

JOHN H. SWIFT, SR., )  
 )  
 Plaintiff/Appellant, )  
 )  
 VS. )  
 )  
 TIMOTHY P. SCHOETTLE, M.D., and )  
 DRS. HOWELL, ALLEN, ALLEN, )  
 SCHOETTLE & LANFORD, P.C., )  
 )  
 Defendants/Appellees. )

Appeal No.  
01-A-01-9605-CV-00239

Davidson Circuit  
No. 95C-3077

**FILED**

**December 20, 1996**

**Cecil W. Crowson  
Appellate Court Clerk**

COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CIRCUIT COURT OF DAVIDSON COUNTY  
AT NASHVILLE, TENNESSEE

THE HONORABLE BARBARA N. HAYNES, JUDGE BY INTERCHANGE

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AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:  
TODD, P.J., M.S.  
KOCH, J.

## OPINION

The sole question in this appeal is whether the plaintiff's malpractice action was barred by the one year statute of limitations and/or the three year statute of repose, Tenn. Code Ann. § 29-26-116. The trial judge dismissed the claim. We affirm.

### I.

After being involved in a car wreck on April 9, 1991, John H. Swift, Jr. consulted the defendant, Timothy P. Schoettle, a neurological specialist. Mr. Swift complained of neck pain, headaches, ringing in his ears, numbness in both arms, and occasional right radicular pain. Dr. Schoettle examined Mr. Swift, ordered certain tests to be made, and determined that a decompressive cervical laminectomy was the indicated and appropriate procedure.

Mr. Swift chose to defer the laminectomy until August 20, 1991. After performing the operation, Dr. Schoettle continued to see Mr. Swift until October 26, 1994. During the post-operative period Mr. Swift continued to complain of pain and Dr. Schoettle ordered further tests, but he concluded that no further surgical procedures were indicated.

On September 25, 1995, Mr. Swift filed a complaint alleging that Dr. Schoettle carelessly and negligently failed to advise Mr. Swift that a spinal fusion was desirable and/or necessary at the time of the laminectomy; that he failed to perform the spinal fusion at the time of the laminectomy; that he negligently failed to suggest any further surgical procedure; and that he failed to refer Mr. Swift to other qualified health care professionals.

On November 25, 1995, Dr. Schoettle moved for summary judgment and filed his own affidavit stating that he complied with the accepted standards of professional practice in the community. Specifically, he denied that Mr. Swift's symptoms or the clinical evidence showed that a spinal fusion was necessary.

Mr. Swift opposed the motion for summary judgment with his own affidavit and the affidavit of a Michigan neurosurgeon. The medical expert averred that Dr. Schoettle deviated from the standard of care -- which he said was the same all across the country -- by performing surgery on three levels of the cervical spine when only one level was involved in Mr. Swift's symptoms; that the multi-level surgery and the failure to perform a spinal fusion destabilized the spine, resulting in a kyphotic (bent forward) state; and that Dr. Schoettle should have referred Mr. Swift for other professional care.

Mr. Swift in his affidavit says only that he saw Dr. Schoettle fifteen times after the surgery, and that the doctor did not ever suggest that Mr. Swift seek a second opinion or other medical care.

The trial judge granted summary judgment to Dr. Schoettle, holding that the action was barred by the one year statute of limitations and the three year statute of repose, Tenn. Code Ann. § 29-26-116(a)(1), (3).

## II.

Tenn. Code Ann. § 29-26-116 provides:

- (1) The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104.
- (2) In the event the alleged injury is not discovered within the said one (1) year period, the period of limitations shall be one (1) year from the date of such discovery.

(3) In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.

With respect to the events of August 20, 1991 -- including the allegation that Dr. Schoettle failed to suggest a spinal fusion, failed to perform the spinal fusion, and negligently performed a three level operation -- the statute of repose clearly bars the plaintiff's action unless Dr. Schoettle fraudulently concealed the cause of action. On that issue Mr. Swift has the burden of proof. *Benton v. Snyder*, 825 S.W.2d 409 (Tenn. 1992).

There is nothing in the plaintiff's responses to the motion for summary judgment that suggests any sort of fraudulent concealment. (Neither does the complaint nor the amended complaint allege fraudulent concealment.) Mr. Swift argued in his brief that the continuing doctor/patient relationship established a confidential relationship and that Dr. Schoettle's failure to disclose that Mr. Swift suffered from the kyphotic deformity amounted to concealment. As to the legal principle he is correct, see *Benton v. Snyder*, but there is nothing in the record from which an inference could be drawn that Dr. Schoettle knew of any wrongdoing on his part or of anything about Mr. Swift's condition that he had a duty to disclose. Therefore, summary judgment on the allegations concerning the operation on August 20, 1991 was proper.

With respect to the remaining allegation -- that Dr. Schoettle failed to refer Mr. Swift to other qualified health care professionals -- there is no competent evidence in the record that Dr. Schoettle's actions deviated from the standard of care. The expert testimony offered by Mr. Swift fails to satisfy the locality rule established by Tenn. Code Ann. § 29-26-115 and we do not believe we are bound to accept the expert's bare assertion that the standard of care is the same everywhere.

The judgment below is affirmed. The cause is remanded to the Circuit Court of Davidson County for any further proceedings necessary. Tax the costs on appeal to the appellant.

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BEN H. CANTRELL, JUDGE

CONCUR:

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HENRY F. TODD, PRESIDING JUDGE  
MIDDLE SECTION

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WILLIAM C. KOCH, JR., JUDGE

