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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOSETTE MONTOUR,

Plaintiff and Appellant,

v.

SHERVIN ERFANI,

Defendant and Respondent.

D060172

(Super. Ct. No. 37-2009-00099182-
CU-MM-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Randa Trapp, Judge. Affirmed.

Josette Montour sued Dr. Shervin Erfani for dental malpractice and fraud. Dr. Erfani then successfully moved for summary adjudication on the malpractice claim based on a statute of limitations defense. (Code Civ. Proc., § 340.5.)¹ After the parties stipulated to dismissal of the fraud claim, the court entered final judgment in Dr. Erfani's favor. On appeal, Montour challenges the court's conclusion that the malpractice claim is time-barred. We reject her contentions and affirm the judgment.

¹ All further statutory references are to the Code of Civil Procedure.

FACTUAL AND PROCEDURAL SUMMARY

We summarize the facts in the light most favorable to Montour, the party opposing the summary judgment. (See *Morris v. De La Torre* (2005) 36 Cal.4th 260, 264-265.)

In February 2003, Montour began dental treatment with Dr. Erfani, who said he was an "implant specialist." During the next 18 months, Dr. Erfani extracted three of Montour's lower teeth, installed six implants, and provided a fixed lower denture and an upper denture. Montour paid about \$20,000 for the treatment. Although the dentures were initially uncomfortable, Dr. Erfani said the discomfort was part of the healing process.

About two years after the treatment was completed, on August 22, 2006, Montour went to a dentist for a routine teeth cleaning (Dr. Srinivasan, sometimes referred to in the record by a version of her first name as "Dr. Hema"). At the time, Montour's implants were "bothering" her and she was experiencing problems with them. Dr. Srinivasan told Montour that she had not been cleaning properly around her dentures.

About five months later, on January 30, 2007, Montour again went to see Dr. Srinivasan. Montour complained that her dentures were loose and she had sore spots on her lower dentures. After an examination, Dr. Srinivasan told Montour that her lower implants were loose, Montour had "lost connectors" (presumably between the implants and the dentures), and Montour had "severe rocking" of the lower dentures. Dr. Srinivasan said that Montour should return to her implant doctor to have him tighten the implants and replace the lost connectors. *In her deposition, Montour admitted that at the*

time she thought Dr. Erfani had done something wrong to cause her implants to become loose.

One week later, on February 7, Montour returned to Dr. Erfani's office and Dr. Erfani's associate (Dr. Agatep) replaced the lost attachments.

Several weeks later, on February 27, Montour again saw Dr. Srinivasan, and the treatment notes state that Montour "had her implant fixed by . . . previous [oral surgeon]. The gums are still sore. Its been 2 weeks already."

In March 2007 and August 2007, Dr. Agatep relined Montour's lower denture. Montour thought this "treatment helped."

About four months later, on December 11, Montour continued to have sore spots on her lower mouth and saw Dr. Srinivasan, who told Montour the "threads" on many of the lower implants were "exposed." Dr. Srinivasan also noted a possible gingival abscess and told Montour to return to her implant doctor to "'fix something'" with Montour's lower implants.

About two weeks later, on December 20, Montour returned to Dr. Erfani's office, and was treated by Dr. Agatep. Dr. Agatep performed "periodontal scaling" and "rootplaning." On February 21, 2008, Montour again saw Dr. Agatep for further treatment. Dr. Agatep told Montour she should see Dr. Erfani during her next visit.

About two weeks later, on March 3, 2008, Montour saw Dr. Erfani. After examining her, Dr. Erfani assured her that "[the] implants were good" and no further treatment was recommended.

About seven months later, on October 21, 2008, at a teeth cleaning appointment, Dr. Srinivasan told Montour there were still problems with her implants, and advised Montour to go back to Dr. Erfani. However, Montour did not want to go back to Dr. Erfani because several months earlier (in March 2008) he had said there were no problems with her implants. At an appointment 10 days later, on October 31, Dr. Srinivasan advised Montour her implants were failing and referred her to a periodontist.

