

This is a dental malpractice case wherein Appellant, Deborah Parris, appeals from the summary judgment entered by the trial court in favor of the appellee, Dr. Phillip Land. For reasons hereinafter expressed, we agree that Appellant's action is time barred under T.C.A. § 29-26-116 and, therefore, affirm.

On April 30, 1993, Ms. Parris filed a complaint alleging that in November 1991, she underwent surgery by Dr. Land for the extraction of four wisdom teeth. She alleged that Dr. Land was negligent in performing the procedure which proximately caused the severing of the right lingual nerve in her mouth. It was alleged that Dr. Land also "split or otherwise injured [her] jaw bone" during the procedure. Parris alleged that following the procedure, the entire right side of her mouth and jaw "remained numb and without any feeling or sensation" and that "since the date of the surgery . . . up to the present day, [she] continues to have no feeling or sensation on the right side of her mouth and jaw." Parris alleged that during the time period between the surgical procedure and January 1993, Dr. Land told her the numbness "would eventually wear off, and that she need not be concerned with it." It was alleged that in January 1993, Dr. Land suggested that Parris see an oral surgeon for treatment of the numbness. Parris alleged that Dr. Land fraudulently concealed her true condition and injuries from the time of the surgery until January 1993.

Dr. Land answered the complaint, denying all material allegations therein and affirmatively asserting that the action was barred by the applicable statute of limitations. Dr. Land moved for summary judgment relying upon the depositions of the parties and his own affidavit. In response, Ms. Parris submitted the affidavit of Dr. Richard Dixon and also relied upon the parties' depositions.

Appellant frames the issues on appeal as follows:

1. Whether material disputed facts prevented the grant of a summary judgment.
2. Whether the discovery rule tolled the one-year statute of limitations in a dental malpractice action.

Summary judgment is to be granted only when it is shown that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *E.g. Gray v. Amos*, 869 S.W.2d 925, 926 (Tenn. App. 1993); Rule 56.03 T.R.C.P. It is incumbent upon the party seeking summary judgment to persuade the court that no genuine and material factual issues exist. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). Once the moving party does so, the nonmoving party must then demonstrate, by affidavits or other discovery materials, that a genuine material factual dispute exists warranting a trial. *Byrd*, 847 S.W.2d at 211. The nonmoving party cannot rely upon his pleadings but must set forth specific facts showing that there is a genuine issue of material fact for trial. *Id.*

The affidavit of Dr. Land states, in pertinent part, as follows:

I first saw [Parris] as a patient on September 23, 1991 during which time I, . . . evaluated her third molars (also known as wisdom teeth). I again saw Ms. Parris on October 1, 1991 during which time we, . . . discussed the subject of her wisdom teeth. On November 13, 1991 I extracted Ms. Parris' wisdom teeth. . . . In my opinion the technique I used in the removal of the teeth was proper. . . .

Shortly after the extractions Ms. Parris complained of paresthesia (numbness) within her mouth, particularly part of the right side of her tongue and gums. I felt that her paresthesia would improve with time, and so advised her. On January 8, 1992, March 22, 1992 and April 9, 1992, we had conversations about the numbness, and on each occasion I told her that I believed her numbness was transient and sooner or later the paresthesia would heal spontaneously. In making those remarks to her, I did so in a good faith belief that her feeling would return and that her numbness was not permanent. Never, at anytime, did I fraudulently conceal any information from her, and, in particular, I did not make any fraudulent remarks to her about her numbness. I felt that her lingual nerve might have been insulted during the removal of tooth number 32 causing the numbness but, as said, I did not feel the numbness was permanent, and so advised her.

On the occasions when I saw plaintiff after the extractions and we discussed her numbness, I told her that I felt the numbness would be temporary and that I believed that sooner or later the numbness would heal spontaneously. In making those comments, I did so in good faith using my best judgment. I actually felt that the numbness was transient and was not permanent.

