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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

SOFIYA STERKINA,

Plaintiff and Appellant,

v.

THE REGENTS OF THE UNIVERSITY  
OF CALIFORNIA,

Defendant and Respondent.

A131675

(San Francisco County  
Super. Ct. No. CGC10498334)

This is an appeal from judgment following the dismissal with prejudice of plaintiff Sofiya Sterkina's third amended complaint against defendant The Regents of the University of California (Regents). Sterkina's third amended complaint purported to set forth a professional negligence claim for injuries she received at the hands of three dentists who performed dental work on her on behalf of the University of California at San Francisco (UCSF) Hospital Dentistry/General Practice Residency.<sup>1</sup> The trial court sustained defendant's demurrer to the third amended complaint without leave to amend after concluding Sterkina's claims were time-barred. We affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

Sterkina received dental treatment from several dentists affiliated with the UCSF Hospital Dentistry/General Practice Residency between February 2008 and February or

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<sup>1</sup> English is not the first language of Sterkina, who is proceeding in propria persona. As a result, statements set forth in Sterkina's court documents are at times lost in translation, although the gist of her claim is well understood.

March 2009. Over one year later, on April 2, 2010, Sterkina filed this medical malpractice lawsuit alleging that she sustained serious injuries, including terrible pain, sleeplessness, headaches and weakness, as a result of negligent dental treatment she received from three of the dentists who cared for her during this time period – to wit, Doctors Wadell, Harrington and Azizi (collectively, the UCSF dentists).

Specifically, Sterkina alleges she visited Dr. Wadell at least twice in February 2008 for “T#2 treatment.”<sup>2</sup> Immediately following her second appointment with Dr. Wadell, which occurred approximately two weeks after her first appointment on February 21, 2008, Sterkina experienced “deep interference under the gum of T#2,” causing her “terrible pain, sleepless nights.”

A few months later, on or about April 9, 2008, Sterkina received dental treatment from Dr. Harrington that included prepping one of her teeth for a prefabricated crown. According to Sterkina, towards the end of this treatment, which lasted about three and a half hours, Sterkina “felt weakness, headache.” Then, once Sterkina arrived home, she experienced “terrible pain, . . . sleepless nights, [and] giddiness.”

Around this time, in March and April of 2008, Sterkina also received dental treatment from Dr. Azizi, which she describes as “T#30 endo treatment.”<sup>3</sup> Following this treatment, on May 7, 2008, Sterkina had “very heavy bleeding, before it very severe episode of dizziness.” As a result, Sterkina alleged she had to cancel a May 8, 2008 follow-up appointment with Dr. Azizi, and was instead seen by him on May 27, 2008.<sup>4</sup>

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<sup>2</sup> “T#2” appears to be a reference to the tooth numbering system recognized by the dental profession, which identifies T#2 as the second molar on the upper right side of a person’s mouth.

<sup>3</sup> “T#30,” according to the above-mentioned tooth numbering system, is the first molar on the bottom right side of a person’s mouth.

<sup>4</sup> Sterkina’s opening brief contains the following additional details with respect to Dr. Azizi’s alleged negligent treatment:

“In a short time after treatment of T#2 patient had three appointments, three hours each for root canal treatment of T#30. Soon, on May 7 of 2008 unusual giddiness and bleeding happened with [Sterkina] in the morning time when she tried some exercise on the floor. Everything was very quick, like in cosmos, flashed, turned in her eyes. She

As previously mentioned, Sterkina initially filed this professional negligence lawsuit on April 2, 2010. In her original complaint, Sterkina failed to properly name the parties. As such, she filed an amended complaint on June 18, 2010, to which the Regents demurred. On August 31, 2010, the trial court sustained the Regents' demurrer to the first amended complaint with 10-days leave to amend, advising Sterkina that "[she] must plead what portion of her treatment gives rise to a cause of action in negligence and what injury she has incurred. Plaintiff must also state the dates of the alleged negligence and when she first suspected the negligence." However, Sterkina failed to heed the trial court's advisement in drafting her second amended complaint, leading to the court's order sustaining the Regents' second demurrer, again with 10-days leave to amend, on November 9, 2010.

