for R kidney cystic mass (~~with PCP~~) with Dr. Grossman, already discussed with patient on 10/1/09. . . ." (Ex. J; App. 107). Dr. Grossmann was not present and did not treat Ms. Berry on October 3 or 4, 2009. (Grossmann Depo. p. 112, ln. 10–p. 113; ln. 10; App. 342–43). Rather, Dr. Grossmann's partner, Dr. Roe, was on-call. (*Id.*; App. 342–43).

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

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

> If we had told her from the emergency room to follow up with her primary care doctor, then it would be up to the patient to call her primary care doctor. If she had not seen me in the clinic, there wouldn't be a letter like that. There would still be a follow-up.

> So the same way that she followed up with me, she made the appointment to come see me, she would have to make the appointment to go see them. If I put that in my note, it doesn't help the primary care doctor because I'm not offering any advice unless the patient makes the appointment. So it doesn't tell them what I'm doing and what I'm treating.

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

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

more on what she was in my office that I do treat." (Grossmann Depo, p. 85; ln 24–p. 86; ln. 19; App. 328–29).

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

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

ARGUMENT

This is an untimely appeal of an untimely case. This Court should dismiss Plaintiffs-Appellants' appeal as untimely or affirm the district court's grant of summary judgment, finding Plaintiffs-Appellants case time-barred by the statute of repose. To decide otherwise would be inconsistent with prior precedent and would eliminate application of the statute of repose in cases alleging a failure to

diagnose/treat. As a court of review, this Court should also decline to consider those issues not ruled upon by the district court.

I. THIS APPEAL IS UNTIMELY

A. Error Preservation

For the reasons discussed in this section, Plaintiffs-Appellants' appeal is untimely.

B. Scope and Standard of Review

The Court is to address the jurisdictional issue of timeliness of appeal before reaching the merits. *City of Des Moines v. City Dev. Bd.,* 633 N.W.2d 305, 309 (Iowa 2001). "It is axiomatic that compliance with our rules relating to time for appeal are mandatory and jurisdictional." *In re Marriage of Mantz,* 266 N.W.2d 758, 759 (Iowa 1978). "Where an appellant is late in filing, by as little as one day, we are without jurisdiction to consider the appeal." *Id.; see also* Iowa R. App. P. 6.101(1)(b) ("A notice of appeal must be filed within 30 days . . . of the final order or judgment."); *Explore Info. Servs. v. Ct. Info. Sys.,* 636 N.W.2d 50, 54 (Iowa 2001) (noting we must "dismiss a case not meeting [appellate] deadlines even if the parties do not raise the issue").

C. Argument

The District Court for Polk County granted Defendants-Appellees' Motion for Summary Judgment on July 17, 2020. (Order: Ruling on Defendants' Motion for

Summary Judgment, Filed 07/17/2020; App. 226). Fourteen (14) days later, on July 31, 2020, Plaintiffs-Appellants filed a "Motion for Enlargement and Reconsideration of Facts and For Nunc Pro Tunc Order," pursuant to Rule 1.904(2). (Plaintiffs' Motion for Enlargement; App. 242). Defendants-Appellees resisted, arguing, in part, that Plaintiffs' Motion for Enlargement was improper and insufficient to prolong the period for appeal. (Defendants' Resistance to Motion to Enlarge, filed 08/10/2020, App. 256–63). On August 22, 2020, the district court entered an Order denying Plaintiffs-Appellants' Motion for Enlargement. (Order: Ruling on Motion to Reconsider, filed 08/22/2020; App. 264). Plaintiffs then filed a Notice of Appeal on August 28, 2020, 6 days after the district court's Order on the Motion to Enlarge and 42 days after the district court's Order granting summary judgment. (Notice of Appeal; App. 266).

As Iowa R. App. P. 6.101 required this appeal to be brought within 30 days of the district court's order, the only question for this court is whether Plaintiffs-Appellants' Motion for Enlargement was proper, such that it extended their time frame for appeal. Iowa R. App. P. 6.101. Defendants-Appellees contend that the Plaintiffs' Motion for Enlargement was merely an effort to obtain reconsideration of the district court's decision, as it simply rehashed the same arguments previously presented to and decided by the district court. *See* Iowa R. Civ. P. 1.904.

