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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JODY L. POULNOTT,

Plaintiff and Appellant,

v.

**AMERICAN HOSPITAL
MANAGEMENT CORPORATION
et al.,**

Defendants and Respondents.

A132429

**(Humboldt County
Super. Ct. No. DR100927)**

Jody Poulnott (Poulnott) appeals from a judgment that was entered after respondents' demurrers to his complaint were sustained without leave to amend. He contends, primarily, that his claims were not barred by the applicable statutes of limitation, he stated a cause of action for the improper denial of access to his medical records (Health & Saf. Code, §§ 123110, 123120), and the court should have permitted him to amend the complaint to allege additional claims.

We will affirm the judgment as to three of the respondents; we will reverse as to one respondent, because Poulnott has stated a cause of action under Health and Safety Code section 123120.

I. FACTS AND PROCEDURAL HISTORY

On August 14, 2008, Poulnott served respondent American Hospital Management Corporation, doing business as Mad River Community Hospital (Mad River Hospital), with a Notice of Intent to Sue under Code of Civil Procedure section 364. By this notice,

Poulcott warned that he intended to sue Mad River Hospital for its negligence in the application of electrocardiogram electrodes during a cardiopulmonary stress test on November 26, 2007, and the misdiagnosis of his resulting injuries by respondent Dr. Robert Mott one week later. Poulcott also disclosed that he was considering filing a claim against respondent Mark Winsor, a cardiopulmonary therapist. The notice included a 49-page binder and 14 8 x 10 color photographs of his injuries.

In November 2010 – over two years after his Notice of Intent to Sue – Poulcott commenced this lawsuit against Mad River Hospital, Winsor, and Dr. Mott, along with Dr. David Gans. Poulcott seeks relief for the injuries he purportedly sustained in 2007, as well as relief for the denial of access to, and copies of, his medical records.

A. Allegations of Poulcott's Complaint

Poulcott alleges that he became an Emergency Room Technician in 1983, completed the U.S. Army's Medical Specialist Course (purportedly equivalent to California's paramedic program) in 1985, and was recertified as a paramedic in 1988 and 1993. In November 2007, he was employed by the City of Blue Lake (city) as a police officer.

1. Poulcott's Injuries

On November 26, 2007, Poulcott went to Mad River Hospital's cardiopulmonary department for a cardiopulmonary "stress test" as part of a physical examination for his employment with the city. Hospital technician Winsor applied 10 Quinton Quik-Prep electrodes to Poulcott's upper chest, left torso, and lower back using an applicator gun. Beginning with the application of the first electrode, Poulcott complained of "significant pain." "Immediately following" the application of all the electrodes, he experienced "excruciating pain" from each of 10 electrode sites.

Poulcott was then required to wait for approximately 93 minutes until Dr. David Gans arrived to conduct the stress test. When the electrodes were removed after the test – about one hour and 50 minutes after they had been applied – Poulcott saw one-half-inch round friction burns that were bleeding from nine of the 10 electrode sites. Winsor told Poulcott the wounds were normal and gave him 4 x 4 inch gauze pads to apply pressure

to the areas before he went home. Poulcott left the hospital without receiving any further treatment or instructions.

Poulcott telephoned “Defendants” to express concern about his injuries. On Monday, December 3, 2007, Mad River Hospital asked Poulcott to return for further examination. On that day, he was examined for about two minutes by Dr. Mott in the hospital’s occupational health services department. According to the complaint, Dr. Mott opined that Poulcott was having an allergic reaction to the gel on the stress test electrodes and he was suffering from “contact dermatitis.” Poulcott was provided a prescription for “Triamcinolone 0.1% Cream” and a “do not work” excuse for one week pending a follow-up appointment.

Poulcott, “believing that [Dr.] Mott’s diagnosis was false, immediately scheduled an appointment with his primary physician [Dr. Carroll] to get a ‘second’ opinion.” On December 5, 2007, Dr. Carroll examined Poulcott and concluded the injuries were not “contact dermatitis,” but friction burns caused by the application of the electrodes during the stress test.

On December 10, 2007, Poulcott returned to Mad River Hospital, where Dr. Mott saw him a second time. Dr. Mott told Poulcott his red spots looked “fine” and advised him that he could return to work. Poulcott received no further treatment from Dr. Mott or Mad River Hospital.

Concerned about his injuries, Poulcott’s employer directed him to the UC Davis Burn Center for further evaluation. There on January 8, 2008, Dr. David Greenhalgh examined Poulcott and noted there were still red areas where the electrodes had been placed. Poulcott was concerned about keloid scarring, and Dr. Greenhalgh directed him to stop using the cream Dr. Mott had prescribed because it contained steroids and promoted growth.

On February 19, 2008, Poulcott was examined by Dr. Tina Palmieri at the UC Davis Burn Center. Dr. Palmieri noted his “burns” were well healed and he had flat “scars” on his trunk. Dr. Palmieri also told him the pain associated with the burns was a normal part of the healing process and he could experience itching for up to a year.

