

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ESETA HEIMULI et al.,

Plaintiffs and Appellants,

v.

JAMES LILJA et al.,

Defendants and Respondents.

A132595

(Alameda County
Super. Ct. No. HG10503883)

INTRODUCTION

Plaintiffs and appellants Eseta Heimuli and her spouse Mike Heimuli appeal a judgment in favor of defendant and respondent physicians James Lilja and Helen Matthews, after the court sustained defendants' demurrer to plaintiffs' third amended complaint for medical malpractice and loss of consortium based on the statute of limitations (Code Civ. Proc., § 340.5).¹ Plaintiffs contend that the court erred in sustaining the demurrer without leave to amend where they alleged they did not suspect that someone had done something wrong until they consulted with their attorney after the surgery on which the malpractice claim was based. We shall affirm.

FACTUAL and PROCEDURAL BACKGROUND

Complaint.

On March 12, 2010, plaintiffs filed a complaint for medical malpractice and loss of consortium against defendants, alleging that on August 9, 2008, defendants negligently

¹ All statutory references are to the Code of Civil Procedure, unless otherwise indicated.

caused them damage by committing medical malpractice in performing a hysterectomy upon Eseta.² The complaint alleged in relevant part that defendants negligently severed her urethra.³ The complaint was filed 19 months after the alleged negligence had been committed. Defendant Lilja filed a demurrer to the complaint based on the statute of limitations, arguing that the one-year statute of limitations (§ 340.5) barred the complaint on its face. Defendant Matthews answered the original complaint, asserting the statute of limitations as an affirmative defense. The original complaint contained no allegations of late discovery by plaintiffs nor allegations of compliance with section 364, the 90-day notice requirement of intent to file suit. Plaintiffs requested leave to amend. The court sustained Lilja's demurrer with leave to amend "to allege facts demonstrating that Plaintiffs' claims are not time-barred by Code of Civil Procedure section 340.5."

First Amended Complaint.

Plaintiffs filed a first amended complaint on August 24, 2010. Therein, they alleged they first consulted an attorney to determine whether they had a valid claim for malpractice against defendants on December 17, 2008. They alleged they "first learned that they had a valid claim against defendants for malpractice" on that date, when they were advised they probably did have a valid claim against defendants. Plaintiffs also alleged that on December 14, 2009, they caused defendants to be served by certified mail, with 90-day notices of plaintiffs' intention to file a lawsuit against defendants, in compliance with section 364. (If the cause of action accrued on December 17, 2008, and plaintiffs served their 90-day notice on December 14, 2009, their action would be timely under the one-year statute of limitations, because their action was filed on March 12, 2010, two days before the statute would have expired on March 14, 2010.)⁴

² For purposes of clarity, the parties and the trial court refer to plaintiff Eseta Heimuli by her given name. We do the same here, intending no disrespect.

³ It was not the urethra, but a ureter that was allegedly severed during surgery and this was corrected in plaintiffs' second and third amended complaints.

⁴ "The one-year statute of limitations period for a medical malpractice action is set forth separately in section 340.5 of the Code of Civil Procedure. The limitations period prescribed by section 340.5 may be extended by 90 days under Code of Civil Procedure

Lilja demurred to the first amended complaint on statute of limitations ground and the trial court sustained the demurrer with leave to amend on November 12, 2010, in an order stating, in part: “Plaintiffs are given one final opportunity to clearly allege facts, if possible, demonstrating that their claim is not time[-]barred by Code of Civil Procedure section 340.5. Specifically, Plaintiffs must allege facts demonstrating how and when they became suspicious of Defendant’s alleged negligence. [Citation.] Plaintiffs’ argument that the statute of limitations began to run on December 17, 2008, when they first consulted an attorney to determine whether they had a valid claim for malpractice, is not well taken. Plaintiffs, it would appear, must have been suspicious of Defendant’s alleged malpractice prior to December 17, 2008, otherwise they would not have consulted an attorney on that date to investigate that claim. It is Plaintiffs’ suspicion of negligence, rather than confirmation of that suspicion, that triggers the limitations period. (*Knowles v. Superior Court* (2004) 118 Cal.App.4th 1290,) 1300.)” The court directed plaintiffs to specifically “allege how and when they became suspicious of Defendant’s alleged negligence, leading them to consult an attorney about the claim.”

