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**STATE OF MINNESOTA
IN COURT OF APPEALS
A05-100**

Jacqueline Hemmerlin-Stewart,
Appellant,

vs.

Allina Hospitals & Clinics,
d/b/a Abbott Northwestern Hospital,
Respondent,
Northwest Anesthesia, P. A., et al.,
Respondents.

**Filed September 6, 2005
Affirmed
Worke, Judge**

Hennepin County District Court
File No. MP 04-10086

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Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and
Parker, Judge. [*]

UNPUBLISHED OPINION

WORKE, Judge

On appeal from the district court's grant of summary judgment in favor of respondents, concluding that appellant's medical-malpractice lawsuit was time-barred, appellant argues that a genuine issue of material fact exists as to whether the statute of limitations should be tolled because of fraudulent concealment. We affirm.

FACTS

On March 24, 1989, appellant Jacqueline Hemmerlin-Stewart underwent a craniotomy at respondent Abbott Northwestern Hospital to remove a right-side acoustic neuroma. Respondent Mahmoud Nagib, M.D., an employee of respondent Neurosurgical Associates, Ltd., performed the surgery, and respondent Northwest Anesthesia, P.A. provided the anesthesia during the procedure. Appellant contends that during the surgery, central lines and/or catheters (CVL) were used and that at some point during the surgery, a CVL broke inside her body. On March 28, 1989, prior to being discharged, an x-ray was taken of appellant's chest, revealing a broken CVL in her left subclavian vein. A dictated x-ray report was placed in appellant's medical records that indicated: "[a]lso noted is a left subclavian line, the catheter has made a curl and is pointing towards the second rib." Other than the dictated x-ray report, there is no record relating to appellant's surgery on March 24, 1989, indicating the installation or removal of a left subclavian catheter into or out of appellant's body.

On May 27, 2001, appellant was admitted to Fairview Ridges Hospital, and an emergency-room doctor informed her that a chest x-ray revealed a CVL imbedded in her

left subclavicular vein. Appellant contends that this is the first she became aware of a CVL in her body and that, although she had been hospitalized or received outpatient treatment on at least eight occasions since 1975, none of these medical procedures required installation of a CVL. Appellant concluded that the CVL found in her left subclavian vein remained in her body following placement during her 1989 surgery. Appellant subsequently consulted with two physicians regarding the CVL in her body, and both stated that the CVL posed little, if any, risk to appellant and recommended avoiding surgical intervention to remove it.

On June 9, 2004, appellant commenced a medical-malpractice lawsuit, alleging that respondents were negligent for failing to remove the CVL and for not informing her about the existence of the CVL in her body and that respondents fraudulently concealed their negligent conduct. After initial discovery, respondents moved for summary judgment on the grounds that appellant's claim was time-barred and that appellant had not presented any evidence of fraudulent concealment. On November 22, 2004, the district court granted respondents' motions for summary judgment. The issue before this court is whether the district court properly granted respondents' motions for summary judgment.

DECISION

“On an appeal from summary judgment, the role of the reviewing court is to review the record for the purpose of answering two questions: (1) whether there are any genuine issues of material fact to be determined, and (2) whether the trial court erred in its application of the law.” *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). This court reviews de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law.

Christensen v. Milbank Ins. Co., 658 N.W.2d 580, 584 (Minn. 2003). When reviewing a summary judgment, this court “must take a view of the evidence most favorable to the one against whom the motion was granted.” *Offerdahl*, 426 N.W.2d at 427 (citing *Abdallah Inc. v. Martin*, 242 Minn. 416, 424, 65 N.W.2d 641, 646 (1954)).

The district court granted summary judgment in favor of respondents, finding that appellant would have had to commence her lawsuit by April 10, 1993, for it to be timely. Minn. Stat. § 541.076(b) (2004) provides: “[a]n action by a patient or former patient against a health care provider alleging malpractice . . . must be commenced within four years from the date the cause of action accrued.” Appellant does not dispute that she should have commenced her lawsuit by April 10, 1993; however, appellant argues that the statute of limitations should be tolled because respondents fraudulently concealed her cause of action.

“In limited circumstances, fraud in concealing a patient’s cause of action may toll the running of the statute of limitations.” *Tackleson v. Abbott-Nw. Hosp., Inc.* 415 N.W.2d 733, 735 (Minn. App. 1987), *review denied* (Minn. Feb. 12, 1988). The supreme court set forth the rule tolling the statute of limitations when there is fraudulent concealment of a cause of action in *Schmucking v. Mayo*, 183 Minn. 37, 235 N.W. 633 (1931).

[W]hen a party against whom a cause of action exists in favor of another, by fraudulent concealment prevents such other from obtaining knowledge thereof, the statute of limitations will commence to run only from the time the cause of action is discovered or might have been discovered by the exercise of diligence.

Id. at 38-39, 235 N.W. at 633. Although there is no categorical definition of what constitutes fraudulent concealment, this court has stated that (1) “[t]he party claiming

fraudulent concealment has the burden of showing that the concealment could not have been discovered sooner by reasonable diligence[,]” and (2) “the concealment must be fraudulent or intentional.” *Collins v. Johnson*, 374 N.W.2d 536, 541 (Minn. App. 1985), *review denied* (Minn. Nov. 26, 1985). Moreover, there must be an affirmative concealment of a cause of action. *Williamson v. Prasciunas*, 661 N.W.2d 645, 650 (Minn. App. 2003).

