

Affirmed and Opinion filed November 1, 2001.



In The
Fourteenth Court of Appeals

NO. 14-00-00891-CV

LORI REES, Appellant

V.

ROBERT DAVIS, M.D., Appellee

**On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 2000-01242**

OPINION

Lori Rees sued Dr. Robert Davis for alleged negligence during a surgical procedure performed in 1990. The trial court granted summary judgment for Davis based on the statute of limitations. On appeal, Rees contends Davis is estopped by the doctrine of fraudulent concealment from relying on the defense of limitations. We affirm.

On September 5, 1990, Davis performed surgery to remove Rees's gallbladder. When complications arose, Rees returned to surgery four days later, at which time Davis discovered that Rees had a transected common bile duct. Davis performed another procedure to repair the transected duct. Rees was ultimately discharged on September 15,

1990.

In 1999, Rees began to experience abdominal pain. Rees underwent additional surgeries, which she alleges were necessary to repair damage caused by Davis's malpractice. Rees filed suit against Davis,¹ alleging negligence. Davis moved for summary judgment, asserting that Rees's claim was barred by the two-year statute of limitations under the Medical Liability and Insurance Improvement Act of Texas. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 2001). In response, Rees argued that Davis was equitably estopped from raising limitations as a defense under the doctrine of fraudulent concealment. The trial court granted Davis's motion, and this appeal followed.

In her sole issue on appeal, Rees contends the trial court erred in granting summary judgment because material fact issues exist as to the elements of fraudulent concealment. To avoid summary judgment on limitations, Rees must raise a genuine issue of material fact that would support her assertion of fraudulent concealment. *Earle v. Ratliff*, 998 S.W.2d 882, 888 (Tex. 1999). Proof of fraudulent concealment requires evidence that the defendant (1) actually knew the plaintiff was in fact wronged, and (2) concealed that fact to deceive the plaintiff. *Id.* As with any summary judgment review, we take as true all evidence favorable to Rees, the nonmovant, and indulge every reasonable inference in her favor. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

In support of her fraudulent concealment claim, Rees presented her own affidavit, the affidavit of her expert, Dr. William Nealon, and various medical records. Nealon's affidavit focuses solely on whether Davis departed from the standard of care by transecting Rees's bile duct during the initial surgery. While this affidavit raises a question of fact as to whether Davis was negligent, it fails to show that Davis concealed any facts with the intent to deceive Rees. Accordingly, Nealon's affidavit provides no evidence in support of fraudulent concealment. *See Earle*, 998 S.W.2d at 889.

¹ Rees's original petition named three other defendants, all of whom were non-suited following the court's entry of summary judgment.

In her brief, Rees claims that evidence of Davis’s concealment is provided by her affidavit, in which she “unambiguously swore that the transection was not discussed with her after either surgery.” To the contrary, Rees’s affidavit states that after the second operation on September 9, 1990, Davis “explained to me that I had an anatomical abnormality that caused the duct tear or caused him to laser the duct.” It is therefore undisputed that Davis told Rees her common bile duct had been cut or torn.

At best, Rees could claim that Davis fraudulently concealed the cause of the transection by blaming it on an anatomical abnormality. However, Rees offers no summary judgment evidence that at the time of this statement, Davis actually knew that his own negligence, as opposed to an anatomical abnormality, caused the bile duct to be transected. In fact, Rees’s contention is directly refuted by the medical records. In his discharge summary, Davis refers to the transected bile duct as an “anatomical problem” and states that Rees “had an extremely short cystic duct or no cystic duct whatsoever.” Nor does Rees offer any evidence that Davis’s purpose in blaming her anatomy was to deceive Rees. Even if the transection did in fact result from Davis’s negligence, Rees has offered no summary judgment evidence that Davis acted fraudulently by concealing a known wrong. *See id.*

Because Rees failed to raise an issue of fact concerning fraudulent concealment, we overrule her sole issue on appeal. The trial court’s judgment is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed November 1, 2001.

Panel consists of Justices Yates, Edelman, and Wittig.²

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² Senior Justice Don Wittig sitting by assignment.