

**Affirmed in part and reversed and remanded in part; Opinion filed March 30, 2000.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-98-01025-CV**

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**CORINA SCOTT, Appellant**

**V.**

**ANDREW P. KANT, M.D., RAUL SEPULVEDA, M.D., KSF ORTHOPAEDIC CENTER,  
AND HOUSTON NORTHWEST MEDICAL CENTER, Appellees**

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**On Appeal from the 333<sup>rd</sup> District Court  
Harris County, Texas  
Trial Court Cause No. 95-38045**

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**O P I N I O N**

Corina Scott sued her healthcare providers after surgery on her back worsened her condition. The healthcare providers successfully moved for summary judgment, and Scott appeals. We affirm the summary judgment for Dr. Andrew Kant and his practice group, KSF Orthopaedic Center a/k/a The Orthopaedic Center. We also affirm the summary judgment for Houston Northwest Medical Center (the Hospital) and Dr. Raul Sepulveda on Scott's surgical claims against them. We reverse the summary judgment granted to Dr. Sepulveda and the Hospital on post-surgical claims because they failed to conclusively establish that these claims were untimely filed.

## I. STANDARD OF REVIEW

On appeal, we determine whether Defendants met their summary judgment burden by establishing that no genuine issue of material fact exists and that they are entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979). The burden of proof is on the defendants, and we resolve all doubts about the existence of a genuine issue of material fact against them. *Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282 (Tex.1996); *Cate v. Dover Corp.*, 790 S.W.2d 559, 562 (Tex.1990). When reviewing a summary judgment granted on general grounds, as was granted in this case, we consider whether any theories set forth in the defendants' motions will support the summary judgment. *See Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 173 (Tex.1995). Additionally, all evidence favorable to the plaintiff must be taken as true. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). We will consider evidence that favors the defendants if it is uncontroverted. *See Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965).

To review the trial court's summary judgment, we will examine Defendants' claim that the statute of limitations bars Scott's suit and Dr. Kant and KSF's claim that they were not negligent as a matter of law. In analyzing limitations, we will determine: (1) the triggering event for limitations; (2) whether all claims derive from surgical negligence, (3) whether Defendants fraudulently concealed Scott's cause of action; and (4) whether the Open Courts provision has been violated.

## II. BACKGROUND

After an on-the-job injury, Scott sought treatment from Dr. Sepulveda for several years for a bad back. Her back did not improve, however, despite physical therapy and a diskectomy. Given this failure to improve, Dr. Sepulveda and Dr. Kant performed surgery on May 20, 1993 at Houston Northwest Medical Center to fuse vertebrae in Scott's back. To help speed the fusion, they implanted AcroMed screws and plates<sup>1</sup> in the vertebrae. Rather than improving her condition, the AcroMed screws and plates allegedly

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<sup>1</sup> AcroMed screws and plates have been the subject of various product liability lawsuits. *See, e.g., In re Orthopedic Bone Screw Product Liability Litigation*, 176 F.R.D. 158 (E.D. Pa. 1997).

further damaged Scott's back. Although she complained about the worsened pain to Dr. Sepulveda, he and Dr. Kant did not remove the screws and plates until July 7, 1994.

The legal wrangling then began on August 4, 1995, when Scott sued the two doctors, the Hospital, and KSF Orthopaedic Center. All Defendants moved for summary judgment on limitations grounds. Additionally, after objecting to Scott's medical expert's affidavit, Dr. Kant and KSF claimed that they were not negligent as a matter of law. The trial court granted summary judgment without specifying the grounds.

### **III. STATUTE OF LIMITATIONS**

Scott contends the trial court erred in granting summary judgment on the defense of statute of limitations because: (1) she filed suit timely; (2) Defendants fraudulently concealed her cause of action; and (3) the two-year statute of limitations violates Texas's Open Courts provision. Our analysis in these areas is lengthy, perhaps in part to the parties' twenty-two summary judgment pleadings before the trial court.

Because of the lengthy analysis, we summarize our holdings regarding the statute of limitations here and explain our reasoning more fully below. First, we conclude that: (a) Scott untimely filed her claims for surgical negligence; (b) Scott's post-surgical negligence claims have a different limitations date; (c) Defendants offered no evidence to limit the claims against them to surgical negligence only; and (d) Defendants did not conclusively establish that limitations had expired for Scott's post-surgical claims. Second, we conclude that Scott failed to raise a fact issue about fraudulent concealment. Third, we conclude that she failed to raise a fact issue about a violation of the Open Courts provision. Accordingly, Defendants are only entitled to partial summary judgment on this grounds.