Poulnott was seen by Dr. Carroll, his primary care physician, on May 12, 2008. Dr. Carroll noted Poulnott's injuries were still visible and the sites showed slight erythema.

On May 20, 2008, Poulnott was examined again by Dr. Greenhalgh at the UC Davis Burn Center. Dr. Greenhalgh noted that Poulnott still had noticeable red marks and confirmed that his itching was part of the healing process. Poulnott was released with no further follow-up required.

Poulnott now alleges the friction burns have resulted in "permanent disfigurement" and he has been unable to obtain employment, remain employed, and enjoy life.

2. Dr. Mott in the News

More than two years later in June 2010 – and nearly two years after serving his Notice of Intent to Sue – Poulnott allegedly read a news article indicating that Dr. Mott had been involved in civil and criminal matters. Poulnott investigated and, around July 2010, "discovered information which Plaintiff is informed and believes constitutes fraud by intentional concealment." Specifically, he alleges: "Plaintiff is informed and believes and thereon alleges that Mott, because of his negative history with law enforcement, his prior bad acts of dishonesty, corruption and gross negligence, INTENTIONALLY CONCEALED the true nature of Plaintiff's injuries by telling him that he was having an allergic reaction to the gel on the stress test electrodes and documenting several times in his medical records that his diagnosis was simply 'contact dermatitis'."

3. Poulnott's Quest for His Medical Records

On October 26, 2010, still not having filed any lawsuit, Poulnott reviewed his medical records already in his possession and concluded that some pages were missing. The next day, he went to Mad River Hospital to get the records. Poulnott completed a records release form and was provided a file folder with just five documents. Poulnott concluded that many records regarding his medical treatment were missing from the file,

and a hospital employee suggested that other records might be held in the occupational health department.

At the occupational health department, Poulcott completed another release form but was told by hospital staff that he could not have a copy of his records because he had not paid for the physical examination. After confirming that the records were generated as part of a physical examination for the city, he was told the records would be sent to the medical records department for copying. Later, however, a hospital records clerk advised him that, under federal regulations, his medical records constituted an “Employment Chart” and would have to be obtained from his employer. Poulcott contacted the California Department of Public Health and was told that this statement was incorrect.

B. Poulcott’s Causes of Action

Poulcott’s complaint asserts seven causes of action: (1) “aggravated battery on a police officer” based on the health care services provided on November 26, 2007; (2) professional negligence based on a delay in obtaining the stress test on November 26, 2007; (3) professional negligence based on a delay in receiving care for his injuries; (4) “fraud-intentional concealment” based on Dr. Mott’s misdiagnosis and advice; (5) intentional infliction of emotional distress; (6) negligent infliction of emotional distress; and (7) “fraud-intentional concealment of medical records.”

C. Order Sustaining Respondents’ Demurrers

In December 2010, respondents filed their respective demurrers to Poulcott’s complaint.

Poulcott filed a motion to strike the demurrers and recover sanctions, claiming respondents’ attorneys had acted in bad faith. Mad River Hospital’s attorney filed a declaration in opposition to the motion, which Poulcott contends is “very damning to [the attorney’s] credibility and to his moral and ethical character.”

A hearing on the demurrers and other matters was held on March 21, 2011; the court took the matters under submission.

On May 10, 2011, the court issued a written order sustaining the respondents' demurrers without leave to amend and dismissing Poulnott's complaint. The motion to strike the demurrers was denied.

D. Application for Reconsideration

On May 20, 2011, Poulnott filed an application for reconsideration of the court's order, along with an accompanying affidavit. Poulnott asserted the following as new or different facts or circumstances that came into his possession after the demurrer hearing: (1) an investigatory report by the California Department of Public Health (Licensing and Certification) found that Mad River Hospital failed to comply with Health and Safety Code section 123110 in connection with Poulnott's medical records¹; (2) another state investigatory report concluded that Mad River Hospital "failed to provide as much information about a proposed procedure as necessary to allow one patient to give informed consent or to refuse the procedure, resulting in skin trauma" (Cal. Code Regs, tit. 22, § 70707(b)); and (3) the latter investigatory report indicated that Mad River Hospital produced to the state investigator the "Quik-Prep system's operation manual" in March 2011, while Mad River Hospital stated in a discovery response in April 2011 that it no longer possessed the "Quinton Quik-Prep device manual for the device that was used in 2007." Poulnott also advised the court that Health and Safety Code section 123120 provided a cause of action for violation of Health and Safety Code section 123110.

On June 16, 2011, the court granted reconsideration but affirmed its previous ruling sustaining the demurrers without leave to amend.

¹ In regard to Poulnott's medical records, the department of public health found that the hospital had left a message with Poulnott on October 29, 2010 – two days after the records request – notifying him that he *could* pick up the copies of his medical records; the agency's concern appears to be that no arrangement was actually made with Poulnott to pick up the records, Poulnott claimed he never received the message and no further message was left, and the hospital did not assure that he was provided the documents within the statutory 15-day period.

