ORAL ARGUMENT — 4/7/99
98-0115
EARLE V. RATLIFF

LAWYER: The issues before this court, we believe, are simple. This was a summary judgment granted on behalf of Dr. Steven Earle by Judge David Peeples in Bexar County on two bases: 1) the 1991 surgery was barred by limitations; and 2) as to the 1993 surgery, Dr. Earle submitted summary judgment proof sufficient to establish that he had met the standard of care. The 4th CA reversed that opinion and we are before you to argue that that was in error.

O'NEILL: There seems to be some confusion about how many surgeries there were.

LAWYER: Let me try to explain that. The 4th CA actually did a pretty good job of explaining that. There were 3 surgeries referenced at times. The second surgery, however, was a nominal surgery to remove a device used to stimulate bone growth. It is not at issue in this case. There is no claims of negligence as to the second surgery. The two surgeries in issue was the 1991 surgery, or the first surgery, and the 1993 surgery, which in some ways of counting would be the third surgery.

At the time this case was decided, we had, we believed a case directly on point. This was a case decided by Judge Baker, *Shook v. Herman* out of the Dallas CA. In that case very similar to this case, we had a situation of two surgeries, they were involving eye surgeries over a period of several years. The plaintiffs in that case as in the *Earle* case argued that what you had was a series of events or a chain of events I think was what they argued, that made it a course of treatment and therefore invoked the second of the three scenarios under Art. 4590i.

HANKINSON: Can surgery ever be part of a course of treatment or must surgery always be treated as a separate event under the first prong of the limitations rule in 4590i?

LAWYER: I believe that that would be based upon the facts and the allegations as presented in each particular lawsuit.

HANKINSON: So regardless of *Shook* and other cases that have focused on the date of surgery as triggering limitations under 4590i, there are cases in which surgery could be part of a course of treatment so that the last date of treatment would in fact be the triggering date?

LAWYER: If the surgery was not the focus and the cause of the patient's damages. If, however, the surgery was being argued as a cause of the patient's damages, as to that entity, that particular cause of action, that personal injury, legal injury, I would believe that for that surgery that would be a precise date.

HANKINSON: If we are unable to distinguish, however, to what extent the injury is

attributable to the surgery itself and to what extent the follow-up treatment continues to aggravate or compound the injury because of some deficit in the treatment during that period of time following surgery, then would that be a case where course of treatment would be the triggering date - the end of treatment would be the triggering date?

LAWYER: Certainly you could probably a factual scenario where in fact the precise date could not be ascertained from the facts. The scenario that you are giving would come close to that where the damages are so intermingled you could not distinguish between whether the surgery caused the damages or the post-operative care caused the damages.

HANKINSON: For example: If the surgery caused some sort of an injury, and then during the post-surgery treatment period perhaps there were things that the surgeon could have done to mitigate or ameliorate the problem, and in fact, the problem was compounded, got worse, whatever along the way, even if the surgery began this unfortunate chain of events could that conceivably be a course of treatment limitations case?

LAWYER: Again, I think it's based on every factual scenario. I would caution the court, however, because obviously if it has an ascertainable date that controls and that was more clearly established by this very court in the *Husain* case, which was decided after the *Earle* case was decided by the 4th CA. In *Husain* if you note, although that is not a surgical case, that is a medical case involving the diagnosis of breast cancer or the delay in diagnosing breast cancer, you can't determine when she actually was damaged in that case. Yet, this honorable court said that you can determine when each time the doctor saw her. So you can ascertain a specific date. And for actions related to that date, limitations run from that date. So going back to your question for damages created by surgery no matter what post-operative care might have done to exacerbate it, I think you have an ascertainable injury with the date of surgery, and then as to that date of surgery, as to those injuries limitations would run.

HANKINSON: Let's say a doctor leaves a sponge in a patient during surgery. We know that injury occurred as of the date of the surgery, and the patient continues to go back to the doctor for follow-up, goes in every couple of weeks, every month, whatever, complaining of fever and pain and problems along the way, and the doctor fails to diagnose at each instance that that sponge is there and that there is something that could be done to take care of the problem. Would that involve a course of treatment? Is that an injury that occurs every time the doctor has the opportunity to fix the problem and doesn't?