Eleven months later, in September 2009, Montour filed a complaint, alleging Dr. Erfani committed dental malpractice and fraud. In the malpractice claim, Montour alleged Dr. Erfani failed to properly diagnose and treat her, performed unapproved dental work, provided excessive treatment, and charged her excessive amounts. Montour's claimed damages included permanent loss of teeth, loss of implants, infections, monetary loss, pain and suffering, and emotional distress. With respect to the limitations period, Montour alleged she did not discover the malpractice until October 21, 2008, when she decided not to return to Dr. Erfani, and she alleged she did not sustain any "injury" until October 31, 2008, when Dr. Srinivasan informed her the implants were "failing."

Dr. Erfani moved for summary adjudication on the malpractice cause of action, arguing the September 2009 complaint was barred by section 340.5's one-year limitations period because Montour knew or should have known by January 2007 or by March 2008 that her claimed injuries were caused by Dr. Erfani's allegedly negligent treatment. In support, Dr. Erfani relied primarily on two excerpts from Montour's deposition transcripts pertaining to the time at which Montour experienced problems with her dental implants and suspected the problems were caused by Dr. Erfani's wrongdoing.

First, during her deposition, Dr. Erfani's counsel asked Montour the following question: "When [Dr. Srinivasan] told you . . . on January 30th, 2007 that there was severe rocking, that the implants were loose, at that point in time you suspected that Dr. Erfani had done something to cause those implants to be loose, correct?" Montour responded, "Correct."

Second, Dr. Erfani's counsel asked Montour several questions at her deposition regarding her knowledge that her problems were caused by Dr. Erfani's negligence when she saw him in March 2008. Montour gave conflicting responses, at one point stating that she did not realize that Dr. Erfani had done something wrong with regard to her implants at the March 2008 visit, and at another point acknowledging that she did suspect negligence at this point.

In opposing the summary adjudication motion, Montour argued there were disputed factual issues as to when her injuries were manifested and when she knew or should have known that Dr. Erfani's negligence was the cause of these injuries. In support, Montour submitted her own declaration in which she discussed the chronology of her visits with Dr. Srinivasan and Dr. Erfani's office, as summarized above. In her declaration, she stated that she learned for the first time on October 31, 2008 that her implants were failing, and "It was not any earlier than October 21, 2008 that I suspected Dr. Erfani might have done something wrong. That is why I did not return to see him [after the March 2008 visit]. If I suspected him earlier, I would not have returned to his office in 2007 and 2008." Montour also noted that she is "not good with dates" and after

her deposition she reviewed the records to "be more accurate than I was in my deposition."

Montour also submitted portions of the deposition transcript of Dr. Srinivasan, who agreed that the first time she told Montour that her implants were "failing" was October 2008. Montour's counsel additionally submitted his own declaration in which he asserted that some of Montour's deposition responses were inaccurate because defense counsel "employed bullying techniques" to obtain responses favorable to the defense.

After considering the papers and conducting a hearing, the court granted the summary adjudication motion, finding the undisputed facts showed Montour filed the complaint more than one year after she discovered the injury and the negligent cause of the injury. Montour thereafter dismissed her fraud claim, and the court entered final judgment in Dr. Erfani's favor.

DISCUSSION

I. *Summary Adjudication Review Standards*

A defendant moving for summary adjudication based on an affirmative defense has the burden of showing there is a complete defense to the plaintiff's claim. (§ 437c, subds. (c), (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) Once the defendant has met this initial burden of production, the burden shifts to the plaintiff to show the existence of a triable issue of one or more material facts as to that defense. (*Aguilar*, at p. 849.)

On appeal, we independently assess the correctness of the trial court's ruling, applying the same legal standard that governs the trial court. (*Norgart v. Upjohn Co.*

(1999) 21 Cal.4th 383, 404.) We strictly construe the moving party's evidence and liberally construe the opposing party's evidence, resolving any doubts as to the propriety of granting the motion in favor of the opposing party. (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.)

II. *Montour's Malpractice Claim Is Time-barred*

A. *Section 340.5*

Section 340.5 sets forth the limitations period governing medical and dental malpractice claims. The code section states: "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." (§ 340.5.) Under this code section, a malpractice litigant must bring her action within one year of discovering the malpractice and no later than three years from the injury date. (See *McNall v. Summers* (1994) 25 Cal.App.4th 1300, 1307-1308.)