#### **A. Triggering Event**

To determine whether Scott filed suit untimely, we must first determine the event that triggered limitations. Defendants contend that May 20, 1993, the day when the doctors implanted AcroMed screws and plates in Scott's spine, triggered limitations. If Defendants are correct, Scott filed her lawsuit just one

day after limitations expired.<sup>2</sup> In response, Scott argues that her claims are not limited to the May 20 surgery because she also pleaded post-surgical mistreatment, failure to diagnose the cause of her pain, and failure to perform tests and studies. She contends that her injuries result from a continuing course of treatment and that limitations began on the last day of treatment, July 7, 1994.<sup>3</sup> Both contentions are all-or-nothing propositions, and both are incorrect.

The two-year statute of limitations for alleged medical malpractice starts at one of three events: (1) the date the breach or tort occurred; (2) the date the medical treatment that is the subject of the claim is completed; or (3) the date the hospitalization for which the claim is made is completed. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Pamph. 1999). A plaintiff cannot simply choose the most favorable of the three dates. *Husain v. Khatib*, 964 S.W.2d 918, 919 (Tex. 1998). Instead, we must measure limitations from the date of the tort, if it can be ascertained. *Id.*; *Bala v. Maxwell*, 909 S.W.2d 889, 891 (Tex. 1995).

Scott erroneously chooses the most favorable of the three dates, characterizing her claims as a continuing course of treatment. Such an argument has been recently rejected by the Texas Supreme Court in a case with almost identical facts. *Earle v. Ratliff*, 998 S.W.2d 882 (Tex. 1999). In *Earle*, the plaintiff's doctors had implanted AcroMed screws and plates in his spine. The plaintiff worsened after the initial surgery, and the implants ultimately had to be removed. He argued that his injuries resulted from a continuing course of treatment and that his limitations period thus did not start until the last day of treatment. The supreme court disagreed, holding that his limitations began to run on the date of the initial surgery. *Id.* at 886.

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<sup>2</sup> Assuming for argument that she sent proper notice letters that tolled the statute of limitations for seventy-five days under article 4590i of the Medical Liability and Insurance Improvement Act. TEX. REV. CIV. STAT. ANN. art. 4590i, § 4.01 (Vernon Pamph. 1999).

<sup>3</sup> In arguing continuous course of treatment for her claims against the Hospital, Scott alternatively suggests that her last day of treatment was May 25, 1993, her discharge date after the initial surgery.

Likewise, we find that Scott's claims do not derive from a continuous course of treatment and that limitations for her surgical claims<sup>4</sup> began on the date of the initial surgery. Because she filed suit for her surgical claims after limitations expired, the trial court correctly granted Defendants summary judgment on them.

Having disagreed with Scott's proposed triggering date, we do not automatically accept May 20, 1993 as the triggering date for her post-surgical claims. This is because the supreme court carefully excluded such post-surgical claims from its holding in *Earle*: "If treatment is negligent following surgery, then . . . limitations begins to run from the date of the breach of the tort or from the date the treatment was completed." *Id.* at 887.<sup>5</sup> We interpret *Earle* to mean limitations for surgical negligence begins separately from limitations for post-surgical negligence. *See also Shook v. Herman*, 759 S.W.2d 743, 745 (Tex. App.–Dallas 1988, writ denied). And in this case, Scott brought claims for surgical and for post-surgical negligence.

Scott does not plead the dates when Defendants allegedly committed post-surgical negligence. And in fact, she contends that the exact dates are not ascertainable. She is not necessarily correct. In cases of misdiagnosis or failure to test, courts can often trace the claim to dates that the plaintiff visited the healthcare provider being sued. *See Hussain v. Khatib*, 964 S.W.2d 918, 920 (Tex. 1998)(failure to take mammogram, examine patient, and refer her to a specialist occurred on specific office visits); *Bala*, 909 S.W.2d at 891-92 (failure to test for and diagnose cancer arose in 1987 office visit); *Rowntree v. Hunsucker*, 833 S.W.2d 103, 108 (Tex. 1992)(doctor's failure to perform tests could have occurred "only on those occasions when he had opportunity to perform examinations"); *Marchal v. Webb*, 859 S.W.2d 408, 417 (Tex. App.–Houston [1<sup>st</sup> Dist.] 1993, writ denied)(injury occurred only on date of either of two surgeries).

