

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

GREGORY MAGNUSSEN and DAINA
MAGNUSSEN,

Plaintiffs,

v.

Civil Action File No. _____

SAMUEL W. MOSS, M.D., THE
SOUTHEAST PERMANENTE
MEDICAL GROUP, INC., KAISER
FOUNDATION HEALTH PLAN OF
GEORGIA, INC., KAISER
FOUNDATION HEALTH PLAN, INC.,
KAISER PERMANENTE INSURANCE
COMPANY, and Fictitious Defendants
"A" through "Z", whether singular or
plural, those other persons, corporations,
firms or other entities whose wrongful
conduct caused the injuries and damages
to Plaintiffs, all of whose true and
correct names are unknown to Plaintiffs
at this time, but will be substituted by
amendment when ascertained

Defendants.

**COMPLAINT FOR MEDICAL
MALPRACTICE AND NEGLIGENCE**

COME NOW Plaintiffs Gregory Magnussen and Daina Magnussen and show the Court
the following for their Complaint for Medical Malpractice and Negligence against Defendants
Samuel W. Moss, M.D., The Southeast Permanente Medical Group, Inc., Kaiser Foundation

Health Plan of Georgia, Inc., Kaiser Foundation Health Plan, Inc., Kaiser Permanente Insurance Company and Fictitious Defendants "A" through "Z":

PARTIES, JURISDICTION AND VENUE

1.

Plaintiffs Gregory Magnussen ("G. Magnussen") and Daina Magnussen ("D. Magnussen") are husband and wife (G. Magnussen and D. Magnussen and their children are sometimes referred to hereinafter as the "Magnussens") and have suffered harm as a result of one or more acts or omissions by the named Defendants in this Action.

2.

G. Magnussen and D. Magnussen are lawfully married and have been lawfully married at all relevant times.

3.

Defendant Samuel W. Moss, M.D. ("Moss") is a doctor of medicine transacting business in Fulton County, Georgia and is subject to the jurisdiction and venue of this Court. Defendant Moss may be served with process at 3550 Preston Ridge Road, Alpharetta, Fulton County, Georgia 30005 (the "Moss Location").

4.

Defendant The Southeast Permanente Medical Group, Inc. ("Southeast Permanente") is a Georgia professional for profit corporation that transacts business at a number of places throughout the state of Georgia, including the Moss Location and its principal office at 3495 Piedmont Road, 9 Piedmont Center, Atlanta, Fulton County, Georgia 30305. Defendant Southeast Permanente is subject to the jurisdiction and venue of this Court and may be served

with process by way of its registered agent, Corporation Service Company, 40 Technology Parkway South, Suite 300, Norcross, Georgia 30092.

5.

Defendant Kaiser Foundation Health Plan of Georgia, Inc. ("Kaiser Health Georgia") is a Georgia for corporation that transacts business at a number of places throughout the state of Georgia, including the Moss Location and its principal office at 3495 Piedmont Road, 9 Piedmont Center, Atlanta, Fulton County, Georgia 30305 (the "Kaiser Office"). Defendant Kaiser Health Georgia is subject to the jurisdiction and venue of this Court and may be served with process by way of its registered agent, Corporation Service Company, 40 Technology Parkway South, Suite 300, Norcross, Georgia 30092.

6.

Defendant Kaiser Foundation Health Plan, Inc. ("Kaiser Health") is a California non-profit corporation with its principal office at One Kaiser Plaza, Oakland, California 94612 that is qualified to do business in Georgia and transacts business at a number of places throughout the state of Georgia, including the Moss Location and 3495 Piedmont Road, 9 Piedmont Center, Atlanta, Fulton County, Georgia 30305. Defendant Kaiser Health is subject to the jurisdiction and venue of this Court pursuant to O.C.G.A. § 9-10-31 et seq. and may be served with process by way of its registered agent, Corporation Service Company, 40 Technology Parkway South, Suite 300, Norcross, Georgia 30092.

7.