LAWYER: Yes, I think it is an injury that occurred. In fact, this court has decided that already in a SC case where the evidence in a summary judgment context was the doctor who was following the patient had a duty on every visit to, in fact it was a breast cancer case, to do a mammogram or to do a check on that patient. That court, although the opinion is difficult to read is really saying, We have an ascertainable date each time the doctor saw the patient. Each time the doctor saw the patient that he had a duty to examine, didn't examine, and therefore, her breast cancer

went undiagnosed. There was an ascertainable date. The cause of action arose. She had two years and arguably 75 days to bring a lawsuit from that date.

HANKINSON: From the end of the course of treatment, or from each instance?

LAWYER: From each instance.

HANKINSON: How under those circumstances would you then determine which damages flowed from which visit?

LAWYER: That's an excellent question. One, I also ____ and believed in the *Husain* case that again you couldn't determine in the *Husain* case what damages flowed from what visit, because the issue of cancer was not diagnosed until later.

HANKINSON: And isn't that why course of treatment is in the limitations period to take care of those kinds of circumstances?

LAWYER: No. I believe it isn't. Going back to *Husain*, the court has said it is unimportant whether you characterize it as a failure to diagnose or an improper course of treatment. The issue is, under the facts can you have an ascertainable date of injury and whether the facts and circumstances of such are enough to put the plaintiff on notice that there might be an injury, not that he has to know fully what his damages are. The *Jennings* case, where again the woman did not know she had cancer yet, this court said it was the negligent referral before she had an opportunity to know what her damages were, that was the ascertainable date that then limitations ran from. In the *Husain* case the reason you have the second and third prongs under art. 4590i is as a proxy. In such a situation the statute resolves doubt about the time of accrual in plaintiff's favor by using the last date of treatment or hospitalization as a proxy for the actual date of the tort. A perfect example of when this would apply is currently we are dealing, the media is dealing especially, maybe not this court yet, with these diet drug cases where men and women are bringing lawsuits where they claim they have been injured for taking diet drugs over a period of 20 months, for example. You cannot determine when in the 20-months there may have been an actual injury. Only at the end of the course of treatment have they been able to say, Yes we now have heart valve problems. That would be a perfect example where you would use as a proxy the last date of treatment to establish the breach or tort.

PHILLIPS: In this case, based on what you've told us, how come Dr. Mooney's affidavit doesn't raise a fact question on whether or not the second operation was an independent round of negligence given everything you've told us as to how you think the law is _____?

LAWYER: Now that's on the issue of whether we came forward with enough proof to establish that we had met the standard of care and whether Dr. Mooney controverted that adequately with his affidavit. We filed objections to Dr. Mooney's affidavit in several respects. We presented

that to Judge Peeples. One of the paragraphs that was struck was the only paragraph that Dr. Mooney discusses the 1993 surgery and that is in the transcript at pg. 302. Judge Peeples found that that paragraph was conclusory because Dr. Mooney stated that merely the surgery on Mr. Ratliff was medically unwarranted without stating what the basis of that opinion was or what specifically the standard of care was that made that medically unwarranted. Judge Peeples struck that as conclusory and therefore not proper summary judgment evidence.

ENOCH: There is negligence in the first surgery. The surgery shouldn't have been done. You come along and you have a second surgery. Arguably because the first surgery didn't do what it was supposed to do you now have to have this second surgery. There is no negligence. The second surgery is medically indicated. In all reasonable medical probability you are supposed to have the surgery, the surgery was all conducted according to the standards in the medical profession. Is that second surgery an injury?

LAWYER: It depends again on the pleadings and the proof before the court at the time.

ENOCH: No, just assume there was nothing that beginning with a negligently performed first surgery, now we take the patient as we find the patient and everything after that is all medically required, medically necessary, properly done this other surgery. That surgery occurs. Is that surgery an injury?