Second Amended Complaint.

Plaintiffs filed a second amended complaint, in which they alleged in relevant part: “[D]uring the surgery of August 9, 2008, Eseta’s left uret[er] was severed due to the negligence of Drs. Lilja and Matthews. [¶] Several days following the surgery, Eseta started experiencing urine discharge through her vagina. She contacted Dr. Matthews and went to see her on August 18, 2008. Dr. Matthews found that Eseta had copious amounts of urine leaking from her vagina due to a vesico-vaginal fistula and requiring diapers to catch the urine flow. Due to lack of insurance and the financial wherewithal

section 364, which provides in pertinent part: ‘(a) No action based upon the health care provider’s professional negligence may be commenced unless the defendant has been given at least 90 days’ prior notice of the intention to commence the action. [¶] . . . [¶] (d) If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days from the service of the notice.’ ” (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 809, fn. 4 (*Fox*).

plaintiff could not be readmitted to St. Rose Hospital. Dr. Matthews sent plaintiff to Highland General Hospital emergency with a letter explaining the circumstances and history. ¶ . . . ¶ In addition Dr. Matthews told plaintiffs that Eseta's condition would take a long time to heal. Dr. Matthews did not state the leng[th] of time for healing. Nor did Dr. Matthews discuss the August 9, 2008 surgery with plaintiffs. ¶ After being seen at Highland Hospital and UCSF Medical Center plaintiffs learned that Eseta would need . . . surgeries to repair a cut and severed uret[er]. Shortly before December 17, 2008 they decided to contact a lawyer for a determination as to whether something wrong was done during the August 9, 2008 surgery. They had no belief as to whether or not defendants had been negligent and whether negligence had caused Eseta's injury."

Lilja and Matthews each filed separate demurrers based on the statute of limitations. The court once again sustained the demurrers, but again gave plaintiffs leave to amend, stating in pertinent part: "If Plaintiffs seek to rely on the delayed discovery rule, they must specifically plead facts showing the time and manner of discovery of their claim, and their inability to have made earlier discovery despite reasonable diligence. (See *Fox*[, *supra*,] 35 Cal.4th 797, 808.) . . . Plaintiffs have failed to allege specific facts demonstrating how and when they became suspicious of Defendants' alleged negligence, or that they did not (and could not reasonably have) become suspicious of that negligence until sometime on or after December 14, 2008, within one year of serving the [section] 364 notices."

Third Amended Complaint.

Plaintiffs filed a third amended complaint on March 8, 2011. It contained allegations that during her August 18, 2008 meeting with Matthews, Matthews did not tell Eseta that anything was done wrong by the surgical team during the August 9 surgery and did not tell her why urine was flowing from her vagina. This complaint also alleged that Matthews had referred plaintiffs to Highland Hospital emergency department with her hand-written note containing the history of Eseta's problem. With respect to when plaintiffs began to suspect wrongdoing, the third amended complaint alleged: "After undergoing extensive medical procedures and with other procedures expected in the

future, plaintiffs decided to see an attorney for a legal opinion. Plaintiffs first saw an attorney on December 17, 2008. Up until they spoke with an attorney and got an opinion from him on December 17th[,] plaintiffs had no belief or suspicion as to whether Eseta's problems relating to her severed uret[er] were caused by the negligence of defendants. In fact, because Dr. Matthews had told Eseta that the surgery of August 9, 2008 had gone well, and because when plaintiffs met with Dr. Matthews on August 18, 2008, she, Dr. Matthews failed to inform them of any connection between her passing urine through her vagina and any surgical error committed at surgery, and that it was something that would take a long time to heal, plaintiffs, when they left their meeting with Dr. Matthews on August 18, 2008, until they met with their attorney on December 17, 2008, believed that what happened to Eseta in the surgery of August 9, 2008[,] was probably just something that could happen in the surgery performed by defendants." The complaint also alleged that Eseta "has had extensive medical treat[ment], including surgeries, to correct the condition caused by defendants."