E. Judgment and Appeal

Judgment was entered on June 20, 2011. This appeal followed.

II. DISCUSSION

Poulcott purports to raise five issues on appeal: “(1) Did Appellant provide enough evidence to the trial court to demonstrate ‘intentional concealment’?; (2) Did the trial court fail to acknowledge the new evidence presented in Appellant’s Application for Reconsideration which included two state investigatory reports regarding the ‘Denial of Medical Records’ and the violation of the ‘Informed Consent doctrine’ that tolls the statute of limitations under Code of Civil Procedure[] section 340.5?; (3) Can the seventh cause of action ‘stand alone?’; (4) Did the trial court commit several procedural errors, denying Appellant his right to due process?’ and (5) Did Appellant provide enough evidence to demonstrate misconduct and spoliation/destruction of evidence by Respondent’s and their attorneys?”

We have considered all of these issues and address those that are relevant and necessary to the disposition of the appeal. To that end, we first decide whether the court erred in sustaining the demurrers, then consider whether the court erred in denying leave to amend, and finally address the denial of Poulcott’s motion for reconsideration and other contentions.

A. Sustaining of Demurrer

In our de novo review of an order sustaining a demurrer, we assume the truth of all facts properly pleaded in the complaint or reasonably inferred from the pleading, but not mere contentions, deductions, or conclusions of law. (*Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 985-986.) We then determine if those facts are sufficient, as a matter of law, to state a cause of action under any legal theory. (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.)

In order to prevail on appeal, an appellant must affirmatively demonstrate error. Specifically, the appellant must show that the facts pleaded are sufficient to establish every element of a cause of action and overcome all legal grounds on which the trial court sustained the demurrer. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th

857, 879-880.) We will affirm the ruling if there is any ground on which the demurrer could have been properly sustained. (*Debro v. Los Angeles Raiders* (2001) 92 Cal.App.4th 940, 946 (*Debro*.)

1. *First Cause of Action: Aggravated Battery on Peace Officer*

Poulnott's first purported cause of action is for "aggravated battery on a police officer," citing Penal Code section 243, subdivision (c)(2), based on the application of the electrodes that occurred on November 26, 2007.

The trial court sustained the demurrers as to this cause of action on two grounds: there is no private cause of action for aggravated battery on a peace officer under Penal Code section 243, subdivision (c)(2); and even if pled as a civil cause of action for assault and battery, the claim would be barred by the two-year statute of limitations under Code of Civil Procedure section 335.1.

The court was correct. Code of Civil Procedure section 335.1 provides for a *two-year* limitations period for actions "for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another." Here, the alleged battery and resulting injuries occurred on November 26, 2007. The complaint was not filed until more than two years later, on November 3, 2010.

The cause of action for battery on a peace officer is time-barred.²

2. *Second Cause of Action: Professional Negligence*

Poulnott's second cause of action alleges professional negligence based on a purported delay in performing the stress test on November 26, 2007. Specifically, he alleges that he arrived for his 11:45 a.m. appointment at 11:20 a.m., Winsor applied the electrodes for his stress test, and then for approximately 93 minutes, while Dr. Gans could not be located, Poulnott "sat in pain with his shirt off in a cold examination room."

Claims for professional negligence against a health care provider are subject to the limitations period set forth in Code of Civil Procedure section 340.5. Under that statute,

² Poulnott argues that he could amend his first cause of action to state a claim under Civil Code section 1714.9. We address this argument *ante*, in our discussion of the court's denial of leave to amend.

“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.*” (Italics added.) A plaintiff “discovers” injury when he or she suspects or should suspect that the injury was caused by someone’s wrongdoing, whether or not the plaintiff is aware of the specific cause or other facts necessary to establish the claim. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110-1111; *Nogart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398; see *Knowles v. Superior Court* (2004) 118 Cal.App.4th 1290, 1299 [applying rule under Code Civ. Proc., § 340.5].)

Poulnott suspected or reasonably should have suspected the purported injury caused by the delay in performing the stress test on November 26, 2007, as he sat in pain with his shirt off in the cold examination room, and when he observed the wounds and bleeding where the electrodes had been placed after they were removed. At the very latest, he suspected or reasonably should have suspected the alleged injury on December 5, 2007, when Dr. Carroll informed him that he was suffering from friction burns. And clearly Poulnott suspected or reasonably should have suspected all the harm he alleges by no later than August 14, 2008, when he served his Notice of Intent to Sue pursuant to Code of Civil Procedure section 364.

The second cause of action is time-barred.

3. Third Cause of Action: Professional Negligence

The third cause of action seeks relief for professional negligence, based on the amount of time Poulnott had to wait between the date of his stress test and injuries (November 26, 2007) and the treatment Poulnott received at Mad River Hospital on December 3, 2007. By this delay, he alleges, respondents failed to meet the standard of care for health care providers and health care professionals.