Defendant Kaiser Permanente Insurance Company ("Kaiser Insurance") is a California for profit corporation qualified to do business in Georgia with its principal office at 300 Lakeside

Drive, Oakland, California 94612 that is qualified to do business in Georgia and transacts business at a number of places throughout the state of Georgia, including the Moss Location and 3495 Piedmont Road, 9 Piedmont Center, Atlanta, Fulton County, Georgia 30305. Defendant Kaiser Insurance is subject to the jurisdiction and venue of this Court subject to the jurisdiction and venue of this Court as joint-tortfeasors pursuant to O.C.G.A. § 9-10-31 et seq. and may be served with process by way of its registered agent, Corporation Service Company, 40 Technology Parkway South, Suite 300, Norcross, Georgia 30092.

8.

Fictitious Defendants "A" through "Z", whether singular or plural, are those persons, firms, corporations or other entities whose negligent acts, wrongful conduct or omissions caused or contributed to cause the injuries, harm and damages to Plaintiffs. The identities and true and correct names of Fictitious Defendant "A" through "Z" are unknown to Plaintiffs at this time, but Plaintiffs will substitute their names by Amendment to this Complaint when Plaintiffs ascertain same. Fictitious Defendants "A" through "Z" are subject to the jurisdiction and venue of this Court as joint-tortfeasors pursuant to O.C.G.A. § 9-10-31 et seq.

9.

Defendant Moss and other individuals working on behalf of Kaiser (as defined hereinafter) at the Moss Location, the Kaiser Office or elsewhere, including individuals who comprise a portion of Fictitious Defendants "A" through "Z" responsible for providing health care services to G. Magnussen and whose negligence acts, wrongful conduct or omissions caused or contributed to cause the injuries, harm and damages to Plaintiffs are sometimes referred to hereinafter collectively as the "Kaiser Actors".

10.

At all relevant times, the Kaiser Actors were working within the course and scope of their authority as agents and/or employees of Defendants Southeast Permanente, Kaiser Health Georgia, Kaiser Health, Kaiser Insurance and other related and affiliated entities who comprise a portion of Fictitious Defendants "A" through "Z" responsible for providing health care services to G. Magnussen and whose negligent acts, wrongful conduct or omissions caused or contributed to cause the injuries, harm and damages to Plaintiffs

11.

Defendants Southeast Permanente, Kaiser Health Georgia, Kaiser Health, Kaiser Insurance and other related and affiliated entities who comprise a portion of Fictitious Defendants "A" through "Z" responsible for providing health care services to G. Magnussen who employed or engaged the Kaiser Actors are vicariously liability for the negligent acts, wrongful conduct or omissions of the Kaiser Actors under the doctrines of agency and *respondeat superior*.

12.

The Kaiser Actors and Defendants Southeast Permanente, Kaiser Health Georgia, Kaiser Health, Kaiser Insurance and other related and affiliated entities who comprise a portion of Fictitious Defendants "A" through "Z" who were responsible for providing health care services to G. Magnussen and whose wrongful conduct or omissions caused or contributed to cause the injuries, harm and damages to Plaintiffs are sometimes referred to hereinafter collectively as "Kaiser".

DUTIES OWED TO PLAINTIFF AND LIABILITY

13.

Defendants Moss and Kaiser (collectively, "Defendants") are engaged in the provision of health care services and/or the practice of medicine in the state of Georgia and owe to individual patients, like G. Magnussen, a duty to provide such services in accordance with their professional obligation to exercise due care.

14.

Defendants also owe a duty to individual patients, like G. Magnussen, to perform their health care provision services with the ordinary care and skill that a reasonably prudent person would exercise under the same or similar circumstances.

15.

Defendants are jointly and severally liable for the injuries, harm and damages suffered by Plaintiffs complained of herein.

COMPLIANCE WITH PROFESSIONAL NEGLIGENCE PROCEDURAL FILING REQUIREMENTS

16.

In addition to alleging harm due as a result of the negligence acts or omissions of one or more Defendants, Plaintiffs are filing this Action as a medical malpractice action as defined by O.C.G.A. § 51-1-27.

17.

O.C.G.A. § 9-11-9.1 requires that an affidavit of an expert competent to testify as to at least one negligent act or omission be filed along with the Complaint.