Ms. Parris states the following in her deposition, as here pertinent: She experienced numbness in the bottom right side of her jaw and tongue by the second or third day after Dr. Land performed the surgery. She informed Dr. Land of the numbness within days of the surgery and “[h]e kept saying don’t worry about it. It will come back. Sometimes it takes a little longer for the feeling

to come back in different areas.” Dr. Land also told her that the healing process could take “up to a year to come back. If after a year nothing has happened then we will worry about it.” Parris saw Dr. Land approximately every two to three days for the first two weeks following the surgery. She was last seen by Dr. Land in April 1992.¹ Parris first became concerned that her condition might be permanent three to four months following the procedure. Since first experiencing it, the numbness has never changed locations or spread to more or less parts of her mouth.

Parris was further questioned as follows:

Q. When Dr. Land would tell you that he felt the feeling would come back, did you gain the impression from listening to him that he was telling you a lie, or did you gain the impression that he in good faith believed it would come back whether it did or not?

A. I believed he thought that it would.

Q. Come back?

A. Come back.

....

Q. Do you think he was being honest with you?

A. I don't know.

....

A. I now know that it hasn't come back that his statement was incorrect, but I don't know if he thought he was being honest.

....

Q. ... did Dr. Land ever tell you anything that would make you think he would tell you a falsehood?

A. No.

Q. So insofar as you know, and you don't know for certain, but insofar as you know he may have been telling you with a good faith belief that the numbness would eventually wear off?

A. He may have been. I would have no way of knowing.

Q. If I understand what you're telling me, you knew that the numbness resulted from the extraction of the teeth and you knew you had the numbness within two or three days after the extraction of the

¹It is undisputed that in January 1993, Dr. Land suggested that Parris consult an oral surgeon for her complaints.

teeth, but you thought it would be temporary based on what Dr. Land told you?

A. Yes, sir.

Parris consulted a Dr. Bernstein in November 1992 regarding her condition. After an examination, Bernstein informed her that he did not believe any sensation would return considering the amount of time that had passed since the surgery and that she should not have waited a year to correct the problem. She was referred to various other oral surgeons who basically relayed the same information. She was ultimately referred to a Dr. Meyer in Atlanta who agreed to attempt corrective surgery. Dr. Meyer informed her that something should have been done within the first three to six months and that her chances of the surgery being a success were 50/50. Parris underwent corrective surgery for her condition in June 1993 which was unsuccessful.²

In ruling on motions for summary judgment, the trial court and this Court must consider the matter in the same manner as a motion for a directed verdict made at the close of the plaintiff's proof, i.e., all evidence must be viewed in a light most favorable to the motion's opponent and all legitimate conclusions of fact must be drawn in that party's favor. *Gray*, 869 S.W.2d at 926. It is Appellee's position that the present claim is time barred under the provisions of T.C.A. § 29-26-116, which provide as follows:

(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.

Appellant counters that the discovery rule applies in this case to toll the running of the statute. She

²Dr. Land's deposition corroborates his affidavit. Dr. Dixon's affidavit addresses the issue of Dr. Land's alleged deviation from the standard of care only; it does not concern the statute of limitations argument.

argues that Dr. Land “persistently” informed her that her numbness was temporary and that she should wait a year before being concerned. Thus, she did not know her condition was permanent until after the year had passed and she sought a second opinion, whereupon she discovered the permanency of her condition and filed suit “approximately four months” later on April 30, 1993.

Appellee relies primarily upon *Bennett v. Hardison*, 746 S.W.2d 713 (Tenn. App. 1987). In almost identical facts to our own, the plaintiff in *Bennett* underwent surgery for the removal of a wisdom tooth by the defendant dentist on February 24, 1984. After the extraction, the defendant informed the plaintiff’s companion that plaintiff would experience a “temporary” numbness. The numbness, however, was permanent. The plaintiff filed suit on October 3, 1985 alleging that the defendant failed to inform plaintiff of the risks of dental surgery. In response to the defendant’s argument that the action was time barred, the plaintiff relied upon the discovery rule to argue that he did not learn his condition was permanent until October 1984 when another doctor told him the numbness was permanent. *Bennett*, 746 S.W.2d at 713. The trial court held the action time barred and entered summary judgment for the defendant. *Id.*

In affirming the trial court, the court of appeals, middle section, held:

It is uncontroverted that plaintiff experienced the numbness immediately after the surgery and that the extent or effect of the numbness did not change from the date of inception until the date of suit. . . . Plaintiff did not see defendant after the surgery, but Dr. Draper removed the stitches a week later and told plaintiff that nerve numbness was not an unusual result of the extraction performed by defendant. . . .