Trial court's ruling.

Defendants again demurred to the complaint on the basis of the statute of limitations and the court granted the demurrers *without* leave to amend. In sustaining the demurrer without leave to amend, the trial court explained:

"The facts, as alleged in the Third Amended Complaint, indicate that Plaintiffs suspected, or reasonably should have suspected that the surgery performed on August 18, 2008, was performed negligently because Eseta's left uret[er] was severed and after multiple procedures would be required to correct the problems that had been created. (See Third Amended Complaint at page 5.) Plaintiffs have changed their allegations to state that '[u]p until they spoke with an attorney and got an opinion from him on December 17th [2008,] plaintiffs had no belief or suspicion . . . as to whether Eseta's problems relating to her severed uret[er] were caused by the negligence of defendants.' (Third Amended Complaint at page 5, paragraph 2.) However, the remaining allegations in the Third Amended Complaint, along with those previously pleaded in the Second Amended Complaint, plainly indicate that Plaintiffs were on notice that something was

wrong at some time prior to their meeting with an attorney for a legal opinion. (See Second Amended Complaint at page 5 [after being seen at Highland and UCSF, Plaintiffs learned that Eseta would need surgery to repair the severed uret[er] and then went to see attorney ‘shortly before December 17, 2008’]; Third Amended Complaint at page 5; [‘[a]fter undergoing extensive medical procedure and other procedures expected in the future, plaintiffs decided to see an attorney for a legal opinion’].) [¶] Plaintiffs seeking to rely on the delayed discovery rule must specifically plead facts showing the time and manner of discovery of their claim, and their inability to have made earlier discovery despite reasonable diligence. (See *Fox*, *supra*,] 35 Cal.4th 797, 808.) Plaintiffs here have failed to allege specific facts demonstrating how and when they became suspicious of Defendants’ alleged negligence, or that they did not (and could not reasonably have) become suspicious of that negligence until sometime on or after December 14, 2008, within one year of serving the [section] 364 notices. Despite being given multiple opportunities to plead facts that would place that date within a year of December 14, 2009, Plaintiffs have failed to do so. As a result, their claims, as pleaded, are time-barred.” The order granting the demurrers and dismissing the action as to Matthews was entered on May 13, 2011. An order dismissing Lilja was entered July 26, 2011. Plaintiffs filed a timely appeal.

DISCUSSION

1. *Standard of review: demurrer.*

“ ‘On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, . . . [t]he reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded.’ [Citations.] ‘[I]t is error for a . . . court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory.’ [Citations.] ‘[I]t is [also] an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility [that the] defect . . . can be cured by amendment.’ [Citations.]” (*Fox*, *supra*, 35 Cal.4th at p. 810.) We will not, however, assume the truth of contentions, deductions or conclusions of fact or law. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1,

[6]; see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, (The Rutter Group 2012) ¶ 8:136.1, p. 8-93.) Furthermore, “[w]here the demurrer is to an amended complaint, the reviewing court may properly consider factual allegations in the prior complaints.” (Eisenberg et al., at ¶ 8:136.1b, p. 8-94; *People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957.) Plaintiffs have the burden of demonstrating the court abused its discretion in refusing to grant leave to amend by showing how the complaint can be amended to state a cause of action. (Eisenberg et al., at ¶ 8:136.3, p. 8-94.)

2. General principles: plaintiff must file suit within one year of discovering the injury and its negligent cause.

In *Artal v. Allen* (2003) 111 Cal.App.4th 273 (*Artal*), the court summarized the principles relating to the statute of limitations for medical malpractice and the assertion of delayed discovery:

“Section 340.5 provides ‘[i]n an action for injury . . . against a health care provider based upon such person’s alleged professional negligence, the time for the commencement of 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.’ Thus, section 340.5 contains two periods of limitation, a three-year period and a one-year period, both of which must be met. [Citation.][⁵]

“Under section 340.5, the three-year period is tolled ‘“(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.” The statute makes clear, however, that the one-year period is not similarly extended. Thus, *regardless of extenuating circumstances, the patient must bring . . . suit within one year after he discovers, or should have discovered, [the] “injury.”* (*Sanchez v. South Hoover*

⁵ “There is no issue here as to [plaintiffs’] compliance with the three-year provision of section 340.5. [Plaintiffs] filed suit less than three years after the [August 9, 2008 surgery].” (*Artal, supra*, 111 Cal.App.4th at p. 278, fn 4.)

