IN THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION
AT JACKSON

MARY GASKINS and Husband, KEN GASKINS,	)	Shelby County Circuit Court No. 54697 T.D.
Plaintiffs/Appellants.	)	
VS.	)	C. A. NO. 02A01-9412-CV-00281
GILBERT G. STEIN, D.D.S., GILBERT G. STEIN, D.D.S., P.C., DOW CORNING CORPORATION and ST. FRANCIS HOSPITAL, INC. FOUNDATION,	)	
Defendants/Appellees.	)	

FILED

August 19, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

From the Circuit Court of Shelby County at Memphis.
Honorable Robert A. Lanier, Judge

Alan R. Wolfe,
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Attorney for Plaintiffs/Appellants.

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Jerry O. Potter, Memphis, Tennessee
Attorneys for Defendants/Appellees, Gilbert G. Stein, D.D.S. and Gilbert G. Stein, D.D.S., P.C.

OPINION FILED:

AFFIRMED

FARMER, J.

CRAWFORD, P.J.,W.S. : (Concurs)
LILLARD, J. : (Concurs)

In this dental malpractice action, Plaintiffs-Appellants, Mary K. Gaskins and Ken Gaskins (the "Gaskins" or "Plaintiffs") appeal the trial court's grant of summary judgment in favor of Defendants-Appellants, Gilbert G. Stein, D.D.S., and Gilbert G. Stein, D.D.S., P.C. ("Dr. Stein" or "Defendant") based upon the three-year medical malpractice statute of repose.

The record reveals the following uncontroverted facts: In October 1983, Mary Gaskins was diagnosed as suffering from internal derangement of her right temporomandibular joint (TMJ). Dr. Stein performed surgery on Mrs. Gaskins and implanted a prosthetic device in her right TMJ known as a "Silastic" TMJ implant. This implant was manufactured by Co-Defendant, Dow Corning Corporation.[1] Mrs. Gaskins condition did not improve after surgery. In 1986, Mrs. Gaskins returned to Dr. Stein and was diagnosed as suffering from internal derangement in her left TMJ. On May 3, 1986, Dr. Stein implanted a Silastic TMJ implant in Mrs. Gaskins' left TMJ. Dr. Stein told Mrs. Gaskins that these implants were permanent.

After completion of the two surgeries, Mrs. Gaskins continued to experience increasing levels of pain in her TMJs. In October 1987, Dr. James McAfee, Mrs. Gaskins' primary physician, ordered a CT scan because she was not improving. The CT scan showed tears or perforations in the right TMJ and opaque fragments of bone or implant in the left TMJ. The CT scan results were read to Mrs. Gaskins soon after the tests were completed. In a deposition, Mrs. Gaskins stated that she felt "horror and disappointment" when she heard the results, and she further stated that she "knew something was wrong."

In 1991, a friend, who had undergone TMJ implant surgery with Dr. Stein, informed Mrs. Gaskins that she had received a letter from Dr. Stein's office informing her that her TMJ implants had been recalled.[2] After receiving the letter, Mrs. Gaskins twice contacted Dr. Stein's office about the status of her own implants, and was assured by one of Dr. Stein's employees that her particular implants were permanent and had not been recalled.

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[1]The trial court directed the entry of a final judgment pursuant to Rule 54.02 T.R.C.P.

[2]It is not clear whether Mrs. Gaskins' friend had Silastic TMJ implants or some other type of TMJ implant. In her deposition, Mrs. Gaskins states that she did not know whether she and her friend had the same brand of implants.

In July of 1992, Mrs. Gaskins obtained her operative records from Dr. Stein's office in an effort to determine the type of implant used in her surgery. From these records, she determined that she had Silastic TMJ implants. After she received product information from the manufacturer, she discovered that Silastic TMJ implants were recommended only for temporary use and were to be removed after one to two months.

On June 23, 1993, the Gaskins brought suit against Dr. Stein, St. Francis Hospital, Inc. Foundation ("St. Francis") and Dow Corning Corporation seeking damages for Mrs. Gaskins' personal injuries and Mr. Gaskins' loss of consortium. In their Complaint, they alleged that Dr. Stein had willfully, negligently or carelessly (1) failed to advise Mrs. Gaskin of the temporary nature of the implants; (2) failed to remove them at prescribed times; and (3) failed to disclose this information when it was sought by Mrs. Gaskins.

Dr. Stein filed a motion for summary judgment, alleging ***inter alia*** that Plaintiffs' claims were barred by the statute of limitation and the statute of repose of the Medical Malpractice Act. The trial court granted summary judgment in favor of Dr. Stein, finding that Plaintiffs' complaint was barred by the statute of repose, T.C.A. § 29-26-116(3), and that the statute's exception for fraudulent concealment was not applicable.