The Iowa Supreme Court succinctly summarized the various uses and appropriateness of Rule 1.904(2) motions, stating:

> There are various uses for a rule 1.904(2) motion:
>
> > The rule can be used by a party, with an appeal in mind, as a tool for preservation of error. 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. Additionally, it can be used, with no appeal in mind, to obtain a ruling on an issue that the court may have overlooked in making its judgment or decree.
>
> Thus, when the district court fails to make specific findings, a rule 1.904(2) motion is an appropriate mechanism to preserve error. Moreover, if the movant asks the court to examine facts it suspects the court overlooked and requests an expansion of the judgment in view of that evidence, then the motion is proper.
>
> When using a rule 1.904(2) motion to preserve error, it is proper for the motion to address "purely legal issue[s]" presented to the district court prior to its ruling but not decided by it. Nevertheless, a rule 1.904(2) motion is improper where the motion only seeks additional review of "a question of law with *no* underlying issue of fact." Additionally, **if the posttrial motion amounts 'to no more than a rehash of legal issues raised and decided adversely' to the movant, the motion is not appropriate. Thus, a rule 1.904(2) motion is not proper if it is used merely to obtain reconsideration of the district court's decision**.

Sierra Club Iowa Chapter v. Iowa Dep't of Transp., 832 N.W.2d 636, 641 (Iowa 2013), *as revised on denial of reh'g* (July 15, 2013)(internal citations omitted)(emphasis added). A Rule 1.904 Motion "is a tool for correction of factual error or preservation of legal error, not a device for rearguing the law." *Hedlund v. State*, 875 N.W.2d 720, 726 (Iowa 2016) (dismissing the Plaintiff's

appeal, finding Plaintiff's Rule 1.904 Motion improper and "a pure 'rehash of legal issues' that was not necessary 'to preserve error.'").

Plaintiffs-Appellants' Motion for Enlargement was improper, as it is merely a rehash of the issues raised and decided adversely. *Compare* Plaintiffs' Resistance to Defendants' Motion for Summary Judgment, App. 130–44; Plaintiffs' Surreply in Resistance to Defendants' Motion for Summary Judgment, App. 199–221; and Summary Judgment Hearing Transcript, App. 376–97 *to* July 17, 2020 Ruling Granting Summary Judgment, App. 226–41; *and* Plaintiffs' Motion for Enlargement, App. 242–55.

Plaintiffs-Appellants Motion for Enlargement was merely an effort to obtain reconsideration of the district court's decision. As in the *Hedlund* case, Plaintiff's Motion did not address any actual or possible factual misconceptions by the district court. 875 N.W.2d at 726. It did not address anything omitted from the court's ruling. It was not necessary to preserve error for appeal. It simply advanced the same arguments and cited the same evidence that had already been considered and rejected by the district court, while asking the district court to change its ruling. This is not the proper use of a Rule 1.904 Motion. As such, it did not extend Plaintiffs-Appellants' deadline to appeal. Plaintiffs-Appellants' Notice of Appeal, filed 42 days after the Ruling Granting Summary Judgment, was not timely filed. This appeal should be dismissed, in its entirety, on these procedural grounds.

II. THE DISTRICT COURT APPROPRIATELY GRANTED SUMMARY JUDGMENT AND DISMISSED ALL CLAIMS AS TIME-BARRED BY THE STATUTE OF REPOSE

A. Error Preservation

For the reasons set forth in Section I, *supra*, Plaintiffs-Appellants' appeal is untimely. If deemed untimely, dismissal is appropriate. Should the Court determine Plaintiff-Appellants' appeal is timely, Defendants-Appellees otherwise agree Plaintiffs' preserved error by and through their Resistance to Defendants' Motion for Summary Judgment.

B. Scope and Standard of Review

Appellate review of summary judgment rulings is for correction of errors at law. *Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.*, 925 N.W.2d 793, 800 (Iowa 2019).