LAWYER: No. I would argue it was not and I would agree in this particular case Dr. Mooney agreed with us. Because in his affidavit he said, But for the original surgery nothing else would have been necessary.

ENOCH: So if a doctor commits the negligence and we have an ascertainable date, and 4590i says, the statute of limitations runs from that date, then it is in the patient's best interest not to permit that doctor to attempt to correct the errors, but is in that patient's best interest to find another doctor with additional medical expenses and have that doctor attempt to correct the errors so that they can now have an adversarial relationship with the first doctor.

LAWYER: Obviously I would not argue that.

ENOCH: But isn't that the result of this case by saying that if we don't count the subsequent medical invasion here as a continuation of the negligence, but simply say negligence is a sweet event that occurred at the first surgery and everything after that you would still have to measure against this standard, and if that's not breached then you've got to sue the very doctor who is now attempting to correct the problem that was created by the first surgery?

LAWYER: I do believe that our law does put the patient on notice when during the course of two years, in that two years it becomes obvious that the first surgery did not fully correct his problems. It does put him on notice for further inquiry as to what is going on and whether he in fact

does have a cause of action against his primary physician.

ENOCH: Not notice for further inquiry. Notice to sue.

LAWYER: Well inquiry to find out if there was something done wrong if in fact there was an error in the first procedure.

GONZALES: But what if the patient is doing the further inquiry but he's doing it with the doctor?

LAWYER: Well in this particular case noted there was further inquiry. Mr. Ratliff had two second opinions between the first and the second surgery. And in fact saw a different physician who concurred in the need for a second surgery.

HANKINSON: In response to CJ Phillip's questions when you were referring to the paragraph that you claim is conclusory in Dr. Mooney's affidavit, the third page of the affidavit does have a paragraph on the standard of care. The next paragraph says, In my opinion, the following acts and things that occurred were in fact breaches of the standard of care or negligence. And then there's a list that says, 1, 2, 3 and 4, and 4 is one of those. So standard of care is in this affidavit. It's on page 3 of the affidavit isn't it?

LAWYER: No. If you read the general standard of care set up in that first paragraph on page 3, you will see that he is referencing the standard of care for an initial back surgery. He is not referencing standard of care for a patient who has previously had back surgery now has spinal instability and is having continual pain and needs to have something done to relieve that continual pain. In fact, what you see is reference to the 1991 surgery just by the essence of what he is talking about. Although I agree, he doesn't specifically say, this only applies to the 1991 surgery.

HANKINSON: And you would agree that this affidavit because we are dealing with a summary judgment is really the nonmovant gets the benefit of the doubt in other words in terms of looking at this affidavit?

LAWYER: Yes, I do agree that the standards do require that the movants get the benefit of the doubt.

HANKINSON: With respect to the informed consent claims were these list procedures?

LAWYER: Yes, these were list procedures and the summary judgment evidence established that the form as required by the Texas Disclosure Panel was in fact signed by the patient, and therefore, rebuttable presumption was created that all of the procedures had been met. Now the informed consent as to the 1991 surgery, we would say was also barred by limitations.

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RESPONDENT

LAWYER: This is an important case to my clients, not only to the Ratliffs but to the 5 other families that we represent that have lawsuits against Dr. Earle for this very same scenario: taking a patient with an on-the-job back injury, was covered by worker's comp, and early on in that treatment performing extensive back surgery that's not warranted by any of the objective tests that have been done, inserting metal bone plates and screws into the back of those patients without ever telling them of the risk and the complications specific to the use of those devices in the spine. And then, knowingly misrepresenting to those patients that the cause of their debilitating problems is the unnecessary surgery that he performed.

Mike Ratliff was first operated on by Dr. Earle in 1991, at which time he performed a 3-level fusion and a 4-level nerve decompression of the lumbar spine. This was 5 months after his on-the-job injury.

Mr. Ratliff's condition continued to deteriorate after that. And in 1993, Dr. Earle performed a second surgery which he took out those pedicle devices and inserted new pedicle devices into his spine.