Plaintiffs appeal the trial court's ruling, presenting the following issue for our review:

> Did the trial court err in granting summary judgment to [Dr. Stein] by ruling that the Plaintiffs' complaint was barred by the statute of repose?

Defendants, on the other hand present the following issue:

> Is the [Plaintiffs'] claim barred by the statute of limitation?

Summary judgment should be granted only if the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Rule 56.03 T.R.C.P.; ***Byrd v. Hall***, 847 S.W.2d 208, 210 (Tenn. 1993); ***Dunn v. Hackett***, 833

S.W.2d 78, 80 (Tenn. App. 1992). When a motion for summary judgment is made, the court must consider the motion in the same manner as a motion for directed verdict made at the close of the plaintiff 's proof; that is, "the court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." ***Byrd***, 847 S.W.2d at 210-11. In ***Byrd***, the Tennessee Supreme Court stated:

> Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. [citations omitted]. In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth ***specific facts*** showing that there is a genuine issue of material fact for trial.

Id. at 211.

The summary judgment process should only be used as a means of concluding a case when there are no genuine issues of material fact, and the case can be resolved on the legal issues alone. ***Id.*** at 210 (citing ***Bellamy v. Federal Express Corp.***, 749 S.W.2d 31, 33 (Tenn. 1988)).

T.C.A. § 29-26-116 contains both a one-year statute of limitations and a three-year statute of repose for medical malpractice actions. T.C.A. § 29-26-116(a) provides:

> (a)(1) The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104.
>
> (2) In the event the alleged injury is not discovered within the said one (1) year period, the period of limitation shall be one (1) year from the date of such discovery.
>
> (3) In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.
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> (4) The time limitation herein set forth shall not apply in cases where a foreign object has been negligently left in a patient's body in which case the action shall be commenced within one (1) year after the alleged injury or wrongful act is discovered or should have been discovered.

T.C.A. § 29-26-116(a) (1980).

The three-year statute of repose does not begin to run upon discovery of the injury, but rather on the date of the allegedly negligent act. ***Benton v. Snyder***, 825 S.W.2d 409, 413 (Tenn. 1992); ***Braden v. Yoder***, 592 S.W.2d 896, 897 (Tenn. App. 1979). Where a statute of repose defense has been asserted and established, the burden of proof shifts to the plaintiff to establish the exception to the statute being claimed. ***Benton***, 825 S.W.2d at 413; ***Smith v. Southeastern Properties, Ltd.***, 776 S.W.2d 106, 109 (Tenn. App. 1989); ***Stockburger v. Ray***, 488 S.W.2d 378, 382 (Tenn. App. 1972).

In ***Benton***, the Tennessee Supreme Court, addressing the proof necessary to establish fraudulent concealment as an exception to the statute of repose, stated:

> In order to meet the burden, a plaintiff who seeks to toll a statute of limitations on the ground of fraudulent concealment must prove that the cause of action was known to and fraudulently concealed by the defendant. ***Ray v. Scheibert***, 224 Tenn. (2 Pack) 99, 104, 450 S.W.2d 578, 580 (1969). Knowledge on the part of the physician of the facts giving rise to a cause of action is an essential element of fraudulent concealment. ***Ray v. Scheibert***, 484 S.W.2d 63, 72 (Tenn. App. 1972). Concealment is also an essential element and it may consist of withholding information or making use of some device to mislead, thus involving act and intention. ***Patten v. Standard Oil Co. of Louisiana***, 165 Tenn. (1 Beeler) 438, 443, 55 S.W.2d 759, 761 (1933).
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> Generally, a plaintiff seeking to establish fraudulent concealment must prove that the defendant took affirmative action to conceal the cause of action and that the plaintiff could not have discovered the cause of action despite exercising reasonable diligence. ***Vance v. Schulder***, 547 S.W.2d 927, 930 (Tenn. 1977). Generally, the affirmative action on the part of a defendant must be something more than mere silence or a mere failure to disclose known facts. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry, or else there must be a duty resting on the party knowing such facts to disclose them. ***Patten v. Standard Oil Co. of Louisiana***, 165 Tenn. (1 Beeler) 438, 443, 55 S.W.2d 759, 761 (1933). For example, such a duty arises where a confidential relationship exists, as between physician and patient. In such cases, there is a duty to disclose, and that duty may render silence or failure to disclose known facts fraudulent. ***Hall v. De Saussure***, 41 Tenn. App. 572, 580-84, 297 S.W.2d 81, 86-87 (1956), *aff'd* 201 Tenn. (5 McCanless) 164, 297 S.W.2d 90 (1956). This is the rule in Tennessee and in other jurisdictions. ***See, e.g., Lasoya v. Sunay***, 193 Ga. App. 814, 389 S.E.2d 339 (1989); ***Borderlon v. Peck***, 661 S.W.2d 907 (Tex. 1983).