In this case, no summary judgment evidence delineates the dates when Scott saw the Defendants between her May 20, 1993 surgery and July 7, 1994 surgery. Because limitations is an affirmative defense, Defendants had the burden bring forward this evidence and conclusively establish that limitations for the post-

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<sup>4</sup> Including her failure to warn and failure to obtain informed consent claims.

<sup>5</sup> In *Earle*, the plaintiff failed to allege post-surgical claims, such as that his doctor "should have done something to relieve his pain or improve his back." 1999 WL 450713 at \*3.

surgical claims had expired. *See Friendswood Dev. Co.*, 926 S.W.2d at 282; *Burns v. Thomas*, 786 S.W.2d 266, 267 (Tex.1990) (per curiam). Although we have scrutinized Defendants' summary judgment evidence, it only establishes that Scott continued under Dr. Sepulveda and Dr. Kant's care and that they ultimately removed the implants at the Hospital. For example, the Hospital attached Scott's deposition in which she testified she continued to see Dr. Sepulveda after the May 20, 1993 operation. Dr. Kant's own affidavit states that he and Dr. Sepulveda followed Scott post-operatively. We cannot determine from this evidence when limitations commenced for Scott's post-surgical claims. *See Jones v. Cross*, 773 S.W.2d 41, 42 (Tex. App.–Houston [1<sup>st</sup> Dist.] 1993, writ denied). Accordingly, Defendants have not met their summary judgment burden on the post-surgical negligence claims. *Delgado v. Burns*, 656 S.W.2d 428, 428 (Tex.1983); *see Jones*, 773 S.W.2d at 43.

### **B. Restricting Post-Surgical Claims**

Next, Defendants argue that Scott pleaded post-surgical negligence only to avoid summary judgment. They maintain that limitations for all her claims should nonetheless begin at the initial surgery. In support of this argument, Dr. Kant and KSF cite *Gormley v. Stover*, 907 S.W.2d 448 (Tex. 1995). In *Gormley*, the plaintiff had sued her dentist for surgical and post-surgical negligence after a failed skin graft, even though the surgery had occurred more than two years previously. The dentist won complete summary judgment on limitations, claiming that all the plaintiff's healthcare complaints actually occurred before or during the surgery. On appeal, the court held that summary judgment was proper because the dentist's uncontroverted evidence proved that no actionable negligence occurred after the surgery. *Id.* at 450. The dentist's evidence included his own affidavit that "if [the plaintiff] was hurt at all, it was during the surgery." *Id.* at 449. He also offered the plaintiff and her expert's depositions, which failed to specify his post-surgical negligence. *Id.* Thus, the *Gormley* plaintiff's limitations commenced at the initial surgery despite the pleadings of post-surgical negligence.

The question, then, in this case is whether any of the Defendants provided evidence like that presented in *Gormley* to restrict Scott's complaints to the initial May 20, 1993 surgery. Dr. Kant's affidavit insufficiently recites that it was his "understanding" that Scott's claims "revolved around" the May 20, 1993 surgery. Although Dr. Sepulveda claims on appeal that if he was negligent, he was only negligent in the initial

surgery, he offers no summary judgment evidence to support this contention.<sup>6</sup> The Hospital also argues without supporting evidence that “none of the allegations asserts a claim separate from that [initial] surgery.” These assertions do not meet defendants’ burden of proof, and we are required to resolve doubts against them. Thus, Defendants have failed to conclusively establish that Scott’s post-surgical claims were indistinct from her surgical claims and were barred by limitations.

### C. Fraudulent Concealment

Scott raises several arguments that, if valid, would permit her to sue for surgical negligence despite expiration of the statute of limitations. First, she contends that defendants fraudulently concealed that the AcroMed hardware damaged her spine. Fraudulent concealment is an equitable doctrine that prevents a defendant from asserting a statute of limitations defense. *Borderlon v. Peck*, 661 S.W.2d 907, 909 (Tex. 1983). The burden is on the plaintiff to provide evidence of specific acts that demonstrate a defendant’s actual knowledge of a wrong and a fixed purpose to conceal it. *Casey v. Methodist Hosp.*, 907 S.W.2d 898, 903 (Tex. App.–Houston [1<sup>st</sup> Dist.] 1995, no writ). Scott offers no evidence that the defendants had actual knowledge or a fixed purpose in concealing an alleged wrong. Accordingly, we find that fraudulent concealment does not bar defendants’ statute of limitations defense.