Plaintiff’s reliance upon the discovery rule is based upon the assumption that temporary numbness and permanent numbness are two entirely separate injuries or results, and that knowledge of temporary numbness is not knowledge of permanent numbness.

In *Security Bank & Trust Co. v. Fabricating, Inc.*, Tenn. 1983, 673 S.W.2d 860, in discussing the one year statute of limitations on legal malpractice suits, the Supreme Court said:

. . . . A plaintiff cannot be permitted to wait until he knows all of the injurious effects as consequences of an actionable wrong. *Taylor v. Clayton Mobile Homes, Inc.*, Tenn. 1974, 516 S.W.2d 72. (673 S.W.2d at 864, 865).

In *Hoffman v. Hospital Affiliates, Inc.*, Tenn. 1983, 652 S.W.2d 341, the Supreme Court reversed a dismissal of a medical

malpractice case based upon the statute of limitations and said:

The “discovery rule” would apply only in cases where the plaintiff does not discover and reasonably could not be expected to discover that he had a right of action. Furthermore, the statute is tolled only during the period when the plaintiff had no knowledge at all that a wrong had occurred, and, as a reasonable person is not put on inquiry. (652 S.W.2d 341 at 344.)

....

Even though plaintiff may have been justified in accepting a brief period of numbness as a necessary incident of the surgery, absent evidence of some unusual cause for the delay, the defendant was not justified in delaying the “discovery” of the permanence of his injury from February 24, 1984, until “around October, 1984”, a period of some 8 months. At some time during that 8 months, any reasonable person would have concluded that the brief, temporary numbness normally incident to oral surgery had outlasted its welcome and had become an unacceptable incident to the surgery. This is especially true because there is no evidence of any improvement in the numbness during the period. An improvement might have justified a wait for further improvement,

Id. at 714.

The similarities between *Bennett* and our own case are quite apparent. As in *Bennett*, Parris experienced numbness in a relatively short time following the surgery (two to three days) and at no time since the surgery has she experienced any signs of improvement. Even accepting as true Dr. Land’s statement to her that she should not be concerned for one year, she concedes that she began worrying that her condition was permanent well before that year’s end (three to four months following the surgery), in February or March of 1992. Yet suit was not filed until over a year later on April 30, 1993. In light of *Bennett*, we conclude that Parris, in the exercise of reasonable care and diligence, should have discovered her cause of action prior to April 30, 1992, (more than five months after the surgery) and that the statute of limitations began running prior to this time.

We further do not find the record to support Appellant’s claim that Appellee fraudulently concealed her cause of action. Fraudulent concealment is shown when the physician has knowledge of the wrong done and conceals such information from the patient. *Housh v. Morris*, 818 S.W.2d 39, 43 (Tenn. App. 1991). Honest mistakes on the part of the physician, standing alone, are not sufficient evidence to establish fraudulent concealment. *Housh*, 818 S.W.2d at 43. The

record before us does not suggest that Dr. Land was dishonest in his statements to Ms. Parris that her condition was temporary and that she should not be concerned until one year had passed. However mistaken Dr. Land may have been, the record does not suggest that he actually knew otherwise. Ms. Parris testified that she thought Dr. Land believed her condition was transient and she had no way of knowing whether or not he was conveying a falsehood. Moreover, we liken the present action to the situation in *Housh* wherein this court held that the physician's statements to his patient, who was rendered permanently disabled after undergoing surgery at his hands, that she would walk again merely concealed the "extent" of her injuries. *Housh* held that "[t]his simply will not operate to toll the statute of limitations." *Housh*, 818 S.W.2d at 43.

Viewing the evidence in a light most favorable to Ms. Parris, we are compelled to conclude that the one year statute of limitations applies to bar her suit. The judgment of the trial court entering summary judgment in favor of Appellee is, accordingly, affirmed. Costs are assessed against Deborah Parris, for which execution may issue if necessary.

FARMER, J.

HIGHERS, J. (Concurs)

LILLARD, J. (Concurs)