Hospital [(1976)] 18 Cal.3d [93,] 100-101 [(*Sanchez*)]’ (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 896[, italics added by this court].)

“In *Sanchez*, the Supreme Court ‘indicated that by common law tradition, the term “injury,” as used in section 340.5, means both “a person’s physical condition *and* its ‘negligent cause.’ ” ([*Sanchez, supra*,] 18 Cal.3d at p. 99, citing *Stafford v. Shultz* (1954) 42 Cal.2d 767, 776-777; [citations],) Thus, once a patient knows, or by reasonable diligence should have known, that he has been harmed through professional negligence, he has one year to bring his suit.’ (*Gutierrez v. Mofid, supra*, 39 Cal.3d at p. 896.)

“The patient is ‘charged with “presumptive” knowledge of his negligent injury, and the statute commences to run, once he has “ ‘notice or information of circumstances to put a reasonable person *on inquiry*, or *has the opportunity to obtain knowledge* from sources open to his investigation. . . .’ ” ([*Sanchez, supra*, 18 Cal.3d] at p. 101. . . .) Thus, when the patient’s “reasonably founded suspicions [have been aroused],” and she has actually “become alerted to the necessity for investigation and pursuit of her remedies,” the one-year period for suit begins. (18 Cal.3d at p. 102.)’ (*Gutierrez v. Mofid, supra*, 39 Cal.3d at pp. 896-897.)” (*Artal, supra*, 111 Cal.App.4th at pp. 278-279.)

The California Supreme Court recognized these principles in *Fox, supra*, 35 Cal.4th at pages 806-809. There, the court held the accrual of a products liability cause of action was delayed unless the patient had reason to suspect that her injury resulted from a defective product and that the plaintiff patient was entitled to amend her complaint to allege facts explaining why she did not discover an earlier factual basis for a products liability claim—an entirely different type of tort action. (*Id.* at pp. 803-805, 814-815.) *Fox* concluded that “under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action

will be tolled until such time as a reasonable investigation would have revealed its factual basis.” (*Id.* at p. 803.)⁶

The Supreme Court also reiterated that plaintiffs seeking to rely on the delayed 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.’ [Citation.] 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.’ (*McKelvey v. Boeing North America, Inc.* (1999) 74 Cal.App.4th 151, 160 [superseded by statute on another point, as stated in *Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 637, fn. 8].)” (*Fox, supra*, 35 Cal.4th at p. 808.)

As the trial court recognized here, plaintiffs failed to meet this burden, despite four opportunities to do so.

Plaintiffs rely on their pleading in the third amended complaint that, “Up until they spoke with an attorney and got an opinion from him on December 17th plaintiffs had no belief or suspicion as to whether Eseta’s problems relating to her severed uret[er] were caused by the negligence of defendants.” However, an attorney’s advice to a client that he or she may (or may *not*) have a legal remedy for suspected malpractice does not affect the statute of limitations period where the plaintiff has learned or should have learned the

⁶ In *Fox, supra*, 35 Cal.4th 797, “the plaintiff underwent gastric bypass surgery. She later sued the surgeon and the hospital for medical malpractice. During discovery, she learned that her alleged injury might have been caused by a defective stapler manufactured by a nonparty. The plaintiff then amended her complaint to add as a defendant the stapler manufacturer, which asserted the statute of limitations as a defense. (*Id.* at pp. 803-805.) [The Supreme Court] concluded in *Fox* that knowledge of the facts supporting a medical malpractice cause of action against one defendant does not necessarily commence the running of the statute of limitations with respect to a separate products liability cause of action against a *different* defendant. (*Id.* at pp. 813-815.)” (*Poosh v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 800.)

facts essential to his or her malpractice claim. (See *Gutierrez v. Mofid, supra*, 39 Cal.3d at p. 902.)