18.

In support of Plaintiff's claims and as required by O.C.G.A. § 9-11-9.1, Plaintiffs have obtained an expert affidavit from Suresh R. Gudur, M.D., a duly licensed Georgia medical doctor (Georgia State Medical License No. 42590), that confirms his opinion that Defendants breached their professional obligations to exercise due care in connection with their provision of medical and health care services to G. Magnussen through one or more acts or omissions and that their deviation from the standard of care was a proximate cause of the harm or injury suffered by Plaintiffs, same being attached hereto as Schedule 1 and incorporated herein by this reference.

FACTS

19.

G. Magnussen always has been a fit individual who performs cabinetry work and other physically demanding and labor intensive work for a living.

20.

Prior to 2010, the Magnussens had been members of a health care plan provided and administered by Defendants for approximately seventeen years.

21.

G. Magnussen had seen Defendant Moss as his primary care physician since 1993 while the Magnussens were enrolled in Defendant Kaiser's health care plan and he considered Defendant Moss to be his personal physician.

22.

On or about April 12, 2010, G. Magnussen visited the office of Defendant Kaiser and obtained a physical examination performed by Defendant Moss.

23.

The results of the physical examination disclosed nothing out of the ordinary and G. Magnussen also had some tests performed while he was in Defendants' office.

24.

Over the course of a number of years, the Magnussens had grown accustomed to hearing from Defendants if any of their test results indicated that further attention might be necessary.

25.

G. Magnussen did not hear anything from Defendants about any of his test results, which did not seem out of the ordinary to him as Defendants always had contacted the Magnussens if anything was amiss.

26.

In approximately June of 2010, the Magnussens left Defendant Kaiser's health care plan.

27.

Neither G. Magnussen or D. Magnussen received anything from Defendants regarding any adverse test results for any of the Magnussens after leaving Defendant Kaiser's health care plan.

28.

During the entire time from April 12, 2010 through October of 2011, G. Magnussen felt as good as he always had felt and engaged in the active and physically demanding lifestyle that he always had enjoyed.

29.

From the time of G. Magnussen's visit with Defendants on or about April 12, 2010 through the time of his diagnosis of colorectal cancer in late October or early November of 2011, G. Magnussen had no signs or symptoms of colorectal cancer.

30.

In October of 2011, G. Magnussen sought the services of Gary S. Orris, M.D. ("Dr. Orris") for an annual physical examination which included routine tests and a rectal examination.

31.

The first consultation that G. Magnussen had with Dr. Orris occurred on or about October 5, 2011, and it was at that time that G. Magnussen requested that Dr. Orris perform a physical examination on his next visit since he had not had one since the April 12, 2010 physical examination performed by Defendant Moss.

32.

The physical exam by Dr. Orris took place later in the month of October and during the rectal examination portion of same, Dr. Orris detected a large mass in G. Magnussen's colon and suggested that G. Magnussen have a colonoscopy and some further testing done.

33.

After G. Magnussen left the office of Dr. Orris, he was in a great deal of pain which would not subside.

34.

Dr. Orris indicated that G. Magnussen should move-up the date of his colonoscopy, which G. Magnussen did.

35.

G. Magnussen consulted with J. Clay Copher, M.D. ("Dr. Copher") for further testing, and at that time, Dr. Copher indicated that G. Magnussen had a large cancerous growth that would need to be removed immediately.

36.

Due to the size of the growth, Dr. Copher indicated to G. Magnussen that a large amount of his colon would have to be removed and a colostomy would be required.

37.

G. Magnussen had surgery on November 4, 2011 wherein Dr. Copher removed the mass and performed the colostomy.

38.

Over the next several months, G. Magnussen underwent treatment for his colorectal cancer which included chemotherapy and radiation treatments.

39.

G. Magnussen and D. Magnussen attributed the colorectal cancer, the emergency surgery and the subsequent cancer treatments and the pain and suffering resulting from same to the "luck of the draw" and went on about their lives.

40.