HECHT: Do you agree that the intervening surgery was unimportant?

LAWYER: I do agree. It was a bone stimulator that has to be taken out at a certain point. I will say, if he hadn't done the first unnecessary surgery, he wouldn't have had it.

HECHT: Also petitioner says that there is no pleading claim of negligence or injury on your part in the interim period arising out of the treatment between the surgeries, do you agree with that?

LAWYER: I don't agree with that. What we have here, we have an unnecessary first surgery. We have a doctor with actual knowledge of an unnecessary first surgery. That meant that the entire course of treatment for this particular problem was unnecessary. An unnecessary surgery is negligence...

HECHT: Is there anything in dependent in the intervening care between the two surgeries here? Was there any claim that medication was given or not given when it should or shouldn't have been or anything like that? I understand your position that the first surgery caused everything that happened thereafter. If your claim as to the first surgery is barred by limitations, is there an independent claim as to the care following the first surgery?

LAWYER: Yes. In Texas a physician has a continuing duty to disclose to his patient material facts that are affecting his condition. He also has a continuing duty to disclose to his patient

the reason for his suffering throughout the course of treatment.

BAKER: The failure to disclose is that the original surgery was unnecessary?

LAWYER: The failure to disclose was that the original surgery was unnecessary and that that is why he continued in the pain that he was in.

BAKER: I understand that but can we also say that all of the pain that your client suffered resulted from the initial surgery and not from each visit that he may or may not have had with Dr. Earle between the first and last surgeries?

LAWYER: Mr. Ratliff's condition was deteriorating. And Dr. Earle continually told him, This is normal, this is to be expected, you are going to be big and strong, I'm going to make you 95% better.

BAKER: But that goes to your argument that you believe Dr. Earle concealed the fact of the unnecessary surgery and said those things as a coverup. Isn't that your argument? And so I still don't see that you've answered Justice Hecht's question. What exactly was negligent treatment between the first and final surgery that you allege would be a continuing course of treatment?

LAWYER: I guess my position is, I can't put course of treatment here and fraudulent concealment here and even open courts here. To me, we've got the whole thing in one ball of wax. We've got an actual knowledge of an unnecessary surgery. And then we have got the fraudulent concealment and misrepresentations.

BAKER: Would you agree that the court in reviewing these arguments have to look at each one and decide whether or not those elements are either proven or a fact question raised in the context of a summary judgment, and that we can't just say, Well the whole ball of wax leads us to this conclusion so we are going to hold thus and so?

LAWYER: Yes. And in the *Husane* case that we've been talking about, the plaintiff went to the doctor three times. So the court looked at - her argument was, Look, the doctor failed in her duty to me to have test run to see if I have breast cancer. That was a failure in the duty that this doctor had to me. And so the court said, Well she went 3 times; on two of those occasions the doctor did order tests, so we have one discrete date that no tests were ordered. In this case, Mr. Ratliff went to see Dr. Earle at least once a month for 2-1/2 years. And on every one of those dates he said, My back hurts, I'm in pain. He never said, Well the reason you are in pain is because I butchered your back.

BAKER: That then would go to a concealment argument?

LAWYER: It goes to a concealment argument. I think it also goes to a negligent course

of treatment when a doctor fails in his duty as a doctor to that patient. There is a duty in this state to tell them why they are in pain and there's a duty to disclose material facts to them that they don't know. He never knew that those test results didn't justify what was done to him. Dr. Mooney's affidavit states that there was absolutely no objective testing to justify the type of destructive procedure that Dr. Earle performed on Mr. Ratliff's back. I would suggest that the only way that Dr. Earle could claim that he didn't know that first surgery was unnecessary, is for him to admit he was too incompetent to interpret the x-rays, the MRI's, the disprovocation results. All of those.

HANKINSON: Looking at the limitations provision of 4590i, would you agree that the purpose of having the 3-prong test, you don't get to choose which one you like, that surgery and allegations of negligent surgery are particularly intended or suited for dealing with the date of the breach of the tort? It makes a date ascertainable which makes limitations law much more predictable for both plaintiffs and defendant doctors?