### D. Open Courts

Second, Scott claims that in this case, the two-year statute of limitations violates the Open Courts provision of the Texas Constitution. *See* TEX. CONST. art. I, § 13. Again, to prevail on an Open Courts

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<sup>6</sup> In fact, the summary judgment evidence tended to support the distinction between Scott’s post-surgical and surgical claims. The doctors’ depositions explained that screws and plates must be removed from a patient’s spine fifty to sixty percent of the time, in part because the hardware is “symptomatic” and painful. Scott complained to Dr. Sepulveda after the May 20, 1993 surgery about her worsening pain. Her back felt different, and she was numb in her spine and backside. Dr. Sepulveda and Dr. Kant performed no tests to investigate her complaints. Instead, Dr. Sepulveda told Scott that she would just have to wait a year. In her expert’s opinion, to which the Hospital and Dr. Sepulveda did not object, Defendants failed to remove the devices as soon as necessary. When they finally removed the hardware, Dr. Kant found a loosened screw, and Dr. Sepulveda agreed that Scott had been experiencing symptomatic hardware. This is evidence of a distinct allegation of failure to timely investigate, relieve, correct, or lessen problems caused by the AcroMed hardware. *See Earle*, 998 S.W.2d at 886-87.

challenge, the “plaintiff must raise a fact issue concerning the applicability of the provision to avoid a summary judgment on limitations.” *Earle*, 998 S.W.2d at 889. Scott did not attach any evidence to support her argument, and her Open Courts challenge thus fails.

#### **IV. NEGLIGENCE CLAIMS**

Because we have not fully affirmed summary judgment for Dr. Kant and KSF based on limitations, we must also address the other grounds in their motion for summary judgment. Specifically, Dr. Kant and KSF claimed that they were entitled to judgment as a matter of law on Scott’s negligence claims. No other party raised these grounds, and we are not permitted to affirm a summary judgment on a ground not specifically presented in a party’s motion. *See Travis v. City of Mesquite*, 830 S.W.2d 94, 100 (Tex. 1992). As part of their argument, Dr. Kant and KSF also objected that a portion of Scott’s medical expert’s affidavit was conclusory, and the trial court struck the affidavit. We sustain the trial court’s ruling on the objection. We also affirm summary judgment for Dr. Kant and KSF on the post-surgical negligence claims.

##### **A. Conclusory Affidavit**

First, we address Dr. Kant and KSF’s objection that the affidavit of Dr. Richard Goodman, plaintiff’s expert, was conclusory. Conclusory statements made by an expert witness are insufficient to support summary judgment. *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999); *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991). Conclusory statements can be either legal conclusions or factual conclusions. *See Rizkallah v. Conner*, 952 S.W.2d 580, 587 (Tex. App.–Houston [1<sup>st</sup> Dist.] 1997, no writ). Neither is proper summary judgment evidence unless it is supported by a detailed factual basis. *Id.* The “opinions must have a reasoned basis which the expert, because of his ‘knowledge, skill, experience, training or education,’ is qualified to state.” *Burrow*, 997 S.W.2d at 236 (citing TEX. R. EVID. 702).

The specific portion of Dr. Goodman’s affidavit to which Dr. Kant and KSF objected discusses post-surgical negligence:

Furthermore, the defendants’ negligence continued past the May 20, 1993 surgery. Specifically, Defendants failed to remove the devices as soon as necessary. Each day these pedicle screws remained in Ms. Scott’s back, they did new and more devastating damages to her spine. Finally, once the screws were implanted, there was a reasonable



medical probability that they would have to be removed. Thus, the July 7, 1994 surgery was a continuation of the May 20, 1993 surgery.