Regarding the one-year deadline, "[the] statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing" (*Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1391 (*Kitzig*); see *Norgart v. Upjohn Co.*, *supra*, 21 Cal.4th at pp. 397-398; *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 896-897.) This "rule sets forth two alternate tests for triggering the limitations period: (1) a subjective test requiring actual suspicion by the plaintiff that the injury was caused by wrongdoing; and (2) an objective test requiring a showing that a reasonable person would have suspected the injury was caused by wrongdoing." (*Kitzig, supra*, 81 Cal.App.4th at p. 1391.) "The first to occur under these two tests begins the limitations period." (*Ibid.*)

The determination of when a plaintiff discovered the injury and its negligent cause is normally a question of fact. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810.) However, summary judgment is proper where the uncontradicted facts are susceptible of only one legitimate inference. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112.)

B. *Analysis*

In moving for summary judgment, Dr. Erfani argued the undisputed facts showed Montour filed the complaint more than one year after discovering her claimed injuries and suspecting they were caused by negligence. In support, Dr. Erfani presented evidence that Montour suffered injuries related to the implants on January 30, 2007 (sore gums, loose implants, lost connectors), and that she admitted at her deposition that on that date she suspected Dr. Erfani's treatment was the cause of the loose implants. Dr. Erfani also presented undisputed evidence that Montour continued to suffer problems relating to her implants during the next year. Montour nonetheless waited to file the complaint more than two years later, in September 2009.

Based on this factual showing, Dr. Erfani met his summary judgment burden to establish the claims were time-barred under section 340.5 because he showed (1) Montour suffered injury by January 2007; and (2) Montour admitted she suspected a negligent cause of the injury by January 2007. (See *Dolan v. Borelli* (1993) 13 Cal.App.4th 816, 823 [undisputed facts showed plaintiff suspected defendant doctor had improperly treated her and made her condition worse more than one year before action was filed]; *Graham v. Hansen* (1982) 128 Cal.App.3d 965, 973-975 [plaintiff suspected

malpractice within months of injury and informed another doctor that she believed defendant doctor had done something wrong; plaintiff was aware of all essential facts on which complaint was based more than 14 months before filing complaint]; see also *Rose v. Fife* (1989) 207 Cal.App.3d 760, 769-770 [more than one year before filing complaint, plaintiff had "'reasonably founded suspicions'" she had been harmed by defendant doctor's treatment].)

On appeal, Montour contends her admission that she suspected Dr. Erfani's negligence in January 2007 did not trigger the limitations period because the evidence does not show that her "implants were actually *failing*" at that time.

A person suffers an injury for purposes of section 340.5 when there is "some manifestation of appreciable harm" in a "significant way." (*Garabet v. Superior Court* (2007) 151 Cal.App.4th 1538, 1545.) "Generally, 'the long-standing rule in California is that a single tort can be the foundation for but one claim for damages Accordingly, if the statute of limitations bars an action based upon harm immediately caused by defendants' wrongdoing, a separate cause of action based on a subsequent harm arising from that wrongdoing would normally amount to splitting a cause of action.' [Citation.] "'Thus, the general rule is that the cause of action is complete on the sustaining of 'actual and appreciable harm,' on which the recoverable damages would be more than nominal.'" (*Clark v. Baxter Healthcare Corp.* (2000) 83 Cal.App.4th 1048, 1056.)

Montour argues she did not suffer "appreciable or actionable harm" until she learned her implants were "failing." She contends she "simply was not *injured* before October, 2008" because the undisputed evidence shows she was not told until October

2008 that her implants were "*failing*." (Italics in original.) However, the record is undisputed that in January 2007 Montour complained to Dr. Srinivasan that her lower mouth was sore, and she was told that her implants were loose, some connectors were missing, and her dentures were severely "rocking." These facts show Montour suffered an appreciable harm at that time. The fact that Montour had not yet suffered the full extent of her claimed damages (i.e., the "failure" of the implants) does not show she did not suffer actionable harm in January 2007. (See *Davies v. Krasna* (1975) 14 Cal.3d 502, 514.)