LAWYER: I agree, and I agree with what you were saying earlier. There are times when the surgery is the only complaint. We have a lot of cases on file where someone does a surgical procedure on a patient, and never sees them again. But when the initial surgery was unnecessary, and that's the very reason that he has to keep coming back month after month to see this doctor, then the harm from that surgery carries over. That surgery was negligent. That surgery was also at the very least constructive fraud on the patient. That's another issue. We've got a fraud claim in this case that's a 4-year statute that covers all of this.

HECHT: If he had seen another doctor for the post-operative care, your claim would be barred?

LAWYER: Yes, if he had never gone back to Dr. Earle after that, then that would have been the very last date that we could point to. As it was, Dr. Earle continued to treat him. After the second surgery about two weeks later Mr. Ratliff was unable to write, walk, talk, to take care for himself and never regained that ability. He died in Sept. 1997. And he remained on morphine drips everyday for the back pain that he continued to be in.

I would also like to address the fact that they've said that Mr. Ratliff's affidavit was failed(?) because it was signed by his wife, Shirley, who had the power of attorney. They cite the *De Los Santos* case, and that is not on point. In that case, there was no evidence that the father couldn't sign his own affidavit, that he was too incapacitated to sign it as was Mr. Ratliff. There is no evidence that the son in that case had the father's power of attorney, as did Shirley Ratliff. Also reading of that case shows that the son forged the father's signature, and later admitted that he had done that. To strike Mr. Ratliff's affidavit because he was too incapacitated to sign it himself would be to reward a doctor for rendering his patient so physically incapable of executing an affidavit against the very doctor that committed the malpractice.

HANKINSON: They moved to strike the affidavit in the TC?

LAWYER: No.

HANKINSON: The trial judge never ruled on this issue?

LAWYER: They moved to strike certain segments of his affidavit that they said were conclusory. But, no, this was not raised until we were in this court.

HANKINSON: If we accept your interpretation on these particular facts aren't we then introducing a tremendous amount of uncertainty that the legislature intended to put aside by passing the limitations provision of 4590i?

LAWYER: I believe that in all of these cases every single one of them fall on their own facts. That's what you have to look at. You have to look at the dates of each one. And when you have a surgery that is by the doctor's actual knowledge that this is an unnecessary surgery - I mean in the *Desiga(?)* case, that Dr. Earle cites, there the court said, Well there was no evidence that the doctor knew this was unnecessary. But when you have got a case as facts show that the doctor knew that this was unnecessary and did an extensive destructive surgery on the man, then I think those egregious facts stand on their own. And we have got a continuing course of treatment of his concealments, his misrepresentations to cover this up...

HANKINSON: Then isn't this really a fraudulent concealment case as a matter of avoidance of the limitations provision?

LAWYER: And we pled fraudulent concealment.

HANKINSON: I know you have. But isn't that what this case really is about then?

LAWYER: Well, we've got actual knowledge and we've got a duty and we've got a fixed purpose to conceal. So, yes, I think we've definitely got a fraudulent concealment claim.

HECHT: Fraudulent concealment is a defense to limitations, but it could also be action if there is a duty to disclose. I'm unclear from your pleadings whether you claim both an avoidance of the bar of limitations, and of separate cause of action for damages.

LAWYER: In claiming that the fraudulent concealment claim deferred limitations and that they didn't commence to run until some later date in there - now our later date is Dec. 1993. Dr. Earle's later date is, Well he saw another doctor in March 1993, so he should have been put on notice then of this fraudulent concealment claim. That still gets us our two years. I mean limitations would be deferred even under their argument to March 1993, and would not commence to run till then. The lawsuit was filed in Feb. 1994. So even under their fraudulent concealment argument, we're within limitations.

BAKER: The doctor's counsel indicates that in their view there was no negligence in the second surgical procedure or the last one. Do you agree or disagree with that?

