

Affirmed and Opinion filed February 22, 2001.



In The

Fourteenth Court of Appeals

NO. 14-98-01098-CV

EDWIN C. SMESNY AND JUNE A. SMESNY, Appellants

V.

ARTHUR EVANS, M.D. AND PEDRO CARAM, M.D., Appellee

**On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Cause No. 97-39889**

O P I N I O N

Edwin C. Smesny sued Drs. Pedro Caram and Arthur Evans for medical malpractice. The doctors sought and won summary judgment on the basis of limitations. In three points of error Smesny contends the trial court erred because there was adequate evidence of fraudulent concealment in the record and because in any case he brought suit within the four-year statute for fraud. We affirm.

Smesny underwent a lumbar laminectomy on April 7, 1992. Dr. Caram was his treating physician and Evans helped perform the surgery. Smesny continued to complain of the lower back pain which was the impetus for the surgery. In fact, the surgery was performed at the

wrong point on the patient's spine. Postoperative X-rays and a dictated report were produced about March 23, 1994 which showed this problem; a copy was delivered to Dr. Caram. The last date of treatment by Dr. Caram was October 28, 1994.

On January 11, 1996, Smesny consulted another physician and learned for the first time that his surgery was performed at the wrong place. Smesny filed suit on July 30, 1997. However, Smesny served Dr. Caram's son, not Dr. Caram. Appellee was not actually served until February 10, 1998, more than two years after Smesny learned of the erroneous surgery.

Appellees successfully moved for summary judgment on the basis of limitations. *See* TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon Supp. 1997). One of the grounds advanced was that Smesny served Dr. Caram more than two years after Smesny discovered his injury. Smesny did not contest this ground in the trial court, nor does he contest the ground in this court. Moreover, Smesny does not bring a broad point which would enable him to attack all possible bases on which the summary judgment could have been based. *See Malooly Bros. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970). Because summary judgment on Smesny's malpractice complaint could have been based on this unchallenged ground, we affirm summary judgment as to Dr. Caram.

We also find the trial court did not err in granting summary judgment in favor of Dr. Evans, whose treatment of Smesny ended with the surgery. When a patient's complaints pertain to events which transpired before or during surgery, without a complaint that follow-up care contributed to the patient's condition, the statute of limitations begins to run on the date of the surgery. *Earle v. Ratliff*, 998 S.W.2d 882, 886-887 (Tex. 1999). Because Dr. Evans' involvement in the case ended with the surgery, because Smesny did not file suit until more than two years after the surgery, and because Dr. Evans did not have a duty to disclose any such errors to Smesny (since he had no confidential relationship with Smesny after the surgery), we find the trial court did not err in granting summary judgment on behalf of Dr. Evans.

Finally, Smesny argues the trial court erred in granting summary judgment because his claim for fraud (based on his allegations of fraudulent concealment) has a four-year statute of

limitations. We disagree. Fraudulent concealment is an affirmative defense to the running of the statute of limitations. *See, e.g., Borderlon v. Peck*, 661 S.W.2d at 907, 908 (Tex. 1983). Fraudulent concealment is not an independent cause of action which could be asserted independent from a malpractice cause of action. *See Rubalcaba v. Kaestner*, 981 S.W.2d 369, 371-372 (Tex. App.—Houston [1st Dist.] 1998, no pet.). The trial court therefore did not err in granting summary judgment on this ground.

We affirm the judgment of the trial court.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed February 22, 2001.

Panel consists of Justices Sears, Cannon, and Draughn. *

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Bill Cannon and Joe L. Draughn sitting by assignment.