On November 18, 2010, Sterkina filed the operative complaint that is the subject of this appeal – to wit, her third amended complaint. In this complaint, Sterkina included an allegation that she did not suspect negligence in connection with her dental work “until or after April 3, 2009.” The Regents again demurred, and the matter was heard February 9, 2011. In sustaining this demurrer, the trial court offered the following explanation:

“Ms. Sterkina, I understand that your complaint is that you are alleging that you received some dental work and that based on that dental work you have had problems. The problem is that you have failed to file this in a timely manner from the time that it was discovered that you had these problems and it was based on your dentistry, and that's the reason why I have sustained the demurrer is because you've not filed this in time.”

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cannot stand up. Her body does not obey her. Without control [Sterkina] staggered from side to side in sitting position. She lied down again on the floor again, than [sic] again a little raised and all the same many times. By the floor [Sterkina] creped [sic] to divan, snatched of it had [sic], anyhow stood up and sat. A few minutes later [Sterkina] had start to bleeding. Never before treatment, like [Sterkina] had in UCSF it happened to her. Because of very bad condition, [Sterkina] was of necessity interrupt treatment. First, [Sterkina] hoped, in a few hours she will feel batter [sic]. She will [be] OK for has her third appointment for root canal treatment on T#2 on this day, May 7 of 2008. But her condition was bad. This appointment [she] had on different date.”

When Sterkina insisted to the trial court she first suspected negligence on or after April 3, 2009, rather than immediately after her treatment, the trial court pointed out that such allegation was belied by other facts in her complaint, a flaw fatal to her case:

“The problem is that there are facts in your complaint which indicate that you actually were aware of the problems much earlier than that and that it was from the fact that you had this dental work, and so that belies the fact that you didn’t know until more recently.”

Subsequently, the trial court entered a written order sustaining the demurer to the third amended complaint and dismissed the case with prejudice, thereby implicitly finding the complaint’s defect was not reasonably curable by way of amendment. Judgment was then entered in favor of the Regents, leading to this timely appeal.

### **DISCUSSION**

Sterkina argues on appeal that the trial court erred in finding her claim time-barred as a matter of law, insisting she filed suit within a year of first suspecting the UCSF dentists’ negligence. In doing so, she acknowledges that her injuries surfaced shortly after the UCSF dentists’ treatment, but claims she believed they were “only [the] result of her body reaction on [sic] the treatment” and thus did not trigger the running of the statute of limitations. The following well-established legal principles govern our review of her contention.

An order sustaining a demurrer is reviewed de novo. We “ ‘treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility

is squarely on the plaintiff. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. See also *People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957.)

Here, the trial court sustained the Regents’ demurrer to Sterkina’s third amended complaint without leave to amend after finding her in violation of the statute of limitations set forth in Code of Civil Procedure section 340.5 (section 340.5). This statute, the applicability of which is not challenged, provides in relevant part that, in a personal injury action against a health care provider for alleged professional negligence, the time for the commencement of the action “shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first.”<sup>5</sup> In this case, the issue is whether Sterkina complied with the latter part of this statute, which is also known as the “discovery rule.” We thus must determine whether Sterkina’s filing of her action on April 2, 2010 occurred within one year of the date she “discover[ed], or through the use of reasonable diligence should have discovered,” her alleged injuries. (§ 340.5.) We, like the trial court, conclude her filing did not meet this deadline for the reasons that follow.

“In order to rely on the discovery rule for delayed accrual of a cause of action, ‘[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.’ (*McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 160 [86 Cal.Rptr.2d 645].) In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to “show diligence”; “conclusory allegations will not withstand demurrer.’ (*Ibid.*)” (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808.) “*Simply put, in order to employ the discovery rule to delay*

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<sup>5</sup> Section 340.5 further provides: “In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person.”

*accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light.”*<sup>6</sup> (*Id.* at pp. 808-809 [emphasis added].)

Turning now to the record, we find unavoidable the conclusion that Sterkina had reason to – and likely did – suspect that the UCSF dentists’ treatment caused her injuries shortly after she received the treatment, such that the statute of limitations set forth in section 340.5 began to run well before April 3, 2009, the date she now claims she first suspected negligence. For example, as set forth above, the operative complaint alleges Sterkina was injured on or around the following dates: February 2008 (Dr. Waddell), April 9, 2008 (Dr. Harrington), and March through May 2008 (Dr. Azizi). Specifically, with respect to Dr. Wadell’s treatment of her T#2, Sterkina experienced “deep interference under the gum of T#2,” causing her “terrible pain, sleepless nights” *immediately following* her second appointment with him. Further, according to the complaint, this second appointment with Dr. Wadell occurred approximately two weeks after her first appointment on February 21, 2008.