Appellant argues that respondents fraudulently concealed her cause of action by failing to disclose to her that the 1989 x-ray revealed the existence of the CVL. Appellant concedes that respondents did not take any affirmative action to conceal the negligence; however, appellant contends that because a confidential doctor-patient relationship existed, respondents had a fiduciary duty to disclose this information to her and mere silence is enough for fraudulent concealment.

Silence alone does not constitute fraud in the absence of a duty to speak. *See L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 380 (Minn. 1989) (recognizing that nondisclosure amounts to fraud only if a legal obligation to communicate exists). A duty to disclose facts may exist when a fiduciary relationship exists. *Id.* Assuming that there is a fiduciary duty, a fiduciary can be liable for fraudulent misrepresentation by silence, even though there is no evidence of fraudulent statements or intentional concealment. *Murphy v. Country House, Inc.*, 307 Minn. 344, 350, 240 N.W.2d 507, 512 (1976); *Cohen v. Appert*, 463 N.W.2d 787, 790 (Minn. App. 1990), *review denied* (Minn. Jan. 24, 1991), *and reconsideration denied* (Minn. Mar. 27, 1991). Even if a fiduciary duty is established, the limitation period is tolled only until the necessary facts are or could have been discovered by the party to whom the fiduciary duty is owed through reasonable diligence. *Cohen*, 463 N.W.2d at 790-91.

Appellant argues that in *Schmucking*, the supreme court created a rule that a physician can be liable for fraudulent concealment by mere silence. *Schmucking*, 183 Minn. at 39, 235 N.W. at 633. Appellant relies on the supreme court's statement: "[i]n the presence of a fiduciary and confidential relation[ship] the fraud may more readily be perpetrated. The relation[ship] of physician and patient of itself begets confidence and reliance on the part of the patient." *Id.* But *Schmucking* does not hold that the relationship between a physician and a patient is fiduciary in nature; the statement in *Schmucking* that appellant relies on is only dictum. This court has declined to reframe medical-malpractice claims in terms of a breach of a fiduciary duty on the part of the physician. *D.A.B. v. Brown*, 570 N.W.2d 168, 171-72 (Minn. App. 1997). There is no Minnesota caselaw holding that physicians or hospital staff members have a fiduciary duty toward their patients.

Appellant further suggests that an Eighth Circuit case is instructive. In *Roberts v. Francis*, 128 F.3d 647 (8th Cir. 1997), a patient underwent surgery to have her bladder removed, and the surgeon also removed her only remaining ovary. Approximately four years later, while being treated by a different physician, the patient first learned that her ovary had been removed. *Id.* at 649. The Eighth Circuit reversed the district court's summary judgment in favor of the surgeon, stating that: "[u]nder Arkansas law, a party may have an obligation to speak rather than remain silent, when a failure to speak is the equivalent of fraudulent concealment." *Id.* Regarding when a duty to speak arises, the Eighth Circuit quoted the Arkansas Supreme Court, "[t]he duty of disclosure . . . arises where one person is in [a] position to have and to exercise influence over another who reposes confidence in him whether a fiduciary relationship in the strict sense of the term exists between them or not." *Id.* Appellant's reliance on *Roberts* is misplaced because

the Eighth Circuit applied Arkansas law, which is not controlling in Minnesota.

In *Haberle v. Buchwald*, 480 N.W.2d 351 (Minn. App. 1992), *review denied* (Minn. Aug. 4, 1992), a patient brought a medical-malpractice action following postoperative complications. The patient contended that a genuine issue of fact existed because of the physician's "false denial of the cause of her complications and on the exclusion or misstatement of important information in her medical records." *Id.* at 357. This court affirmed summary judgment in favor of the physician and rejected the patient's claim of fraudulent concealment because the patient produced no facts suggesting that the physician intentionally concealed anything from her or intentionally omitted important information from her medical records. *Id.*

A similar situation exists here. Appellant has produced no facts that respondents intentionally concealed anything from her or intentionally omitted important information from her medical records. Indeed, the 1989 x-ray report stating the existence of the CVL in appellant's body was found in appellant's medical records rather than hidden or discarded to conceal a potential cause of action. Further, appellant failed to provide any evidence that respondents intentionally concealed any information from her.

"[A] 'genuine issue' of material fact for trial 'must be established by substantial evidence.'" *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). A party cannot rely on general statements of fact to oppose a motion for summary judgment; instead, the nonmoving party must demonstrate that at the time the motion is made, specific facts exist that create a genuine issue of material fact. Minn. R. Civ. P. 56.05; *Moundsview Indep. Sch. Dist. No. 621 v. Buetow & Assocs., Inc.*, 253 N.W.2d 836, 838 (Minn. 1977). "Mere speculation, without some concrete evidence, is not enough to avoid summary judgment[.]" and the evidence "must have some foundation other than mere conjecture."

Bob Useldinger & Sons, Inc. v. Hangsleben, 505 N.W.2d 323, 328 (Minn. 1993).

Appellant has not presented substantial evidence that a genuine issue of material fact exists. Appellant has not provided any evidence that respondents even installed the CVL into her body. In fact, the medical records relating to appellant's 1989 surgery do not document the insertion or removal of a left subclavian catheter into or out of appellant's body. Further, although appellant contends that none of the eight other occasions in which she received inpatient or outpatient treatment required the installation of a CVL, she has not provided any evidence that the CVL was installed while she was under respondents' care. Appellant contends that the statute of limitations should be tolled because respondents did not tell her that the CVL existed in her body, but she does not provide any evidence that respondents fraudulently concealed this from her. The district court properly granted respondents' motions for summary judgment.

Affirmed.

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Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.