Benton, 825 S.W.2d at 414.

In granting summary judgment in the instant case, the trial court determined that the Gaskins had failed to present any evidence that would create a reasonable inference that Dr. Stein actually knew the implants were temporary in nature or that Dr. Stein knew any other facts which would lead to an inference of fraudulent concealment. Consequently, the trial court determined that Plaintiffs had failed to carry their burden of proof as to fraudulent concealment and found that Plaintiffs' claim was barred by the statute of repose. For the reasons hereinafter set out we affirm the judgment of the trial court, but on different grounds.

On appeal, the Gaskins argue that the trial court erred in determining that the record was void of any evidence that would support an inference of actual knowledge on the part of Dr. Stein. To support their argument, the Gaskins point to the affidavit of their expert, Dr. Henry Wall, D.D.S., who averred "that the standard of care with regard to the implantation, treatment and removal of said Silastic TMJ implant was for its use to be in accordance with the manufacturer's instructions, which were for the implantation to be on a temporary basis, rather than a permanent basis." They further point to the affidavit of Dr. Stein wherein he states that he is "familiar with the standard of care applicable to dentists and oral surgeons practicing in this community." They argue that Dr. Stein's statement that he was "familiar with the standard of care" coupled with Dr. Wall's statement defining the applicable standard of care are enough to give rise to a question of fact as to whether Dr. Stein knew that the implants were only to be used temporarily.

Assuming ***arguendo*** that Dr. Wall and Dr. Stein's affidavits are minimally sufficient to give rise to a jury question of whether Dr. Stein knew about the temporary nature of the implants when he and his employee told Mrs. Gaskins that they were for permanent use, we do not believe that such a finding is wholly determinative in the instant case. In order to successfully allege fraudulent concealment as an exception to the statute of repose, it is necessary to show that the plaintiff did not or could not have discovered the cause of action while exercising reasonable diligence. ***Benton***, 825 S.W.2d at 414; ***Vance v. Schulder***, 547 S.W.2d at 930. As the court stated in ***Ray v. Scheibert***:

> [I]n order for the statute of limitations to be tolled by a fraudulent concealment there must be an allegation that the cause of action was known to the defendant and fraudulently concealed by him and that

> the running of the statute would not be prevented by mere ignorance of the plaintiff and his failure to discover the existence of the cause of action within the statutory limitation would not prevent its running and that if the plaintiff either knew or neglectfully failed to discover the cause of action the statute would not be tolled.

Ray, 450 S.W.2d at 580-81 (citing ***Hudson v. Shoulders***, 164 Tenn. 70, 45 S.W.2d 1072 (1931)).

In the instant case, it is undisputed that Dr. Stein represented to Mrs. Gaskins that the replacement of her TMJ would assist in alleviating her discomfort. It is further undisputed that prior to the surgery Dr. Stein told her that the only possible complication would be a deadening of nerve cells around the implant areas. Notwithstanding Dr. Stein's representations, the pain in Mrs. Gaskins' head, neck and shoulders persisted and sporadically worsened after completion of the two implant operations.

When her condition did not improve, Mrs. Gaskins sought the advice of Dr. McAfee, who ordered that a CT scan be conducted. The October 1987 CT scan showed tears or perforations in the right TMJ and opaque fragments of bone or implant in the left TMJ. The CT scan results were read to Mrs. Gaskins soon after the tests were completed. Mrs. Gaskins' deposition testimony reveals that she understood what the test meant, that she felt "horror and disappointment" when she heard the results, and that she "knew something was wrong."

The results of the CT scan coupled with the persistent pain would have put any reasonable person on notice of inquiry as to the cause of their injuries. Notwithstanding the 1987 CT scan, and the persistent pain, Mrs. Gaskins waited until 1991 to begin researching the origin of her injury. This was four years after the October 1987 CT scan revealed that the implants were malfunctioning. We do not think that such an extended period of time was reasonable based upon the facts before us.

Because there is simply no indication in the record that Mrs. Gaskins could not have discovered her cause of action prior to 1991 had she attempted to do so, her claim of fraudulent concealment must fail. Mrs. Gaskins did not file this suit until June 23, 1993. Therefore, her claim is barred by the three-year medical malpractice statute of repose.

Given our ruling in respect to the issue presented by Plaintiffs, we deem it unnecessary to address Defendants' issue.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellants, for which execution may issue if necessary.

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FARMER, J.

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CRAWFORD, P.J., W.S. (Concurs)

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LILLARD, J. (Concurs)