As stated, a cause of action for professional negligence is subject to the limitations period set forth in Code of Civil Procedure section 340.5. As such, Poulnott’s cause of action is time-barred if he did not file his complaint within one year after he suspected or should have suspected his injury.

Poulnott suspected or reasonably should have suspected the harm caused by the November 26 to December 3 delay by December 3, 2007. He did not file his complaint within a year thereafter.

The third cause of action is time-barred.

4. *Fourth Cause of Action: Fraud – Dr. Mott’s Diagnosis*

The fourth cause of action is for “fraud-intentional concealment” under Civil Code section 1710(3), based on Dr. Mott’s diagnosis and treatment of his injuries. The allegations state neither a claim for fraud nor any other viable cause of action.

As mentioned, Poulnott alleges that on December 3, 2007, Dr. Mott told him he had contact dermatitis, prescribed “Triamcinolone 0.1% Cream,” and provided a “do not’ work” excuse for one week. Poulnott, “*believing that Mott’s diagnosis was false*, immediately scheduled an appointment with his primary care physician to get a ‘second’ opinion.” (Italics added.) On December 5, 2007, Dr. Carroll told Poulnott that his injuries were friction burns, not contact dermatitis. And after Dr. Mott told Poulnott on December 10, 2007, that he could return to work, Dr. Greenhalgh told Poulnott on January 8, 2008, that he had not heard of electrodes being applied with a motorized applicator gun, directed Poulnott to stop using the cream that Dr. Mott had prescribed, and advised Poulnott not to work for six weeks.

To state a fraud cause of action, a plaintiff must allege that he justifiably relied on the defendant’s statement and was harmed as a result. (E.g., *Agosta v. Astor* (2004) 120 Cal.App.4th 596, 603.) Here, Poulnott does not allege that he relied on Dr. Mott’s contact dermatitis diagnosis; to the contrary, he alleges that he thought Dr. Mott’s diagnosis was “false” and “immediately” followed up with Dr. Carroll. And while it appears that Poulnott allegedly used the cream and returned to work in reliance on Dr. Mott’s advisement, there is no *allegation* that his reliance was detrimental, in that the cream or the return to work *themselves* caused a new injury or exacerbated the existing one. Poulnott therefore fails to state a viable cause of action for fraud.

We next consider whether Poulnott’s allegations might state some other cause of action. As respondents’ argue – and as Poulnott suggests by his reference in his “fraud”

claim to Code of Civil Procedure section 340.5 – the allegations in Poulnott’s fourth cause of action may state a claim for failure to timely diagnose and treat Poulnott’s friction burns – in other words, a claim for professional negligence subject to the one-year limitations period of section 340.5.

As applied here, Poulnott knew of his injury and the shortcomings in Dr. Mott’s diagnosis and treatment by the time Dr. Carroll advised him that he had actually suffered friction burns and Dr. Greenhalgh told him not to go to work or use the cream. These advisements occurred on or before January 8, 2008, and by that date Poulnott suspected or reasonably should have suspected any injury resulting from Dr. Mott’s acts or omissions. Because Poulnott did not file his complaint within one year thereafter – or even within a year after his Notice of Intent to Sue – he is precluded from pursuing a claim for professional negligence.

Perhaps sensitive to this predicament, Poulnott alleged in his complaint that “the statute of limitations outlined in California Code of Civil Procedure § 340.5 are tolled” based on his allegations that Dr. Mott intentionally concealed the true nature of his injuries. He makes the same contention on appeal. Poulnott is incorrect, however. Although the *three*-year limitations period of Code of Civil Procedure section 340.5 (measured from the date of injury) may be tolled upon proof of fraud or intentional concealment, “[t]he ‘one-year period is not similarly extended,’” since it commences at the time the injury is discovered or reasonably should have been discovered. (*Warren v. Schechter* (1997) 57 Cal.App.4th 1189, 1201 (*Warren*); see *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 896-897 [one-year period commences once plaintiff has “ ‘ ‘ notice or information of circumstances to put a reasonable person *on inquiry*, or *has the opportunity to obtain knowledge* from sources open to [the plaintiff’s] investigation” ’ ’] (*Gutierrez*)).) Regardless of Mott’s alleged intentions or concealment of Poulnott’s condition, Poulnott discovered his injuries more than a year before he filed his lawsuit. Any claim for personal injury based on professional negligence is time-barred.

The demurrers to the fourth cause of action were properly sustained.

5. *Fifth Cause of Action: Intentional Infliction of Emotional Distress*

Poulcott's fifth cause of action is for intentional infliction of emotional distress, based on the allegations that he "attempted to seek help, counsel and treatment from Defendants after Defendants inflicted catastrophic harm to his person on November 26, 2007," and "Defendants' intentional and continual acts resulted in Defendants inflicting severe distress upon Plaintiff by not offering help at the time Plaintiff needed help the most." According to the allegations of the complaint, the last time Poulcott was treated by respondents was on December 10, 2007.