In *Gutierrez v. Mofid, supra*, 39 Cal.3d 892, the plaintiff sued the defendant for malpractice arising out of the defendant's performance of a hysterectomy, rather than the simple operation for removal of a tumor or appendix that plaintiff had understood and agreed was to be performed. The plaintiff suspected the doctors had done something wrong by failing to advise her in advance that the operation might end her ability to conceive. (*Id.* at p. 895.) However, when she consulted a firm of malpractice attorneys, they "told her there was 'no provable malpractice'." (*Id.* at p. 896.) After the statute of limitations had run, she consulted a second firm of lawyers and the action was immediately filed. (*Ibid.*) The Supreme Court reiterated the "uniform California rule . . . that a limitations period dependent on discovery of the cause of action begins to run no later than the time the plaintiff learns, or should have learned, the *facts* essential to his claim. [Citations.]" (*Id.* at p. 897.) Reliance on an attorney's advice did not postpone the time of discovery or extend the statute of limitations period applicable to a person "who had already come to suspect he [or she was] a victim of malpractice." (*Id.* at p. 898.) "[T]he one-year 'discovery' limitations period for medical malpractice (§ 340.5) is not delayed, suspended, or tolled when a plaintiff with actual or constructive knowledge of the facts underlying his malpractice claim is told by an attorney that he has no legal remedy." (*Gutierrez v. Mofid*, at p. 902.)

"It is irrelevant that plaintiff is ignorant of the legal theories underlying his or her cause of action: '[I]f one has suffered appreciable harm and knows or suspects that . . . blundering is its cause, the fact that an attorney has not yet advised him does not postpone commencement of the limitations period.' [Citation.]" (Rylaarsdam et al., Cal. Practice Guide: Civil Procedure Before Trial, Statutes of Limitations (Thomson Reuters 2012) ¶ 3:158.2. p. 3-22, quoting *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 398, fn. [2].)

Plaintiffs here did not meet their pleading burden as articulated by *Fox, supra*, 35 Cal.4th 797. Plaintiffs failed to "specifically plead facts to show (1) the time and

manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.’ [Citation.]” (*Id.* at p. 808.) As the trial court recognized, plaintiffs “changed their allegations” in the third amended complaint to state that “ ‘[u]p until they spoke with an attorney and got an opinion from him on December 17th [2008,] plaintiffs had no belief or suspicion . . . as to whether Eseta’s problems relating to her severed uret[er] were caused by the negligence of defendants.’ (Third Amended Complaint at page 5, paragraph 2.)” However, the remaining allegations in the third amended complaint, when considered with the allegations of the second amended complaint, “plainly indicate” plaintiffs “*were on notice that something was wrong at some time prior to their meeting with an attorney for a legal opinion.* (See Second Amended Complaint at page 5 [after being seen at Highland and UCSF, Plaintiffs learned that Eseta would need surgery to repair the severed uret[er] and then went to see attorney ‘shortly before December 17, 2008’]; Third Amended Complaint at page 5; [‘[a]fter undergoing extensive medical procedure and other procedures expected in the future, plaintiffs decided to see an attorney for a legal opinion’].)” (Italics added.)

We agree with the trial court’s assessment of the third amended complaint. Plaintiffs do not identify in other than the most general manner *when* they became aware that Eseta’s problems were caused by the severed ureter. The complaints here demonstrate plaintiffs had reason to suspect an injury and some wrongful cause at some unspecified time *before* they consulted an attorney. Indeed, in their appellants’ opening brief, plaintiffs argue that “They decided to find out whether they had a *claim*, by consulting an attorney. When they found they had a claim they complied with [section] 340.5 and filed this action” (Italics added.) Whether or not plaintiffs knew they had a viable legal *claim* is not the question. Neither plaintiffs’ ignorance of the legal theories underlying a possible cause of action, nor the likelihood of bringing a successful claim are relevant to the question of when plaintiffs knew they had “ ‘suffered appreciable harm’ ” and suspected that “ ‘blundering’ ” was its cause. (*Norgart, supra*, 21 Cal.4th at p. 398, fn. 2.)