With respect to Dr. Harrington, Sterkina was treated on or about April 9, 2008. According to Sterkina, towards the end of this treatment, which included prepping one of her teeth for a prefabricated crown and lasted about three and a half hours, she “felt weakness, headache.” Further, once Sterkina arrived home, she experienced “terrible pain, . . . sleepless nights, [and] giddiness.”

Finally, with respect to Dr. Azizi, who provided “T#30 endo treatment” in March and April of 2008, Sterkina alleges having “very heavy bleeding, before it very severe

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<sup>6</sup> “This policy of charging plaintiffs with presumptive knowledge of the wrongful cause of an injury is consistent with our general policy encouraging plaintiffs to pursue their claims diligently. [Citation.]” (*Fox v. Ethicon Endo-Surgery, Inc.*, *supra*, 35 Cal.4th at p. 808.)

episode of dizziness” on May 7, 2008, prompting her to cancel a May 8, 2008 follow-up appointment.

These undisputed facts relating to Sterkina’s discovery of injuries in the time period of February to May 2008 render her professional negligence claim untimely as a matter of law. (§ 340.5.) Simply put, Sterkina’s injuries should have alerted her to possible wrongdoing by the dentists, triggering her duty to conduct a reasonable investigation of all potential causes of those injuries. Such investigation, we conclude, would have disclosed a factual basis for her cause of action long before April 3, 2009, the date she claims to have first suspected negligence. “Pursuant to the plain language of section 340.5, it is the discovery of ‘the injury,’ rather than the discovery of a particular defendant’s negligence, that triggers the limitations period.” (*Knowles v. Superior Court* (2004) 118 Cal.App.4th 1290, 1299; see also *Fox v. Ethicon Endo-Surgery, Inc.*, *supra*, 35 Cal.4th at pp. 807-808)<sup>7</sup>

Accordingly, for the reasons stated, we agree with the trial court that Sterkina’s claim is time-barred as a matter of law. Moreover, Sterkina has made no effort to meet her burden to prove there is a reasonable possibility that she could cure this timeliness defect if given a fourth opportunity to amend her complaint. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318; see also *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227 [“Liberality of permitting amendment is the rule, if a fair opportunity to correct the defect has not been given”].) As such, the trial court properly exercised its discretion in

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<sup>7</sup> We also point out the legal principle that “ ‘[g]eneral pleadings are controlled by specific allegations. . . . [¶] For example, where plaintiff alleges a permissible conclusion of law such as the due performance of a condition precedent but also avers specific additional facts which either do not support such conclusion, or are inconsistent therewith, such specific allegations will control “and a complaint which might have been sufficient with general allegations alone may be rendered defective . . . .” [Citations.]’ [Citation.]” (*Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 174-175.) As such, Sterkina’s conclusory allegation that she did not suspect wrongdoing until at least April 3, 2009 does not trump her specific allegations relating to her discovery of injuries between February and May of 2008.

sustaining the demurrer to her third amended complaint without leave to amend.<sup>8</sup> (See *Melican v. Regents of University of California, supra*, 151 Cal.App.4th at p. 175 [“ ‘[t]he trial court has wide discretion in allowing the amendment of any pleading [citations], [and] as a matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or gross abuse of discretion is shown’ ”].)

### DISPOSITION

The judgment is affirmed.

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Jenkins, J.

We concur:

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McGuinness, P. J.

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Siggins, J.

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<sup>8</sup> As Sterkina points out, the trial court’s order sustaining the demurrer to her third amended complaint failed to include a statement of the specific ground upon which the order was based, which Code of Civil Procedure section 472d requires. However, this failure by the trial court provides no basis for reversal absent a showing of prejudice to Sterkina. (*Lambert v. Carneghi* (2008) 158 Cal.App.4th 1120, 1128 fn. 4.) Nothing in this record suggests any such prejudice, particularly given that the trial court advised Sterkina in open court that the demurrer was being sustained on the ground that her claim was untimely.