The limitations period for an intentional infliction of emotional distress claim is two years. (Code Civ. Proc., § 335.1; *Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1450.) In this case, the infliction of emotional distress purportedly occurred by December 10, 2007. The complaint was not filed until over two years later. Accordingly, the fifth cause of action is time-barred.

6. *Sixth Cause of Action: Negligent Infliction of Emotional Distress*

The sixth cause of action is for negligent infliction of emotional distress, based again on the allegations that he "attempted to seek help, counsel and treatment from Defendants after Defendants inflicted catastrophic harm to his person," and instead of helping him, "Defendants inflicted further distress upon Plaintiff by not offering help to Plaintiff at the time when he needed it the most and intentionally concealing the true nature of his injuries." Poulcott also alleges that he suffered emotional distress when defendants physically assaulted him. The last day Poulcott saw any of the respondents in regard to his injuries was December 10, 2007.

The limitations period for a negligent infliction of emotional distress claim is ordinarily two years. (Code Civ. Proc., § 335.1.) Because the claim is based on a health care provider's negligence, it is arguably subject to the one-year limitations period of Code of Civil Procedure section 340.5. In either event, Poulcott's claim is time-barred: he filed his complaint more than two years after respondents could have inflicted emotional distress in their treatment of him.

The court did not err in sustaining the demurrers as to the sixth cause of action.

7. *Seventh Cause of Action*

The seventh cause of action is purportedly for “fraud-intentional concealment of medical records.” It alleges that in October 2010, Mad River Hospital failed to allow Poulnott access to his medical records as required by Health and Safety Code section 123110. Specifically, after completing a written authorization for the release of his medical information, Poulnott was handed a file that was “GUTTED OUT,” containing only five documents. He completed another authorization for the release of his medical records from the occupational health department, was initially told he could not obtain copies because he had not paid for the physical examination, and was later told that he would have to obtain copies from his employer because his records constituted an “employment chart” under federal regulations. Then the California Department of Public Health told him the “information that Defendants[] provided Plaintiff regarding his medical records was false.” As a result, Poulnott alleges, he has not been able to review his medical records.

Because Poulnott’s seventh cause of action is entitled “fraud-intentional concealment of medical records,” we first consider whether his allegations state a cause of action for fraud. They do not. Although Poulnott alleges a purportedly false statement (i.e. that the records constitute an “employment chart” under federal regulations, which respondents urge was merely a statement of opinion), Poulnott does not allege that he *relied* on the statement (to the contrary, he alleges that he turned to the Department of Public Health) or that he suffered injury *as a result of any reliance*. In other words, the harm he allegedly suffered – not being able to see his medical records – stemmed from the denial of access, not any reliance on the purportedly false statement. Poulnott fails to allege a cause of action for fraud.³

³ Poulnott relies on the definition of fraud in Civil Code section 3294, subdivision (c). That definition is for the purpose of applying the punitive damages statute, not for the purpose of setting forth the elements required to allege a fraud cause of action.

Poulnott argues that an inference of fraud may arise because his “personal copy” of medical records was missing documents, Mad River Hospital kept his records not in the file room but in a safe, the fact his file contained only five documents shows that the hospital tampered with his file, a hospital employee said his medical records were employment records, the hospital ignored his letters, a hospital employee told him he was not allowed access pursuant to federal regulations, after the demurrer hearing a state agency substantiated Poulnott’s complaint that the hospital violated Health and Safety Code section 123110, and the hospital continued to withhold access to his original documents. However, none of these purported facts, nor his arguments, address the failure to allege detrimental reliance.

We turn, therefore, to the possibility that some other cause of action might be based on the hospital’s refusal to provide access to, or copies of, his medical records. We need not look far. Health and Safety Code section 123120 authorizes an action by a patient to enforce the obligations imposed on health care providers under Health and Safety Code section 123110. Under certain conditions, Health and Safety Code section 123110 requires health care providers to allow patients to review their medical records and to provide copies of those records to patients who request them in writing.⁴

Health and Safety Code section 123110, subdivision (a), provides in part: “Notwithstanding Section 5328 of the Welfare and Institutions Code, and except as provided in Sections 123115 and 123120, any adult patient of a health care provider . . . shall be entitled to *inspect* patient records upon presenting to the health care provider a *written request* for those records and upon *payment* of reasonable clerical costs incurred in locating and making the records available. . . . A health care provider shall permit this inspection during business hours within five working days after receipt of the written request.” (Italics added.) Section 123110, subdivision (b), provides: “Additionally, any

⁴ In the trial court, Mad River Hospital insisted there was no cause of action for violation of Health and Safety Code section 123110. The trial court apparently accepted this representation, despite Poulnott’s arguments to the contrary at the demurrer hearing. Mad River Hospital now acknowledges that Health and Safety Code section 123120 provides a cause of action for violation of Health and Safety Code section 123110.

patient or patient's representative shall be entitled to *copies* of all or any portion of the patient records that he or she has a right to inspect, upon presenting a *written request* to the health care provider specifying the records to be copied, together with *a fee* to defray the cost of copying The health care provider shall ensure that the copies are transmitted within 15 days after receiving the written request.” (Italics added.)