Here, several of Dr. Goodman's statements are factual conclusions unsupported by their factual bases. First, he fails to detail the basis for his conclusion that the screws damaged Scott's spine each day that they remained in her back. Second, he fails to detail the basis for his conclusion that within reasonable medical probability, the implants would have to be removed after the initial surgery. Third, he omitted the basis for his factual conclusion that Defendants failed to remove the implants as soon as necessary. Dr. Goodman's affidavit also contained two legal conclusions. First, he concludes that defendants' "negligence" continued past the initial surgery. Second, he concluded that the July 1994 surgery was a "continuation" of the first. Both legal conclusions are merely supported by factual conclusions. Neither legal conclusion is supported by a detailed factual basis. Accordingly, we hold that the trial court properly struck this portion of Dr. Goodman's affidavit as conclusory.

### **B. Evidence Proving No Negligence**

After our analysis about the statute of limitations, the only remaining claims against Dr. Kant and KSF are for post-surgical negligence. Thus, we review whether Dr. Kant and KSF conclusively established that they were not negligent following Scott's May 20, 1993 surgery. Dr. Kant offered his own summary judgment affidavit, which states that he followed Scott post-operatively. In the affidavit, he explains that a patient's hardware can be removed if the patient continues to feel pain after the vertebrae have fused. Dr. Kant states that when subsequent evaluation showed Scott continued to experience pain, he and Dr. Sepulveda removed her hardware. He concludes that in his expert opinion, he adhered to the proper standard of care in his care, treatment, and diagnosis of Scott. He states that *at all times* he properly, correctly, and timely cared for, treated, and diagnosed Scott's condition. He opines that no act or omission on his part caused any damages or injury to Scott.

A defendant can prove the right to summary judgment solely on the uncontroverted testimony of an expert witness if the subject matter is such that a trier of fact would be "guided solely by the opinion testimony of experts, [and] if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." TEX. R. CIV. P. 166a(c).

The affidavit of an interested expert witness, such as Dr. Kant, can support summary judgment if it meets the requirements of Rule 166a, even if that expert is a party to the suit. *Anderson*, 808 S.W.2d at 55; *see, e.g., Shook*, 759 S.W.2d at 746-47; *Hunte v. Hinkley*, 731 S.W.2d 570, 571 (Tex.App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.). As there has been no argument, either at the trial court or on appeal, that Dr. Kant's affidavit fails to meet Rule 166a's requirements, it is conclusive evidence unless controverted.

Scott argues that she submitted controverting evidence, specifically Dr. Goodman's affidavit, that raises a fact issue on Dr. Kant and KSF's alleged negligence. We disagree. Dr. Goodman's affidavit, excluding the conclusory portion, addresses only the May 20, 1993 surgery and pre-surgical tests and treatment. We have already found that Scott's claims for these matters were brought outside the statute of limitations. Regarding post-surgical negligence, none of Scott's evidence controverts Dr. Kant's averments that he was not negligent and that no act or omission on his part caused her damages. Accordingly, Dr. Kant and KSF defeated Scott's post-surgical negligence claims as a matter of law.

#### IV. CONCLUSION

Scott untimely filed her claims for surgical negligence, and she failed to raise a fact issue on fraudulent concealment and violation of the Open Courts provision. Accordingly, summary judgment was proper for all defendants on the surgical claims. However, Scott also pleaded post-surgical negligence, which has a different limitations period. Defendants failed to limit Scott's claims against them to surgical negligence only. They also failed to conclusively establish that limitations had expired for Scott's post-surgical claims. Thus, the Hospital, Dr. Sepulveda, Dr. Kant, and KSF are only entitled to partial summary judgment on limitations.

Lastly, we hold that Dr. Kant and KSF conclusively established entitlement to summary judgment on Scott's post-surgical negligence claims. Having earned summary judgment on separate grounds for surgical claims and post-surgical claims, Dr. Kant and KSF were correctly awarded full summary judgment. Accordingly, we affirm the granting of summary judgment to Dr. Andrew Kant, and KSF Orthopaedic Center a/k/a The Orthopaedic Center. We affirm in part the summary judgment granted to Dr. Raul Sepulveda and Houston Northwest Medical Center on Scott's surgical claims. We reverse and

remand the summary judgment granted to Dr. Sepulveda and Houston Northwest Medical Center on Scott's post-surgical claims.

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Norman Lee  
Justice

Judgment rendered and Opinion filed March 30, 2000.

Panel consists of Justices Draughn, Lee, and Hutson- Dunn.\*

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

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\* Senior Justices Joe L. Draughn, Norman Lee, and D. Camille Hutson-Dunn sitting by assignment.