LAWYER: I disagree with that. And Dr. Mooney's affidavit clearly states it was a breach of the standard of care and that it was medically unwarranted. And the reason it was medically unwarranted as he states: To reinsert hardware into the back of a patient who has had a 3-level fusion, a 4-level nerve decompression when that previous hardware failed, he says that is a breach of the standard of care.

BAKER: The same hardware was reinserted the second time?

LAWYER: Yes. And the doctors that Mr. Ratliff went to earlier, one of them only looked at his neck. Because actually as Dr. Mooney also states, that was his main problem. When he went to see Dr. Earle in the first place was his neck was in far worse shape than his back was. The other doctor agrees that there is tremendous instability and something needs to be done, but he never says, We need to go back in and put other screws back in. So Dr. Mooney clearly says that that was negligent. Had Dr. Earle told Mike Ratliff, I butchered your back, I did a destructive surgery, shouldn't have done it, that's why you are in the shape you are in, that's why you are never going to get any better, he clearly would have fired his doctor, clearly would have gotten another doctor and hopefully a doctor like Dr. Mooney who would not have put him through the second surgery. And I believe he would still be alive today if that would have happened.

ENOCH: My concern about this it seems to me any surgeon will do some post-operative care, will do some sort of follow-up to see how it's coming along. And the statute is fairly clear that there is a discernable date there, that's the date that's going to control. It would seem to me all a plaintiff, if adopting your rule, would have to allege is that the doctor committed negligence in the surgery, the doctor knew it was negligence, and since they didn't reveal that at the post-operative care, therefore, the statute of limitations really doesn't run from the discrete date of the surgery, the statute begins to run from the last date the doctor saw me and looked at my injury. How do you distinguish between everyday surgery circumstances and the particular circumstance that you say is so compelling here?

LAWYER: Well, I think in the everyday surgery circumstances hopefully everyday we don't have a doctor doing this. But if they have been negligent in that first surgery and if you have got evidence to show that, then they continue to have that duty to tell their patient. It's a duty we have as a lawyer to tell our clients if we malpractice their case.

ENOCH: So your answer is it would apply in every surgical circumstance?

LAWYER: Only in surgical circumstances where the doctor was negligent and the doctor knew that he was negligent, and he didn't tell the patient. He didn't say, Here's the reason why you are having such problems.

HECHT: What summary judgment evidence is there that Dr. Earle knew he was negligent?

LAWYER: He knew that that first surgery was not necessary. The summary judgment evidence is his entire medical records, which we submitted, and Dr. Mooney's review of those records. And he said, there was absolutely no basis in reading the results of the x-rays, the results of the MRI's, and the disprovocation test, nothing in those tests, all the objective testing performed indicated that he needed either a 3-level fusion or much less a 4-level nerve decompression because there was no evidence of any nerve root _____. That was in the radiological test and that was in Mr. Ratliff's subjective complaints. We've never complained of ridiculer pain. So the entire procedure was totally unwarranted and there is no way that a doctor who can interpret MRI's, x-rays and other objective tests would not know that when his decision was totally contrary to the test ordered.

What we've got here is a doctor who in the face of all objective testing to the contrary orders an unnecessary and highly destructive procedure on the back of a 38-year old laborer just 5 months after his injury, and then conceals that from him. And this court said in the *Kimbell* case that the course of treatment doctrine often applies in cases of misdiagnosis and mistreatment. I think that misdiagnosis is too nice a word for this. I think this is clearly mistreatment and if this doesn't rise to the level of the mistreatment that this court was referring to in the *Kimbal* case, then I don't know if the course of treatment doctrine exist in this state any longer. I hope that it does and I would ask that this court affirm the 5th circuit.

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REBUTTAL

LAWYER: I think *Husane* has decided the question about whether you call it misdiagnosis, mistreatment, I don't care what you call it. I think the *Husane* case is correctly stated. That is immaterial. That is not what you look at. You first look to determine if, from the facts of each case, is an ascertainable date for which a breach or tort occurred.