Poulcott alleged in his complaint that he signed authorizations for the release of his medical information; these written authorizations may reasonably be construed to constitute written requests for his medical records for purposes of Health and Safety Code section 123110, at least for purposes of a demurrer. Although Poulcott does not allege that he tendered payment of the “reasonable clerical costs incurred in locating and making the records available” (Health & Saf. Code, § 123110, subd. (a)) or “a fee to defray the cost of copying” (Health & Saf. Code, § 123110, subd. (b)), there is no indication that the hospital's purported refusal to provide access and copies was based on a failure to pay or that the hospital even requested such payment. Liberally construing the allegations and assuming them to be true for purposes of a demurrer, the complaint alleges a breach of Health and Safety Code section 123110.

The remedy authorized by Health and Safety Code section 123120 is enforcement – that is, an order or judgment requiring the hospital to grant access to the requested medical records and make copies of them in accordance with Health and Safety Code section 123110. Mad River Hospital argues that Poulcott's patient records have already been produced to him in discovery, and he was allowed to inspect the original documents on or about March 14, 2011, at Mad River Hospital. This is irrelevant to whether he stated a cause of action in his complaint filed back on November 3, 2010. Nor does it render the matter moot, since Poulcott does not agree that all the documents have been provided, and whether they have been provided is a factual matter for the trial court to determine. In addition, Health and Safety Code section 123120 authorizes not just an

order of enforcement, but also, in the court's discretion, an award of reasonable attorney fees (which, appearing pro per, Poulcott may not be able to recover) and costs of suit.⁵

In the final analysis, Poulcott alleged a cause of action under Health and Safety Code section 123120 against Mad River Hospital. Accordingly, the court erred in sustaining Mad River Hospital's demurrer to the seventh cause of action. The court did not err, however, in sustaining the demurrers as to all other respondents, who did not perform the acts underlying the violation of Health and Safety Code section 123110.

B. Denial of Leave to Amend

To the extent the trial court properly sustained respondents' demurrers, we must also consider whether the court erred in denying leave to amend. We review a denial of leave to amend for an abuse of discretion. (*Debro, supra*, 92 Cal.App.4th at p. 946.) To prevail on appeal, an appellant must usually demonstrate a reasonable possibility that the defects in the complaint can be cured by amendment. (E.g., *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

Poulcott asserts that he should be permitted to amend his complaint because, at the demurrer hearing, he offered to amend the complaint and respondents did not object. At that hearing, Poulcott offered to amend his first cause of action for battery on a police officer to be based on Civil Code section 1714.9. As discussed next, this and other arguments for leave to amend are meritless.

1. Amendment to Seek Relief Under Civil Code Section 1714.9

Under Civil Code section 1714.9, a defendant may be liable for willful or negligent conduct causing injury to a peace officer employed by a public entity, under limited situations set forth in the statute.

However, the limitations period for a cause of action under Civil Code section 1714.9 would be two years pursuant to Code of Civil Procedure section 335.1, as a claim for "injury to . . . an individual caused by the wrongful act or neglect of another." Therefore, the time for filing a cause of action based on Civil Code section 1714.9

⁵ We note the statute makes no provision for monetary damages.

expired in November 2009, long before Poulcott's complaint was filed, and even longer before he sought leave to amend. The court did not abuse its discretion in denying leave to amend on this basis.

2. *Amendment for Failure to Obtain Informed Consent*

Poulcott next contends he should be allowed to amend his complaint to allege a cause of action for negligent failure to obtain informed consent. We disagree.

A physician has a duty to inform a patient in lay terms of the dangers inherently and potentially involved in a proposed treatment. (*McKinney v. Nash* (1981) 120 Cal.App.3d 428, 440.) A failure to obtain the patient's informed consent may subject a health care provider to liability for negligence if an undisclosed complication occurs and the patient proves that a prudent person in his or her position would not have consented to the procedure if adequately informed of the risks. (*Warren, supra*, 57 Cal.App.4th at pp. 1202, 1205-1207.) Poulcott argues that respondents failed to provide him with any information regarding the possible risks of being burned or skin trauma associated with the procedure. Thus, he urges, he experienced an undisclosed inherent complication as a result of the cardiopulmonary stress test.

Poulcott's proposed claim for failure to obtain informed consent, however, would be time-barred. The limitations period for such a claim is governed by Code of Civil Procedure section 340.5. (*Warren, supra*, 57 Cal.App.4th at pp. 1200-1201; *Gutierrez, supra*, 39 Cal.3d at p. 895.) Therefore, a cause of action for failure to obtain informed consent must be commenced within 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." (Code Civ. Proc., § 340.5.)