In her reply brief, Montour argues the mere fact that connectors are loose or the fact that a denture is "rocking" does not show her awareness of negligence. We agree, but in this case, the undisputed evidence shows that in January 2007 Montour was having pain in her lower mouth and she was told that her implants were loose, *and* she suspected that these problems were caused by Dr. Erfani's wrongdoing. These facts show an injury and the discovery of a possible negligent cause of the injury by January 2007. "[W]hen a plaintiff's "reasonably founded suspicions [have been] aroused" and the plaintiff has "become alerted to the necessity for investigation and pursuit of her remedies," the one-year period commences.'" (*Dolan v. Borelli, supra*, 13 Cal.App.4th at p. 823.)

We also reject Montour's argument in her reply brief that the pre-October 2008 manifestations of her injuries are irrelevant because she sought relief in the lawsuit only for the failed implants that occurred in October 2008 and she has not made a claim for the implant-related problems that occurred before that time because those issues were "all resolved and fixed prior to March 3, 2008." (Italics omitted.) These assertions are

unsupported by the record. In her complaint, Montour's broadly sought relief from all consequences of Dr. Erfani's alleged negligent treatment occurring from "February 2003 to March 2008," and she did not limit her claims to "failing implants." Likewise, in opposing the summary judgment motion, Montour did not present evidence showing her earlier problems with her implants were resolved and/or that her injuries in October 2008 were separate and unconnected to the problems occurring in 2007. Although she had the full opportunity to do so, Montour never stated or suggested in her declaration that she no longer suffered implant-related problems after the February 2007 visit with Dr. Erfani's office.

Montour alternatively argues her admission that she suspected wrongdoing in January 2007 did not trigger the limitations period because she continued to be treated by Dr. Erfani and was assured by him *in March 2008* that everything was fine and there were no problems with the implants.

With respect to Dr. Erfani's March 2008 statements, by that time more than one year had passed since Montour had been suspicious that Dr. Erfani had caused her implant problems. Thus, this evidence cannot create a triable issue of fact on the limitations issue because the statutory limitations period had already run.

With respect to the fact that Montour continued to be treated by Dr. Erfani's office after January 2007, we agree that a patient is generally "entitled to rely upon the physician's professional skill and judgment while under his [or her] care . . ." and therefore a patient who is continuing to be treated by the allegedly negligent health provider has a "diminished" level of responsibility to "ferret[] out and learn[] of the

negligent causes of his condition." (*Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 102; *Kitzig, supra*, 81 Cal.App.4th at p. 1393.) However, once the patient is aware of his or her injury and a possible negligent cause of the injury, the limitations period is no longer tolled. (*Sanchez, supra*, 18 Cal.3d at p. 102; *Enfield v. Hunt* (1984) 162 Cal.App.3d 302, 308; see also *Petrucci v. Heidenreich* (1941) 43 Cal.App.2d 561, 562.) Even during the doctor-patient relationship, the one-year period begins to run when a plaintiff discovers an injury and his or her reasonably founded suspicions have been aroused. (*Ibid.*) At that point, the plaintiff has become alerted to the necessity for investigation and pursuit of his or her remedies, and has one year in which to file the action.

In *Kitzig, supra*, 81 Cal.App.4th 1384, we restated these general rules, but recognized a narrow exception where a briefly held suspicion is immediately dispelled by reassurances from the defendant professional. In *Kitzig*, the plaintiff suffered injuries from dental implants while she was continuing to see the defendant dentist, and during this continued treatment she sought a second opinion after becoming concerned that the defendant dentist may have done something wrong. (*Id.* at pp. 1387-1389.) The second dentist told the plaintiff that "'everything looked okay'" and the plaintiff continued treating with the defendant dentist, who had told her he was not "concerned" with problems she was experiencing because this "'was just something that happens.'" (*Id.* at pp. 1389, 1388.) At trial, the plaintiff presented evidence that her "briefly held" concern was "immediately abated" after consulting with the second dentist, and she testified that this prior suspicion had no effect on her continuing relationship with the dentist doctor

and she continued to rely exclusively on this dentist's professional judgment. (*Id.* at pp. 1393-1396.) The jury found in favor of the plaintiff on the statute of limitations defense. (*Id.* at p. 1390.)