On or about June 29, 2012, G. Magnussen received a certified letter from Defendant Kaiser dated June 26, 2012 (the "June 26 Kaiser Letter") notifying him of an adverse result from

his fecal occult blood test (the "Adverse Test Result") that Defendants allegedly performed on April 12, 2010 (the "April FOBT") and stating the following:

"Dear Gregory Magnussen:

Our records indicate that you are no longer enrolled with Kaiser Permanente. We want to inform you that you had an abnormal laboratory test prior to leaving our care that you should discuss with your new doctor or health care provider.

You received a positive fecal occult blood test (FOBT) on 4/12/10 which is a test used as a screening tool for colon cancer. Your test indicates that further evaluation is required.

Please contact your current physician for further guidance.

Sincerely,

Your Health care Team
Kaiser Permanente - Georgia Region"

41.

A true and correct copy of the June 26 Kaiser Letter is attached hereto as Schedule 2 and incorporated herein by this reference.

42.

G. Magnussen's receipt of the June 26 Kaiser Letter was the first time he had any knowledge or comprehension that there had been positive results from the April FOBT or that he must have had a condition in 2010 that, when left untreated, later developed into colorectal cancer that required aggressive treatment by Dr. Copher.

43.

The Magnussens have not heard one word from Defendant Moss, Defendant Kaiser or any of the other Defendants since learning of the Adverse Test Result other than receiving the June 26 Kaiser Letter.

44.

Had G. Magnussen known about the results of April FOBT and received the June 26 Kaiser Letter substantially contemporaneously with the performance of the April FOBT as he should have, he would have sought further evaluation and treatment and the lives that the Magnussens and their extended family members now have would be very different.

45.

At the time Defendant Moss performed the rectal exam of G. Magnussen, he violated the standard of care by failing to diagnose the presence and/or risk of colorectal cancer and by failing to notify G. Magnussen of the Adverse Test Result.

46.

The misdiagnosis of G. Magnussen's condition by Moss and the failure of Defendants to notify G. Magnussen of the Adverse Test Result caused his colorectal cancer to manifest itself between the time period from April 12, 2010 and October of 2011 and to grow within G. Magnussen's body without being detected or treated.

47.

As a direct and proximate result of the professional negligence described herein, G. Magnussen's colorectal cancer was not timely diagnosed or treated.

48.

The manifestation and growth of G. Magnussen's colorectal cancer between April 12, 2010 and October of 2011 constitutes an injury to G. Magnussen that did not exist at the time of the Defendants' negligence.

49.

As a direct and proximate result of the negligence of Defendants, G. Magnussen has suffered severe, permanent and disabling personal injuries, including special damages, and has suffered, and will continue to suffer, physical, mental and emotional pain and suffering.

50.

All conditions precedent to the liability of Defendants to Plaintiffs have been satisfied.

COUNT I

NEGLIGENT BREACH OF DUTY OF CARE

51.

The allegations of Paragraphs 1 through 52 hereof are hereby realleged as if set forth fully herein.

52.

Defendants owed G. Magnussen a duty to protect his health and welfare by informing him of potential medical issues disclosed by their examination of him and the results of the tests they performed on his behalf.

53.

Defendants failed to follow the standard of care applicable to similarly situated professionals under similar circumstances and like surrounding conditions when they failed to notify G. Magnussen of the Adverse Test Result in a timely manner.

54.

The foregoing failure by Defendants constitutes medical malpractice as defined by O.C.G.A. § 51-1-27.

55.

As a result of the failure of Defendants to fully inform G. Magnussen of the Adverse Test Result and to make him aware that he should seek further examination and treatment, G. Magnussen developed advanced colorectal cancer which was not detected until eighteen months after the Adverse Test Result, which required G. Magnussen's condition to be treated in an aggressive manner in order to provide him with the highest likelihood of recovery and survival.

COUNT II

GROSSLY NEGLIGENT BREACH OF DUTY OF CARE

56.

The allegations of Paragraphs 1 through 55 hereof are hereby realleged as if set forth fully herein.

57.

For approximately seventeen years, Defendant Moss had served as G. Magnussen's personal physician and Defendant Kaiser had served as the primary health care provider for the Magnussens.