Poulcott's injury immediately manifested in burns and bleeding at the electrode sites on November 26, 2007. The time by which he had to file a cause of action for failure to obtain informed consent therefore expired one year later in November 2008. Because any claim based on failure to obtain informed consent would be time-barred, the court did not err in denying leave to amend the complaint in this regard.

Poulcott argues that his claim for informed consent is subject to the three-year statute of limitations under Code of Civil Procedure section 338, rather than the one-year period of Code of Civil Procedure section 340.5, based on the decision in *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623 (*Nelson*). *Nelson*, however, is inapposite.

In *Nelson*, physician Gaunt convinced Nelson to undergo injections of what he called an “inert substance” for breast augmentation, based on his representations that the procedure was simple and had “absolutely no side effects.” (*Nelson, supra*, 125 Cal.App.3d at p. 629.) Gaunt did not disclose that the substance to be injected was silicone, even though he knew that the state health department considered silicone unsafe for injection into human tissue and he knew his use of it without government approval was illegal, since he had previously been arrested for the offense. (*Id.* at pp. 629-630.) As a result of the procedure, Nelson suffered side effects and other harm. (*Id.* at pp. 630-631.) She sued Gaunt, went to trial on claims including fraud, and prevailed. (*Id.* at p. 628.)

On appeal, Gaunt argued that Nelson’s causes of action were barred by the one-year statute of limitations for malpractice claims, because they were really claims for injuries as a result of medical treatment. (*Nelson, supra*, 125 Cal.App.3d at pp. 628, 632.) The court disagreed, concluding that the proper limitations period for Nelson’s fraud claim was, indeed, the limitations period for fraud claims. While injuries resulting from a procedure that was performed without sufficient information for knowledgeable consent are subject to claims for negligence or battery, a fraud claim may be stated in “the more egregious situation” of affirmative misrepresentations, and Nelson had presented evidence satisfying every element of fraud. (*Id.* at pp. 634-635.) In a narrow holding, the court concluded: “We hold that where, as here, a physician knowingly and intentionally represents that he can administer safely a substance that, in fact, can be administered only under restrictions and controls of state or federal authority, and he administers that substance without the requisite permit and without informing the patient of the restrictions and dangers, the patient can maintain an action for fraud as well as malpractice.” (*Id.* at p. 636.)

Nelson is obviously distinguishable from the matter before us. Here, it is alleged that respondents merely failed to give Poulnott information regarding possible risks of burns or skin trauma; it is not alleged that a physician knowingly and intentionally misrepresented that he could administer a substance that could actually be administered only under government authority. Nor is it alleged that respondents lacked a requisite governmental permit to attach the electrodes with the applicator gun. Moreover, while the plaintiff in *Nelson* had evidence to establish the elements of fraud, Poulnott's complaint fails to allege those elements. Simply put, Poulnott has no fraud claim, so he cannot invoke the limitations period for a fraud claim.

The court did not abuse its discretion in denying leave to allege a cause of action for failure to obtain informed consent.

3. *No Other Basis for Leave to Amend*

Lastly, Poulnott does not establish any other basis for leave to amend his allegations. The untimeliness of the first six purported causes of action cannot be cured by amendment. The claims purportedly for fraud cannot be amended to state fraud causes of action, because other allegations in his verified complaint preclude an inference of justifiable and detrimental reliance. Without sufficient explanation, Poulnott's existing allegations prevent him from amending the complaint to allege such reliance. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742-743.)

In sum, Poulnott has not demonstrated any reasonable possibility that the defects of his pleading can be cured by amendment, and the court did not abuse its discretion in denying him leave to amend his complaint.

C. *Denial of Reconsideration*

Poulnott's application for reconsideration contended that he had a private cause of action under Health and Safety Code section 123120. As stated *ante*, we agree and have afforded him the relief to which he is entitled on appeal. Poulnott's application also argued that the hospital's failure to provide informed consent and its intentional concealment tolled the limitations periods. For reasons stated *ante*, however, the applicable limitations periods were not tolled.

D. Poulcott's Other Arguments

In reaching our conclusions in this matter, we have carefully considered the appellate record and all of Poulcott's arguments, *whether or not they are all expressly addressed in this opinion*. We give a brief explanation for our rejection of the following.

1. Clerk's Failure to Enter Defaults

Poulcott contends the superior court clerk erred in refusing to enter the defaults of respondents before they filed their demurrers. The record indicates that on December 6, 2010, Poulcott presented to the court clerk four applications for entry of default, but no defaults were entered.⁶ If the defaults had been entered, Poulcott urges, respondents could not have filed their demurrers.

Poulcott's argument is unavailing. According to the proofs of service, respondents were served with the summons and complaint at California addresses "by mail and acknowledgement of receipt of service" on November 3, 2010. (See Code Civ. Proc., § 415.30.) Under Code of Civil Procedure section 415.30, a copy of the summons and of the complaint must be mailed to by first-class mail (or "airmail"), together with two copies of a notice and acknowledgement form and a postage prepaid return envelope. (§ 415.30, subd. (a).) Service is not *perfected*, however, until the defendant signs the acknowledgement. Subdivision (c) of the statute provides: "Service of a summons pursuant to this section is deemed complete on the date a written acknowledgement of receipt of summons is executed, if such acknowledgement thereafter is returned to the sender."