Nor did plaintiffs attempt to plead facts showing “that a reasonable investigation at that time would not have revealed a factual basis” for their malpractice cause of action or their “reasonable diligence.” (*Fox, supra*, 35 Cal.4th at p. 803.) Plaintiffs’ “ ‘conclusory allegations will not withstand demurrer.’ (*Ibid.*)” (*Id.* at p. 808.) As the Supreme Court recognized in *Fox*, “A plaintiff seeking to utilize the discovery rule must plead facts to show his or her inability to have discovered the necessary information earlier despite reasonable diligence. [Citation.] This duty to be diligent in discovering facts that would delay accrual of a cause of action ensures that plaintiffs who do ‘wait for the facts’ will be unable to successfully avoid summary judgment against them on statute of limitations grounds.” (*Id.* at p. 815.)

Plaintiffs rely upon *Artal, supra*, 111 Cal.App.4th 273, which they describe as holding that a plaintiff, “who suspected an intubation caused her pain, can wait for another exploratory [surgery] to confirm her already held suspicions.” The case does not stand for the proposition that plaintiffs suggest. *Artal* involved an instance of medical malpractice that could not have been discovered without later surgery. (*Artal*, at p. 276.) The patient in *Artal* suffered complications from an improperly performed intubation during a previous pelvic surgery. She knew the throat pain had begun after intubation from the previous surgery and suspected some trauma might have been caused during intubation. Thereafter, she sought help from at least 20 medical specialists—none of whom were able to determine the cause of her pain and she was given possible diagnoses of numerous different and unrelated conditions that could be causing her pain. (*Id.* at p. 281.) As her diligent efforts showed, she could not have discovered that the prior intubation had caused her injury without the exploratory surgery. “It was not until the exploratory surgery, which revealed the thyroid cartilage fracture, that Artal had reason to suspect Dr. Allen had *negligently* performed the intubation. Although a malpractice litigant is required to pursue her claim diligently through discovery of the cause of her injury, Artal’s duty of diligence did not extend to submitting to surgery sooner in order to discover the negligent cause of her injury. [Citation.]” (*Ibid.*) The court concluded that the statute of limitations did not begin to run *until the plaintiff could have discovered the*

cause of the injury. (*Ibid.*) As the appellate court explained, “requiring a plaintiff to sue while still ignorant of her injury *and its negligent cause* would require a plaintiff to bring a lawsuit without any objective basis for believing that malpractice had occurred.” (*Ibid.*)

In *Artal*, the plaintiff truly was unable to appreciate the injury until subsequent diagnosis of broken thyroid cartilage. (*Artal, supra*, 111 Cal.App.4th at p. 278.) The *Artal* plaintiff properly *pleaded* she had discovered the negligent cause of their injury upon the second exploratory surgery. She also pleaded facts showing “that a reasonable investigation at that time would not have revealed a factual basis” for her malpractice cause of action and also pled facts demonstrating her “reasonable diligence.” (See *Fox, supra*, 35 Cal.4th at p. 803.)

In this case, plaintiffs argue they “knew something had gone wrong, but not necessarily whether the cause was negligence of respondents or was a risk of the procedure, especially when told by Dr. Matthews that the operation went well, coupled with the failure of Dr. Matthews to tell Ms. Heimuli that negligence caused her condition when they met on August 18, 2008.” This argument does not address the fundamental defects in the Third Amended Complaint: plaintiffs’ failure to plead *when* they learned that Eseta’s ureter had been severed; their failure to plead *when* they first *suspected or reasonably should have suspected* the wrongdoing that led them to seek an attorney’s advice; and their failure to plead facts to show their inability to have discovered the relevant information earlier, despite their due diligence. The court allowed them three opportunities to plead these facts. Upon their failure to do so, the court did not err in sustaining defendants’ demurrers without leave to amend.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on this appeal.

Kline, P.J.

We concur:

Haerle, J.

Richman, J.