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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JEFFREY HILL,

Plaintiff and Appellant,

v.

ERWIN KUO et al.,

Defendants and Respondents.

A140825, A141324

(Alameda County  
Super. Ct. No. RG09488280)

In these consolidated actions, plaintiff Jeffrey Hill appeals from summary judgments granted in favor of defendants Erwin Kuo, M.D., Mark K. Lee, M.D., and Alfred J. Rothman, M.D. He challenges the trial court's conclusion that his medical malpractice claims were untimely as a matter of law under the one-year statute of limitations set forth in Code of Civil Procedure section 340.5.<sup>1</sup> We affirm.

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Plaintiff was employed by Matson Navigation Company, Inc. (Matson) as a merchant marine. In November 2007, he visited Dr. Rothman, his primary care physician, after experiencing a chest rash, weakness, fatigue, headaches, and knee swelling a few weeks prior while he was out at sea. He also complained of night sweats and fever in the week immediately prior to the visit. Shortly thereafter, he was admitted to Alta Bates Summit Medical Center by Dr. Karin Dydell. Dr. Dydell saw plaintiff on a daily basis from November 14, 2007, to November 20, 2007. During that time, she

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<sup>1</sup> Subsequent statutory references are to the Code of Civil Procedure.

requested an infectious disease consult with defendant Lee for suspected bacterial endocarditis.

Defendant Kuo took over plaintiff's care on November 21, 2007, and ordered his discharge from the hospital that same day. Although no final diagnosis of the cause for plaintiff's symptoms had been made, he was deemed stable and was discharged to follow up with Dr. Rothman. Plaintiff saw Dr. Rothman on November 28 and December 24, 2007, after which he went back on board a ship headed for Hawaii.

On February 4, 2008, plaintiff suffered loss of vision in his left eye while working on the ship. After the ship docked in Hawaii a few days later, plaintiff saw a physician on shore, who told him he had temporal arteritis.<sup>2</sup>

In July 2008, plaintiff encountered Dr. Dydell at an art festival. He introduced himself and reminded her that she had treated him in the hospital. During their conversation, he asked her whether his vision loss was linked to his hospitalization. She responded that she had "no idea." When he told her of his diagnosis, she said she had never heard of temporal arteritis.

On November 10, 2009, plaintiff served defendants with a notice of intention to sue pursuant to section 364.

On December 9, 2009, plaintiff commenced this action with his employer Matson as the sole named defendant.

On February 5, 2010, plaintiff added Drs. Kuo, Rothman, and Lee to the action by way of his first amended complaint (FAC).

On September 30, 2010, plaintiff filed the operative second amended complaint (SAC).<sup>3</sup> The SAC alleges a cause of action for medical malpractice. In his claim, he asserts he did not know, and using reasonable diligence could not have known, about

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<sup>2</sup> Temporal arteritis is a rheumatologic condition characterized by inflammation of the temporal artery, which interferes with circulation to the eye.

<sup>3</sup> Although plaintiff's amended complaints name Dr. Dydell and Alta Bates Summit Medical Center, plaintiff dismissed them so that by July 2011 the only medical defendants were Drs. Kuo, Rothman, and Lee.

defendants' malpractice until approximately April, May, or June of 2009, when his then doctor told him there might be a relationship between the loss of his eyesight and his medical treatment in November of 2007.

On May 29, 2013, Dr. Kuo filed a motion for summary judgment, asserting plaintiff's action was barred by the one-year statute of limitations. Dr. Kuo also argued plaintiff would not be able to establish the elements of negligence or causation. As to whether delayed discovery had extended the statute of limitations, Dr. Kuo contended plaintiff had a suspicion of wrongdoing at least as early as July 2008, when he approached Dr. Dydell at the art festival and specifically asked her if his vision loss was linked to his November 2007 hospitalization. Even under a theory of delayed discovery, Dr. Kuo asserted plaintiff had only until July 2009 to bring legal action, yet he did not file the FAC until February 2010.

On October 4, 2013, the trial court granted Dr. Kuo's motion for summary judgment as to plaintiff's claim for medical malpractice, finding it barred by the statute of limitations. The court concluded the action should have been filed at the latest by July 2009 because the undisputed facts showed plaintiff suspected he had been wronged no later than July 2008, when he "confronted" Dr. Dydell at the art festival as to a connection between his injury and his hospitalization in 2007.

On October 17, 2013, Dr. Lee moved for summary judgment on statute of limitations grounds.