C. Argument

The district court properly held Plaintiffs' claims are untimely and they are time-barred from advancing them. It also properly found that, because the heart of Plaintiffs' liability claim is the same as the basis of their fraudulent concealment allegations, their baseless fraud allegations failed to save their untimely claims from dismissal. This court should affirm the district court's correct application of Iowa precedent, as to hold otherwise would eviscerate the statute of repose in any failure to diagnose/disclose case.

The statute of repose, the outside limit for all cases, is established by Iowa Code section 614.1(9). It provides, "**in no event shall any action be brought more than six years after the date on which occurred the act or omission or occurrence alleged** in the action to have been the cause of the injury or death unless a foreign object unintentionally left in the body caused the injury or death." Iowa Code § 614.1(9)(a)(emphasis added). This "statute of repose" provides "an outside limitation for all lawsuits, even though the injury had not been discovered." *Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 455 (Iowa 2008). The purpose of Iowa's statute of repose is to "close the door after six years on belated-discovered claims." *VonAh v. Alexander*, 680 N.W.2d 377, *1 (Iowa Ct. App. 2004) (citing *Koppes v. Pearson*, 384 N.W.2d 381 (Iowa 1986). "In effect, the mere passage of time prevents the legal right from ever arising. *Id.* Statutes of repose have "harsh consequences," which "reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct." *Estate of Anderson ex rel. Herren v. Iowa Dermatology Clinic, PLC*, 819 N.W.2d 408, 419 (Iowa 2012) (*citing Albrecht v. General Motors Corp.*, 648 N.W.2d 87, 91 (Iowa 2002)).

Limitation periods "are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay." *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507

N.W.2d 405, 410 (Iowa 1993) (*citing Schulte v. Wageman,* 465 N.W.2d 285, 287 (Iowa 1991)). Their intended purpose is to close the door after six years on belatedly discovered claims. *Koppes,* 384 N.W.2d at 387. This is necessary, in part, to address "the lapse of time," between the allegedly negligent act and initiation of suit, which "often results in the unavailability of witnesses, memory loss and a lack of adequate records." *Bob McKiness Excavating*, 507 N.W.2d at 410. Statutes of repose are "designed to prevent the trial of stale claims because evidence gathering is usually made more difficult by the passage of time." *Albrecht*, 648 N.W.2d at 91 (*citing Fisher v. McCrary–Rost Clinic, P.C.,* 580 N.W.2d 723, 725 (Iowa 1998)). In addition, statutes of repose "reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct." *Id.* (*citing* 51 Am. Jur.2d *Limitation of Actions* § 18, at 463). Such statutes "avoid the difficulties in proof and recordkeeping that suits involving older claims impose ... and protect certain classes of persons ... from claims that are virtually indefensible after the passage of time." *Id.* In effect, the mere passage of time prevents the legal right from ever arising. *Bob McKiness Excavating*, 507 N.W.2d at 410.

This suit was filed nearly 9 years beyond the dates on which occurred the act, omission, or occurrence alleged in the action to have caused Plaintiffs'-Appellants' alleged injury. *Compare* Petition (filed April 2018, App. 7) *to* Petition, ¶ 89 (alleging

relevant injury occurred in “2004, 2006, and/or 2009”, App. 19). It is precisely the type of case which the legislature intended to prevent from being litigated. It is clearly time barred. The Plaintiffs-Appellants recognize this fact and do not argue their suit was timely.

Instead, in an effort to dodge application of the statute of repose, Plaintiffs concocted an unsupported and baseless conspiracy theory of fraudulent concealment. Plaintiffs-Appellants’ briefing is notable for its desperate effort to throw as many “facts” as possible at the court, while avoiding any meaningful or substantive discussion of Iowa law and its application to the *undisputed and material facts* of this case. Defendants-Appellees will focus their discussion on the actual issue and law before this Court.

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

(1) The defendant has made a false representation or has concealed material facts;

(2) the plaintiff lacks knowledge of the true facts;

(3) the defendant intended the plaintiff to act upon such representations; and

(4) the plaintiff did in fact rely upon such representations to his prejudice.