On appeal, the defendant dentist argued that once the plaintiff subjectively suspected wrongdoing and consulted the second doctor, the limitations period was no longer tolled as a matter of law. (*Kitzig, supra*, 81 Cal.App.4th at pp. 1391-1396.) We rejected this argument, reasoning that a briefly-held suspicion does not necessarily trigger the limitations period during a continuing doctor-patient relationship "where both the malpracticing doctor and a consulting professional continue to reassure the plaintiff that everything is fine, the plaintiff subjectively relies on these reassurances while continuing treatment with her doctor, and this reliance is reasonable." (*Id.* at p. 1395.)

The *Kitzig* holding is inapplicable here because Montour presented no facts showing that during the limitations period she received assurances from Dr. Erfani (or his associate) that everything was fine and that the problems with her implants were not caused by Dr. Erfani's negligence. Unlike *Kitzig*, there is no evidence in the record that during the one-year period after she became suspicious, Montour's concerns were alleviated by the defendant or by her second dentist (Dr. Srinivasan). Montour stated in her declaration that the treatment in 2007 by Dr. Erfani's associate "helped" her symptoms, but Montour did not present facts from which it can be inferred that she no longer suspected Dr. Erfani's wrongdoing or that she was not continuing to suffer implant-related problems. About 10 months after she first suspected Dr. Erfani had

caused her loose implants, the undisputed record shows Montour continued to have substantial additional problems with her implants.

Montour stated in her declaration that she would not have returned to see Dr. Erfani if she had suspected the negligence "earlier." However, this general statement was insufficient to show her suspicions were dispelled in light of her specific concession at her deposition that in January 2007 she did in fact suspect Dr. Erfani's wrongdoing was a cause of her implant-related problems. A plaintiff's declaration that is inconsistent with her previous deposition testimony is generally disregarded when ruling on a summary judgment motion. (*Princess Cruise Lines, Ltd. v. Superior Court* (2009) 179 Cal.App.4th 36, 40; see *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 22.)

Montour's reliance on *Unjian v. Berman* (1989) 208 Cal.App.3d 881 is also misplaced. In *Unjian*, a plaintiff sued his plastic surgeon after unsuccessful face-lift surgery. (*Id.* at pp. 883-884.) Although the plaintiff noticed shortly after the operation that his face looked "'worse'" after the operation, he remained in the surgeon's care for 10 more months and the defendant surgeon told him the problem could have been caused by a preexisting condition. (*Id.* at p. 883.) Reversing a summary judgment in favor of the plastic surgeon, the Court of Appeal found triable issues of fact existed on whether section 340.5 was tolled by the plaintiff's delayed discovery. The court reasoned that the fact that the operation did not produce the expected result did not necessarily connect the injury to the defendant's negligence. (*Id.* at p. 885.) The court additionally found the plaintiff could have reasonably accepted the doctor's nonnegligent explanation of the

injury and therefore there was a triable issue as to when the plaintiff knew or should have known of the injury and its negligent cause. (*Id.* at pp. 884-888.)

This case is distinguishable because, unlike the *Unjian* defendant, Dr. Erfani has not claimed that Montour's problems with her implants necessarily suggested negligence. Instead, in moving for summary judgment, Dr. Erfani relied on Montour's admissions that she suffered manifested injuries and suspected Dr. Erfani's negligence in January 2007 and in March 2008. Further, there is no evidence here that during the limitations period Dr. Erfani gave Montour an innocent explanation for the implant problems and that Montour relied on this explanation to dispel her earlier suspicions of wrongdoing. The record is silent regarding any efforts made by Montour to investigate the source of her implant problems once she suspected possible wrongdoing by Dr. Erfani.

Finally, Montour argues it would be unfair to conclude that her action is time-barred because this would "promote[] and reward[]" Dr. Erfani's alleged fraud. However, as the California Supreme Court recently stated, "statutes of limitations are not mere technical defenses, allowing wrongdoers to avoid accountability. [Citation.] Rather, they mark the point where, in the judgment of the Legislature, the equities tip in favor of the defendant . . . and against the plaintiff "The period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.'" (*Poosh v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797.)

In this case Montour had manifested problems with her implants and suspected Dr. Erfani's wrongdoing since at least January 2007, and although these problems continued during the next several years, Montour waited more than two and one-half years to file her malpractice action. On this record, the court properly found Montour's malpractice claim to be time-barred.

DISPOSITION

Judgment affirmed. Appellant to bear respondent's costs on appeal.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.