On November 12, 2013, Dr. Rothman moved for summary judgment, asserting that the trial court's ruling in favor of Dr. Kuo applied equally to bar plaintiff's claims against him.

On January 8, 2014, judgment was entered in favor of Dr. Kuo.

On January 31, 2014, the trial court granted Dr. Lee's and Dr. Rothman's motions for summary judgment.

On February 6, 2014, judgment was entered in favor of Dr. Rothman.

On February 10, 2014, judgment was entered in favor of Dr. Lee. These appeals followed.

## DISCUSSION

### ***I. Summary Judgment and Standard of Review***

A “party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving party bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if this burden is met, the burden of production shifts to the opposing party to make a prima facie showing of a triable issue of material fact. (*Ibid.*)

On appeal from a summary judgment, we review the record de novo, considering all of the evidence presented by the parties except evidence properly excluded by the trial court. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We view the evidence in the light most favorable to the opposing party, liberally construing the opposing party’s evidentiary showing while strictly scrutinizing the moving party’s showing. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

### ***II. Statute of Limitations and Delayed Discovery***

A plaintiff must file an action within the applicable statute of limitations period after accrual of the cause of action. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397 (*Norgart*)). In malpractice cases against health care providers, the plaintiff must commence the action within “one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury . . . .” (§ 340.5.)<sup>4</sup> For purposes of accrual of the cause of action, “ ‘injury’ . . . ‘means both “a person’s physical condition and its ‘negligent cause.’ ” ’ ” (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808, fn. 2 (*Fox*); *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 896.)

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<sup>4</sup> The one-year period can be slightly longer given the required 90-day notice of intent to sue a health care provider. (§ 364, subd. (a).) If a notice of intent to sue a health care provider is served within 90 days of the expiration of the statute of limitations, the time for commencement of the action is extended by 90 days from the date of service of the notice. (§ 364, subd. (d).)

To trigger the statute of limitations, it is not necessary that the plaintiff know the legal theories underlying the claim; all that is required is that the plaintiff have a reason to suspect a factual basis for the “ ‘generic’ ” elements of a cause of action—i.e., “wrongdoing, causation, and harm.” (*Fox, supra*, 35 Cal.4th at pp. 806-807; *Norgart, supra*, 21 Cal.4th at pp. 397-398 & fn. 2.) The statute of limitations begins to run “when, simply put, he at least ‘suspects . . . that someone has done *something* wrong’ to him [citation], ‘wrong’ being used, not in any technical sense, but rather in accordance with its ‘lay understanding [citation].’ ” (*Norgart, supra*, at pp. 397-398, italics added). It is a common sense assessment. (*Fox, supra*, at p. 807.) Further, when a plaintiff has knowledge of circumstances to put a reasonable person on inquiry notice of a potential cause of action, the plaintiff need not know the specific facts necessary to establish the claim in order to commence the limitations period. (*Norgart, supra*, 21 Cal.4th at p. 398; *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110-1111 (*Jolly*)). Rather, a plaintiff who has reason to suspect he or she has been harmed by wrongdoing must investigate the facts and file suit if the facts support a cause of action; additional facts necessary to establish the claim may be obtained through pretrial discovery. (*Norgart, supra*, at p. 398; *Jolly, supra*, at pp. 1110-1111.)

In contrast, the delayed discovery rule operates to postpone commencement of the statute of limitations if a plaintiff did not suspect, or have reason to suspect, one of the core elements until a later date. (*Fox, supra*, 35 Cal.4th at p. 807; *Jolly, supra*, 44 Cal.3d at pp. 1109-1110.) Additionally, a plaintiff who is otherwise on inquiry notice may show delayed accrual of the cause of action when the circumstances reveal that “despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period.” (*Fox, supra*, at p. 809.)

This level of suspicion has been triggered in a variety of instances. In *Norgart*, a woman’s father suspected his daughter’s suicide was attributable to some other person or cause. “ ‘[T]here had to be some other force or action upon her that caused her to commit suicide. . . .’ He therefore impliedly admitted . . . that he ‘suspect[ed]’ . . . that

someone ha[d] done something wrong’ to cause her death.” (*Norgart, supra*, 21 Cal.4th at p. 406.) The father believed either the woman’s husband was abusing her or her psychiatrist had been professionally negligent in her care. (*Ibid.*) The court held that inquiry notice was triggered by his suspicions even though the decedent’s family had not focused on defendant manufacturer specifically. (*Id.* at pp. 405-406.)