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

The Plaintiffs-Appellants failed to establish any of the elements of fraudulent concealment. First:

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

Christy, 692 N.W.2d at 702 (emphasis added, internal quotations and citations omitted). Plaintiffs-Appellants did not demonstrate any such affirmative act. There can be no *genuine issue* of fact as to whether Dr. Severidt informed Linda Berry of the concerning findings on her CT scan. He documented that discussion the same day. Dr. Grossmann also testified her reviewed the issues with her. The fact that Dr. Grossmann issued a letter to her primary care provider explaining his treatment relative to the condition he was actually asked to evaluate, and which was within the

scope of his practice, is not an affirmative act concealing her cause of action. Plaintiffs-Appellants presented no evidence of any act to conceal the cause of action independent of the allegedly liability-producing conduct, nor evidence of lack of knowledge of the true facts.

Regardless, what is readily apparent is that the fraudulent concealment doctrine cannot not apply under the circumstances alleged by Plaintiffs-Appellants. Even if their tortured version of the "facts" were true, the allegation of concealment is the same act alleged to constitute negligence—that is a failure to disclose the incidental CT finding to Linda Berry or her primary care provider(s). Failure to disclose such information to a patient ***cannot*** be the basis for fraudulent concealment. *Van Overbeke*, 540 N.W.2d at 276–77, *abrogated on other grounds by Christy*, 692 N.W.2d 694; *see also Skadburg v. Gately*, 911 N.W.2d 786 (Iowa 2018). "If it could be, there would effectively be no statute of limitations for negligent failure to inform a patient (fraud as basis of liability cannot also be basis for finding of fraudulent concealment.)." *Id.*

This case is virtually identical to *Van Overbeke*. 540 N.W.2d 273. In *Van Overbeke*, the plaintiff asserted various acts of diagnostic negligence. *Id.* This Court, however, noted that the "heart" of the Plaintiff's claim was an alleged failure to disclose to the plaintiff that she needed a RHoGAM injection. *Id.* at 276–77 ("the doctor's failure to disclose to the plaintiff that she needed the RHoGAM injection

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

Van Overbeke is not the only case that is directly on point, however. In fact, this case is no different from a litany of other Iowa cases dismissed and later upheld on appeal because they were beyond the statute of repose. In addition to the comparison to *Van Overbeke*, 504 N.W.2d at 276–77, this case is also nearly identical to *VonAh v. Alexander*, 680 N.W.2d 377 (Iowa Ct. App. 2004). There, the Iowa Court of Appeals held that the plaintiffs’ claim accrued, and six-year statute of repose began to run, when a doctor allegedly failed to disclose to a patient a bone tumor allegedly discovered in x-ray of the patient’s left knee and then allegedly

failed to schedule or recommend follow up. *VonAh*, 680 N.W.2d 377. There, much like here, the plaintiff sought treatment for a knee injury. *Id.* at *1. Almost seven years later, the knee was found to be cancerous. *Id.* Plaintiff VonAh brought a medical malpractice claim arguing "X-rays of her left knee revealed stippling within the shaft of the distal diaphysis of her left femur, which was felt most likely to be an enchondroma.[1] *Id. This was not mentioned to Julia, and no follow up was scheduled or recommended.*" *Id.* (emphasis added). Under circumstances unequivocally similar to those in this case, the case was dismissed pursuant to the statue of repose and affirmed on appeal. *Id.*

Caswell v. Yost, 671 N.W.2d 553 (Iowa Ct. App. 2003), provides another guiding example. There, the court held that the plaintiff's claims were barred by the statute of repose and that the fraudulent concealment doctrine did not function to save the plaintiff's untimely claim. *Id.* at *3. In *Caswell*, the plaintiff sought treatment from her family practitioner for a rash. *Id.* at *1. Her family practitioner referred her to a dermatologist. *Id.* The dermatologist authored a letter back to the family practitioner, stating the rash was suspicious of lupus. *Id.* Both the family practitioner and the dermatologist told the plaintiff she likely had lupus. *Id.* A few weeks later, the plaintiff followed up with the dermatologist. *Id.* Four days after that