I would also like to address briefly the argument that there is actual knowledge - there is evidence of actual knowledge in this record that Dr. Earle knew that he had done something wrong and therefore failed to disclose it in the fraudulent concealment aspects of the case. The only evidence is the affidavit of Dr. Mooney, which in it, he gives opinions that the tests were interpreted one way and should have been interpreted another, and therefore, Dr. Earle was wrong in recommending surgery initially. I would direct the court to a case that was not cited in our brief, that is not a medical malpractice case, but was decided by the SC in 1996, and that is *S.B. v. R.V.*, 933 S.W.2d 1. It does not deal specifically with fraudulent concealment but it was a directed verdict case and it does talk about discovery, and by analogy, I think you are holding at page 15 as particularly instructive. We have held only that the bar of limitations cannot be lowered by no other reason than a swearing match between parties over facts and between experts over opinions. And I would submit

that's what you have at most here. You have Dr. Mooney saying, I wouldn't have done the surgery because these tests didn't do this or that; whereas, Dr. Earle in his affidavit denied he was negligent, denied he had actual knowledge of negligence and denied that he concealed.

HANKINSON: But swearing matches in summary judgment motions between experts in malpractice cases means the cases get tried. Isn't that typical? I mean isn't that kind of the way it comes down because you always have expert testimony in order to keep the case of alive and if you have competing experts doesn't that - if issue is properly joined, and I agree you don't agree with that, but generally competing experts mean fact issues in a malpractice case if the necessary proof requirements are met.

LAWYER: I agree as to standard of care and as to causation. The issue that I am arguing this point about is regarding the limitations and the bar of limitations. The argument that has been made to this court a moment ago was that the affidavit of Dr. Mooney stating that the interpretations of the tests by Dr. Earle were wrong, therefore, he had actual knowledge or that's the argument, he had actual knowledge...

HANKINSON: What about the allegation that Dr. Earle admitted in his deposition that he knew the devices he inserted in the first surgery were temporary and in fact all the literature relating to the devices indicated that they were temporary, and he never told the patient that he had put in what was a temporary device and was instead telling him everything is going to be okay. That's pretty specific factual allegation as I read it.

LAWYER: And our brief deals with the issue. There is no summary judgment proof as to the issue that it was temporary verses permanent. Ratliff's affidavit absolutely does not deal with that. In addition, the medical disclosure panel does set forth what requirements were of disclosure. He met those disclosures.

HANKINSON: But we're dealing with the question of the failure to disclose on fraudulent concealment and limitations which is what I thought you were talking about. If the controverting summary judgment evidence shows in fact that Dr. Earle admits that he knew the device was temporary and if the summary judgment evidence shows that in fact he put the device in the patient's back, and if the summary judgment evidence shows that the patient says, I was never told it was temporary, I thought it was permanent, and he kept telling me I was going to get better, why don't we have a fact issue there?

LAWYER: What you would have then arguably is fraudulent concealment until the moment that he is put on notice therefore for further inquiry. And when would that be? I would argue it would be the time that within the two-year period before the second surgery when he is sent for a second opinion and they are discussing whether or not there should be an additional surgery. At that point, according to *Borderline v. Peck* he has knowledge of such facts is in law equivalent to the cause of action and therefore in on inquiry. Note that occurred within the two-year period of

limitations.

HANKINSON: But fraudulent concealment is not - the statute of limitations doesn't begin to run in fraudulent concealment isn't that correct until the patient is...

LAWYER: Actually this court has never addressed that specific point under 4590i.

HANKINSON: But that's what fraudulent concealment law is generally in Texas.

LAWYER: I would agree, that is true. Fraudulent concealment however was engrafted into art. 4590i by one opinion that was highly dissented upon based upon the fact that 4590i also says, Notwithstanding any other law, you have two-years and 75 days in which to bring a lawsuit. I do not believe this court has specifically addressed how you would interpret fraudulent concealment if the patient is put on notice clearly within your two-year period. If as you have done in the open courts challenge, if you are put on notice within the two-year period, you must bring your lawsuit within that two-year period. That is still an open question.