In *Dolan v. Borelli* (1993) 13 Cal.App.4th 816 (*Dolan*), the defendant performed surgery on plaintiff to eliminate pain caused by carpal tunnel syndrome. He told plaintiff the surgery should relieve her pain within 60 days. When this pain did not go away in 60 days, the plaintiff believed defendant’s work was inadequate. (*Id.* at p. 820.) The failure to realize desired relief was held to be sufficient to trigger the necessary suspicion of possible malpractice and the running of the statute of limitations. (*Id.* at pp. 823-824.)

In each instance above, the level of suspicion of impropriety was not elevated. The plaintiffs in each case thought things were amiss—be it a personality change or the continuance of previous pain after surgery—and the inference of wrongdoing was sufficient to trigger the statute of limitations.

Resolution of the statute of limitations issue is normally a question of fact. (*Fox, supra*, 35 Cal.4th at p. 810.) However, where the uncontradicted facts are susceptible of only one legitimate inference, summary judgment is proper. (*Jolly, supra*, 44 Cal.3d at p. 1112.)

### **III. Analysis**

When plaintiff happened to run into Dr. Dydell, the physician primarily in charge of his care during his November 2007 hospitalization, he asked her if she thought there was a link between the loss of his eyesight and the hospitalization, and learned that she had never even heard of the condition with which he was ultimately diagnosed. She testified that she told him a link “was possible but [she] wasn’t sure,” while he testified she said she had “no idea.” Either way, there is no other legitimate inference to be drawn than that plaintiff was “suspecting” at the time that the failure to diagnose the cause of his condition during his hospitalization had led to the loss of his eyesight. Her statement that she had never heard of his diagnosis would further cause a reasonable person to suspect

that some type of wrongful conduct had occurred. “[A] person need not *know* of the actual negligent cause of an injury; mere *suspicion* of negligence suffices to trigger the limitation period.” (*Knowles v. Superior Court* (2004) 118 Cal.App.4th 1290, 1295 (*Knowles*.) “[T]he limitations period is not triggered when a plaintiff forms an *opinion* that wrongdoing has occurred. Rather, . . . the plaintiff’s mere *suspicion* of negligence triggers the statute.” (*Id.* at p. 1298, fn. 5.)

In *Knowles*, the plaintiffs admitted they suspected, shortly after their loved one’s death, that medical negligence was involved. (*Knowles, supra*, 118 Cal.App.4th at p. 1298.) However, “their initial investigation did not lead them to suspect Knowles had been negligent, [and] they did not discover their cause of action against [Knowles] until . . . a second consultant’s opinion led them to suspect Knowles’s negligence.” (*Id.* at p. 1300.) The *Knowles* court held: “It is a plaintiff’s *suspicion* of negligence, rather than an expert’s *opinion*, that triggers the limitation period. The limitations period begins when the plaintiff’s suspicions are aroused.” (*Ibid.*) Thus, a plaintiff need not have a suspicion confirmed by an expert in order for the statute of limitations to commence running. The “essential inquiry is when did [the patient] suspect [defendant] was negligent, not when did she learn precisely how he was negligent.” (*Dolan, supra*, 13 Cal.App.4th at p. 824.)

Plaintiff argues that the defense had the additional burden of proving plaintiff could have discovered the cause of his injury with reasonable diligence. This is incorrect. “[A] plaintiff’s diligence *after* he has become suspicious of wrongdoing is not relevant to the running of the statute of limitations. Diligence is only relevant to determine when he *should* have suspected wrongdoing. Once a plaintiff actually has the requisite suspicion, the statute of limitations commences to run. It is not tolled by efforts to learn more about the matter short of filing suit.” (*Kleefeld v. Superior Court* (1994) 25 Cal.App.4th 1680, 1684.) After a plaintiff suspects he or she has a claim, he or she has “a year . . . to investigate and bring suit.” (*Knowles, supra*, 118 Cal.App.4th at p. 1300.)