58.

The Magnussens trusted Defendants with their health care and well-being and Defendants always had assured the Magnussens that they would be notified immediately of any urgent matters or conditions requiring further treatment or evaluation.

59.

Defendants owed G. Magnussen a duty to protect his health and welfare by informing him of potential medical issues disclosed by their examination of him and the results of the tests they performed on his behalf.

60.

Defendants were grossly negligent in their failure to follow the standard of care applicable to similarly situated professionals under similar circumstances and like surrounding conditions when they failed to notify G. Magnussen of the Adverse Test Result.

61.

The foregoing failure by Defendants constitutes medical malpractice as defined by O.C.G.A. § 51-1-27.

62.

As a result of the grossly negligent failure of Defendants to fully inform G. Magnussen of the Adverse Test Result and to make him aware that he should seek further examination and treatment, G. Magnussen developed advanced colorectal cancer which was not detected until eighteen months after the Adverse Test Result, which required G. Magnussen's condition to be treated in an aggressive manner in order to provide him with the highest likelihood of recovery and survival.

63.

G. Magnussen has suffered harm as a result of Defendants' breach of the duty they owed to him which are a direct and proximate result thereof and which are recoverable by him in an amount to be determined at trial by the enlightened conscience of the jury.

64.

Defendants' conduct complained of in this Count has been done with reckless indifference to the consequences and is of such an aggravated nature that G. Magnussen is entitled to recover from Defendants punitive damages in an amount to be determined by the enlightened conscience of the jury in order to punish Defendants and deter them from such wrongdoing in the future.

COUNT III

NEGLIGENT FAILURE TO NOTIFY

65.

The allegations of Paragraphs 1 through 64 hereof are hereby realleged as if set forth fully herein.

66.

Notifying a patient about a positive test result that indicates a potentially serious medical condition does not require the exercise of professional judgment.

67.

Defendants owed G. Magnussen a duty to exercise reasonable care by informing him of the Adverse Test Result and they failed to do so.

68.

G. Magnussen has suffered harm as a result of Defendants' breach of the duty they owed to him which are a direct and proximate result thereof and which are recoverable by him in an amount to be determined at trial by the enlightened conscience of the jury.

COUNT IV

GROSSLY NEGLIGENT FAILURE TO NOTIFY

69.

The allegations of Paragraphs 1 through 68 hereof are hereby realleged as if set forth fully herein.

70.

For approximately seventeen years, Defendant Moss had served as G. Magnussen's personal physician and Defendant Kaiser had served as the primary health care provider for the Magnussens.

71.

G. Magnussen and D. Magnussen trusted both of these Defendants, as well as all of the employees and independent contractors who worked for Defendant Kaiser, with their health care and well-being and Defendants always had assured the Magnussens that they would be notified immediately of any urgent matters or conditions requiring further treatment or evaluation.

72.

Notifying a patient about a positive test result that indicates a potentially serious medical condition does not require the exercise of professional judgment.

73.

Defendants owed G. Magnussen a duty to exercise reasonable care by informing him of the Adverse Test Result and they failed to do so with gross indifference to the consequences which is highlighted by the very circumstances and lack of any type of follow-up surrounding the sending of the June 26 Kaiser Letter.

74.

G. Magnussen has suffered harm as a result of Defendants' breach of the duty they owed to him which are a direct and proximate result thereof and which are recoverable by him in an amount to be determined at trial by the enlightened conscience of the jury.

75.

Defendants' conduct complained of in this Count has been done with reckless indifference to the consequences and is of such an aggravated nature that G. Magnussen is entitled to recover from Defendants punitive damages in an amount to be determined by the enlightened conscience of the jury in order to punish Defendants and deter them from such wrongdoing in the future.

COUNT V

BREACH OF FIDUCIARY DUTY

76.

The allegations of Paragraphs 1 through 75 hereof are hereby realleged as if set forth fully herein.

77.

For approximately seventeen years, Defendant Moss had served as G. Magnussen's personal physician and Defendant Kaiser had served as the primary health care provider for the Magnussens.

78.