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

follow up, the dermatologist wrote a letter to the family practitioner, explaining that the rash might be a drug reaction related to the seizure medication the family practitioner prescribed to the plaintiff. *Id.* The family practitioner did not disclose that letter or the dermatologist's opinion to the plaintiff. *Id.* Instead, the plaintiff found out approximately 1 year later, when the dermatologist told her about the letter. *Id.* She brought suit approximately two years later. *Id.*

The district court dismissed Caswell's case on the statute of limitations. *Id.* On appeal, the plaintiff argued fraudulent concealment to save her case, alleging that the family practitioner fraudulently concealed that the drug reaction was causing the rash to persist, not lupus. *Id.* The Court of Appeals agreed with the district court that the plaintiff's fraudulent concealment claim was based upon the same act as her medical malpractice claim—the defendant's failure to disclose what caused her rash. *Id.* at *3. Once again, these circumstances directly guide the outcome in this case. Plaintiffs-Appellants' fraudulent concealment claim is based upon the same act as the medical malpractice claim—an alleged failure to disclose the results of a CT scan. As such, the court must similarly reject Plaintiffs-Appellants' argument that the doctrine of fraudulent concealment is applicable to the facts in this case and affirm the district court's grant of summary judgment on the statute of repose.

This case is distinguishable from the only case to which Plaintiffs-Appellants cited to the district court and almost exclusively rely upon on appeal, *Skadburg v.*

Gately, 911 N.W.2d 786 (Iowa 2018). *Skadburg*, is a legal malpractice case, in which the court found the doctrine of fraudulent concealment tolled the statute of limitations. *Id.* There, attorney Gatley allegedly told his client, the plaintiff-administrator of an estate, to pay certain debts of the estate. *Id.* at 790. On Gatley's advice, the administrator allegedly paid debts out of the proceeds of a life insurance policy and 401k fund. *Id.* Gatley allegedly failed to tell the administrator that the life insurance proceeds were exempt from any claims against the estate. *Id.* The Court held Gately's alleged negligence was advising the plaintiff to pay the debts with the respective life insurance policy and 401k funds even though the funds were exempt from claims against the estate. *Id.* at 799. It then found Gately's alleged concealment was his silence after the plaintiff told him she had paid all the bills and sent the three communications over the course of more than a year, allegedly blaming herself for the economic loss, while thinking Gately did "the best" that he could for her. *Id.* In other words, the plaintiff's contention concerning fraudulent concealment was that Gately should have told her that he gave incorrect legal advice concerning the administration of the estate *once he realized he had given her bad advice* based upon her multiple follow up communications, but instead he knowingly concealed the known error from her. *Id.* at 799–800.

Here, there is no such subsequent act of concealment to which Plaintiffs can—or do—point. Plaintiffs' allegations are focused on the same set of events in October

2009—which Plaintiffs assert are both the negligent act and the fraudulent concealment. This case is precisely the type of case intended to be barred by the statute of repose.

Regardless of the ever-evolving arguments and distortion of the facts employed by Plaintiffs-Appellants to keep this matter active, the negligence forming the foundational basis of their liability claim—Dr. Grossmann's alleged failure to disclose—is the same conduct to which they point as constituting fraudulent concealment. Failure to disclose information to a plaintiff ***cannot*** be the basis for fraudulent concealment. *Van Overbeke*, 540 N.W.2d at 276–77; *see also Skadburg*, 911 N.W.2d 786. "If it could be, there would effectively be no statute of limitations for negligent failure to inform a patient (fraud as basis of liability cannot also be basis for finding of fraudulent concealment.)." *Id.* As such, this Court should follow controlling Iowa law and prior precedent, which requires affirmation of the district court's order granting summary judgment and dismissing this untimely case.