In our case, on November 14, 2007, plaintiff came to Alta Bates Summit Medical Center with a complaint of fever and shortness of breath. He also stated he had bilateral

leg pain and weakness, and was jaundiced. He already had evidence of multiple abnormal blood test results. Dr. Dydell was the admitting physician. She suggested several serious conditions were indicated: endocarditis, liver abscess, or hematologic malignancy. Dr. Lee, an infectious disease specialist, met with plaintiff in the hospital and reviewed the tests. He suggested several differential diagnoses: perhaps plaintiff had developed endocarditis after a dental cleaning; he could have had a viral illness, including viral hepatitis or mononucleosis, or picked up a rare pathogen during a recent trip to Italy. Dr. Lee also suggested to Dr. Dydell and plaintiff the possibility he suffered from a rheumatologic disease such as rheumatoid arthritis or systemic lupus erythematosus.

Plaintiff was released from the hospital by Dr. Kuo on November 21, 2007. No conclusive diagnosis was provided for his illness and the varied symptoms he manifested. He saw Dr. Rothman on November 28 and December 24, 2007. By the end of the year, plaintiff had received little clarification regarding the medical issues that caused significant hospitalization and testing. Then on February 4, 2008, while at sea with Matson, he suffered severe headache and visual impairment in his left eye. With his left eye vision gone, plaintiff saw Dr. Troy Tanji in Honolulu, who made the diagnosis of temporal arteritis. Hence, from late November 2007 to February 2008, plaintiff suffered myriad ailments without explanation. Plaintiff's physical complications happening over a short time period seem no less suspicious than the personality change in *Norgart, supra*, 21 Cal.4th 383, or the continued pain in *Dolan, supra*, 13 Cal.App.4th 816.

Plaintiff plainly suspected someone did something wrong and that the wrongful conduct was linked to the loss of his eyesight when he asked Dr. Dydell about this same connection. His curiosity, indeed suspicion, was natural. Dr. Dydell testified in her deposition that she told plaintiff it was possible the circumstance were related. Plaintiff's SAC alleges he did not discover his claim, and the statute of limitations did not begin to run, until he had asked a *different* physician in April, May or June of 2009 *the same exact question* and was told there "might" be a relationship between the loss of his eyesight and the care provided by the physician defendants. Thus, the same question that he asked

Dr. Dydell earlier led to the filing of this action. The conclusion that he had acquired the requisite suspicion to initiate this suit by July 2008 is thus unavoidable.<sup>5</sup>

Plaintiff cites to *Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, but that case differs in significant respects from the present one. The court in *Kitzig* held the statute of limitation did not begin to run when the plaintiff sought a second opinion while continuing to treat with the defendant. (*Id.* at p. 1387.) However, second opinions are not at issue here. The *Kitzig* court also pointed out that bad side effects and unsatisfactory outcomes are not necessarily sufficient to put a plaintiff on notice of malpractice, holding the plaintiff's action did not accrue upon her initial suspicions because her concerns were abated by another doctor who told her there was nothing wrong with the treatment and recommended that she continue her treatment with the defendant. (*Id.* at pp. 1392, 1396.) Unlike *Kitzig*, no one reassured plaintiff about the care he had received or otherwise abated his suspicions.

Contrary to plaintiff's contention, *Clark v. Baxter Healthcare Corp.* (2000) 83 Cal.App.4th 1048, also differs from the facts here. In *Clark*, the plaintiff sued the manufacturer of latex gloves. The plaintiff, who was a nurse, began experiencing skin rashes and breathing problems in 1992, which she thought were caused by latex gloves. (*Id.* at p. 1052.) By January 1994, she had consulted doctors and concluded that she was allergic to the gloves. But she did not file her complaint against the manufacturer until January 1996. (*Id.* at p. 1053.) In response to the manufacturer's motion for summary judgment, she submitted a declaration explaining that she filed her action after reading an article at the end of 1995 about defects in the manufacturing process for latex gloves. (*Ibid.*) She had known about the connection between the gloves and her medical problems since 1994, but her action did not accrue because she believed her problems were simply being caused by her own allergic reaction. Unlike the plaintiff in *Clark*,

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<sup>5</sup> In his reply brief, plaintiff asserts there is no evidence that he had a subjective suspicion of negligence when he spoke with Dr. Dydell. However, the statute of limitations also begins to run if a reasonable person would have suspected his or her injury was caused by wrongdoing. (See *Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1391.)

plaintiff's declaration here gave no alternative explanation for his vision loss that did not involve the medical care provided by the defendants in November 2007. Summary judgment was proper as there are no triable issues of material fact on the application of the statute of limitations to plaintiff's malpractice claims.

**DISPOSITION**

The judgments are affirmed.

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Dondero, J.

We concur:

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Humes, P.J.

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Banke, J.