G. Magnussen and D. Magnussen trusted both of these Defendants with their health care and well-being and Defendants always had assured the Magnussens that they would be notified immediately of any urgent matters or conditions requiring further treatment or evaluation.

79.

The relationship of doctor and patient is one of trust in which the doctor owes a fiduciary obligation to the patient to provide for his health, care and well-being.

80.

Defendants owed G. Magnussen a duty to protect his health and welfare by informing him of potential medical issues disclosed by their examination of him and the results of the tests they performed on his behalf.

81.

G. Magnussen has suffered harm as a result of Defendants' breach of the duty they owed to him which are a direct and proximate result thereof and which are recoverable by him in an amount to determined at trial by the enlightened conscience of the jury.

82.

All of the acts of Plaintiff complained of in this Count are in bad faith, constitute stubborn litigiousness, or have caused Defendants unnecessary trouble and expense, thereby

authorizing Defendants to recover their expenses of litigation, including reasonable attorney's fees, pursuant to O.C.G.A. § 13-6-11.

83.

Defendants' conduct complained of in this Count has been done with reckless indifference to the consequences and is of such an aggravated nature that G. Magnussen is entitled to recover from Defendants punitive damages in an amount to be determined by the enlightened conscience of the jury in order to punish Defendants and deter them from such wrongdoing in the future.

COUNT VI

LOSS OF CONSORTIUM

84.

The allegations of Paragraphs 1 through 83 hereof are hereby realleged as if set forth fully herein.

85.

As a direct and proximate result of the harm suffered by G. Magnussen as a result of the negligent and grossly negligent acts and omissions of Defendants, the marital relations of G. Magnussen and D. Magnussen have been adversely impacted.

86.

As a direct and proximate result of Defendants' misconduct as complained of herein, D. Magnussen has lost the marital society, companionship, comfort and consortium of G. Magnussen for which all Defendants are liable in an amount to be proven at trial.

Defendants' conduct complained of in this Count has been done with reckless indifference to the consequences and is of such an aggravated nature that D. Magnussen is entitled to recover from Defendants punitive damages in an amount to be determined by the enlightened conscience of the jury in order to punish Defendants and deter them from such wrongdoing in the future.

WHEREFORE, Plaintiffs pray that a judgment be entered in their favor granting them the following relief:

- (a) That all Defendants be served with process;
- (b) That all issues in this Action triable by a jury be tried by a jury of twelve persons;
- (c) With respect to Count I, a judgment in favor of G. Magnussen and against Defendants in an amount in excess of \$10,000.00 to be determined at trial in order to compensate him for the harm he has suffered as a result of Defendants' professional negligence;
- (d) With respect to Count II, a judgment in favor of G. Magnussen and against Defendants in an amount in excess of \$10,000.00 to be determined at trial in order to compensate him for the harm he has suffered, including punitive damages, as a result of Defendants' gross professional negligence;
- (e) With respect to Count III, a judgment in favor of G. Magnussen and against Defendants in an amount in excess of \$10,000.00 to be determined at trial in order to compensate him for the harm he has suffered as a result of Defendants' negligence;
- (f) With respect to Count IV, a judgment in favor of G. Magnussen and against Defendants in an amount in excess of \$10,000.00 to be determined at trial in order to

compensate him for the harm he has suffered, including punitive damages, as a result of Defendants' gross negligence;

(g) With respect to Count V, a judgment in favor of G. Magnussen and against Defendants in an amount in excess of \$10,000.00 to be determined at trial in order to compensate him for the harm he has suffered, including punitive damages, as a result of Defendants' breach of fiduciary duty.

(h) With respect to Count VI, a judgment in favor of D. Magnussen against Defendants in an amount in excess of \$10,000.00 to be determined at trial in order to compensate her for the harm she has suffered, including punitive damages, as a result of Defendants' negligent and grossly negligent acts;

(i) Punitive damages as a result of Defendants' misconduct and reckless indifference to the consequences of an aggravated nature; and

(j) Any and all other and further relief that the Court deems just and proper.

Submitted as of October 4, 2013.

Respectfully submitted,

LARRY C. OLDHAM, P.C.



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