III. THIS COURT SHOULD DECLINE TO CONSIDER THOSE ISSUES NOT DECIDED BY THE DISTRICT COURT

A. Error Preservation

For the reasons set forth in Section I, *supra*, Plaintiffs-Appellants' appeal is untimely. Should the court determine Plaintiffs-Appellants' appeal is timely, Defendants-Appellees disagree error has been preserved. *See* Iowa R. App. P. 6.903(2)(g)(Providing Appellant's brief shall include a statement of how the issue

was preserved, including with reference to the places in the record where the issue was raised ***and decided***.); *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002)(*citing Linge v. Ralston Purina Co.,* 293 N.W.2d 191, 195–96 (Iowa 1980) (issue not preserved where it was not specifically addressed in the district court ruling and the record and ruling did not infer the issue was decided).

B. Scope and Standard of Review

For the reasons set out below, this matter is not ripe for review. The district court did not rule on any issues beyond the statute of repose. Therefore, the scope of this Court's review should be limited to that single issued decided by the district court. *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 413 (Iowa 2017) ("A supreme court is 'a court of review, not of first view.").

C. Argument

Finding all of Plaintiffs-Appellants claims time-barred by the statute of repose, the district court declined to address the parties' other arguments on summary judgment. These included substantive, but not wholly dispositive, issues as to whether certain claims were barred by the statute of limitations and whether Plaintiffs had sufficient evidence to pursue a claim for punitive damages. Because the district court did not decide these issues, this Court need not consider those issues.

It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before an Iowa appellate court will decide them on appeal. *UE Local 893/IUP v. State*, 928 N.W.2d 51, 60–61 (Iowa 2019); *Meier*, 641 N.W.2d at 537; *Metz v. Amoco Oil Co.,* 581 N.W.2d 597, 600 (Iowa 1998) ("issues must be presented to and passed upon by the district court"); *Peters v. Burlington N. R.R.,* 492 N.W.2d 399, 401 (Iowa 1992) ("issues must be raised and decided by the [district] court"). The reason for this principle relates to the essential symmetry required of our legal system. It is not a sensible exercise of appellate review to analyze facts of an issue "without the benefit of a full record or lower court determination [ ]." *Yee v. City of Escondido,* 503 U.S. 519, 538 (1992). According to these principles, as a general rule, Iowa appellate courts do not address issues presented on appeal for the first time, and do not remand cases to the district court for evidence on issues not raised and decided by the district court. *Goode v. State*, 920 N.W.2d 520, 526 (Iowa 2018)(noting the exception to this general rule is cases of ineffective assistance of counsel); *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 413 (Iowa 2017) (declining to rule on damages issues not decided by the district court after the district court granted summary judgment on liability and stating, "A supreme court is 'a court of review, not of first view.") (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7, (2005)).

This case is no exception to the general rule. This court should affirm the district court's ruling granting summary judgment and confirm Plaintiffs-Appellants' claims are untimely and barred by the statute of repose. Even if it does not, however, it should decline to issue a broader opinion that takes a "first view" of the issues not ruled upon by the district court.[2]

CONCLUSION

Defendants-Appellees respectfully request the Court affirm the ruling of the district court, finding Plaintiffs-Appellees claims time-barred pursuant to the statute of repose.

REQUEST FOR NON-ORAL SUBMISSION

As this matter involves application of existing precedent, oral argument is unlikely to be of assistance to the Court. Therefore, Defendants-Appellees request non-oral submission and summary disposition by the Court.

[2] To the extent this Court decides to expand its review beyond those issues considered by the district court, Defendants incorporate its arguments on summary judgment, which are part of the record before this Court. (Def. MSJ, App. 82–99).

CERTIFICATE OF COST

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

CERTIFICATE OF COMPLIANCE

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

This brief has been prepared in a proportionally spaced typeface using Times New Roman size 14 font and contains 7,134 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

CERTIFICATE OF FILING AND SERVICE

I hereby certify:

That I filed the foregoing Final Brief with the Clerk of the Supreme Court of Iowa by EDMS on the 15th day of March 2021, which constitutes service on all other parties to this appeal pursuant to Iowa Ct. R. §16.315(1)(b).

/s/Joseph F. Moser