⁶ Poulcott represents in his opening brief that, because he sought a prove-up hearing before entry of a default judgment, the court clerk would not accept his requests for default without an accompanying notice of hearing, and provided Poulcott with a hearing date; Poulcott went to the local law library and typed the requested paperwork which was then accepted at the clerk's window, but the defaults were ultimately not entered on the ground that the defendants had answered the complaint. The requests for default included in the augmented record on appeal indicate that the defaults against Dr. Mott and Dr. Gans were not entered because the "prayer of complaint asks no dollar amount" and the defaults against Winsor and Mad River Hospital were not entered because there was an "answer filed."

In the matter before us, the proofs of service do not indicate that the notice of acknowledgement and return envelopes were included in the service. Nor is there any indication in the record that respondents signed and returned an acknowledgement of a return of service. It is therefore apparent from the record that service was *not* completed, and the time within which to respond to the complaint never commenced. Thus, when Poulcott presented the court clerk with the applications for entry of default on December 6, 2010, there was no basis for entering the defaults as a matter of law. Regardless of the reason the clerk chose not to enter them, Poulcott was not deprived of anything to which he was entitled.

In a similar vein, Poulcott complains that respondents did not seek an extension of the time to file their demurrers, and he insists they “waived [objections to] service” by failing to file a motion to quash the service of summons. He is incorrect. Without the execution and return of the acknowledgement of service, service was not completed, and the time to respond to the complaint did not commence, so the filings of the demurrers were not untimely and there was no reason to seek an extension of time or request that the summons be quashed.

2. *Discovery Disputes*

Poulcott presents arguments about a subpoena duces tecum, an inspection demand, and request for admissions he served on Mad River Hospital, and Mad River Hospital’s responses. Among other things, Poulcott argues that Mad River Hospital failed to produce responsive documents to his satisfaction. He also argues that Mad River Hospital’s response to his requests for admission indicates the hospital’s spoliation or destruction of evidence. Specifically, while Mad River Hospital’s response to Poulcott’s request for admissions on April 9, 2011, advised that the hospital no longer used the Quinton Quik-Prep device, no longer possessed it, and no longer had the policy and procedure manual or instruction guide, a report of the California Department of Public Health indicates that Mad River Hospital *produced* the operation manual for examination at an inspection on March 7, 2011; in Poulcott’s view, this suggests either that the

April 2011 discovery response was untrue or that Mad River Hospital had destroyed the evidence in the interim.

According to the registry of actions and the record in this appeal, the trial court has not ruled on any discovery matters. Accordingly, such matters are neither the subject of this appeal nor ripe for appellate review. Furthermore, the spoliation and discovery contentions are irrelevant to whether the *allegations in the complaint* are sufficient to state a cause of action. Poulnott's causes of action became time-barred *before* the purported spoliation of evidence, precluding an inference that any spoliation prejudiced Poulnott's ability to prosecute the causes of action he has attempted to allege. Nor has Poulnott stated a cognizable cause of action for spoliation of evidence. (*Coprish v. Superior Court* (2000) 80 Cal.App.4th 1081, 1086, 1090-1091.)

3. *Other Acts and Omissions By the Superior Court Clerk*

Poulnott complains of several acts or omissions of the superior court clerk's office besides the clerk's refusal to enter his requests for default, such as failures to include the requests for default in the clerk's transcript for this appeal, to notify him of changes in hearing dates, and to reschedule the default judgment hearings. In light of the disposition in this appeal, Poulnott does not establish that any of these matters were prejudicial or entitle him to relief.

E. *Conclusion*

In sum, Poulnott's complaint fails to state any cause of action against Mad River Hospital, except as to the purported violation of Health and Safety Code section 123110. The complaint fails to state any cause of action against Winsor, Dr. Mott, or Dr. Gans. The trial court did not abuse its discretion in denying leave to amend.

Accordingly, the judgment dismissing Mad River Hospital will be reversed, and the order sustaining Mad River Hospital's demurrer will be reversed in light of the cause

of action under Health and Safety Code section 123120. The judgment dismissing Winsor, Dr. Mott, and Dr. Gans will be affirmed.⁷

III. DISPOSITION

The judgment is reversed to the extent it dismisses Mad River Community Hospital, and the order sustaining Mad River Community Hospital's demurrer is reversed because the complaint states a claim under Health and Safety Code section 123120. The judgment dismissing Winsor, Dr. Mott, and Dr. Gans is affirmed. Each party is to bear its own costs on appeal.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.

⁷ On March 26, 2012, Poulcott filed a declaration attaching another investigation report from the California Department of Public Health in regard to Poulcott's medical records at Mad River Hospital, as a matter that arose after briefing had been completed. The declaration does not affect our disposition of the appeal.