

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FOURTH APPELLATE DISTRICT

DIVISION TWO

TINA NOTLEY et al.,

Plaintiffs and Appellants,

v.

DAVID A. FRISCIA et al.,

Defendants and Respondents.

E053916

(Super.Ct.No. INC1101582)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Harold W. Hopp, Judge.

Reversed.

Daniels, Fine, Israel, Schonbuch & Lebovits, Moses Lebovits, Jason Tortorici, Anna Lisa Knafo, and Scott A. Brooks for Plaintiffs and Appellants.

Davis, Grass, Goldstein, Housouer, Finlay & Brigham and Stacy K. Brigham for Defendants and Respondents.

I. INTRODUCTION

Plaintiff and appellant Tina Notley sued defendants and respondents David Friscia, M.D. and Desert Orthopedic Center, a Medical Group, Inc. for medical malpractice.¹ Defendants demurred to the complaint on the ground it is barred by the statute of limitations set forth in Code of Civil Procedure section 340.5.² This statute has two limitations periods: a one-year “discovery rule” and a three-year period that runs from the “date of injury,” but which can be tolled upon proof of fraud or intentional concealment. The court sustained the demurrer without leave to amend. Following the entry of judgment, plaintiffs appealed.

We conclude that the allegations in the complaint do not establish that Notley discovered or should have discovered defendants’ negligence within the one-year limitations period; and although the action was commenced more than three years after the date of injury and plaintiffs failed to adequately allege facts to support tolling of the

¹ Notley’s husband, Christopher Notley, is also a plaintiff and appellant. Because his only claim—for loss of consortium—is derivative of his wife’s claim, and for ease of reference, our references to the singular, “plaintiff,” and to “Notley” are to Tina Notley; references to “plaintiffs” include both plaintiffs.

² All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Although our record includes a notice of demurrer and a memorandum of points and authorities in support of a demurrer, it does not appear that defendants filed a demurrer, as such, or complied with the rules of court regarding the form of demurrers. (See Cal. Rules of Court, rule 3.1320; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶¶ 7:98 - 7:99, pp. 7(1)-43 - 7(1)-44.) Any procedural defects, however, were neither raised by plaintiffs below nor asserted on appeal and are therefore forfeited and waived.

three-year statute of limitations, they should be given leave to amend to allege such facts. Accordingly, we reverse the judgment.

II. FACTUAL SUMMARY

On September 10, 2002, defendants negligently and improperly performed surgery on Notley to repair a fracture in her left heel. For two years following the surgery, Notley returned to defendants with complaints of pain, limited range of motion, and symptoms of infection in her left foot.

On May 14, 2007, she returned to defendants, complaining of chronic pain and swelling in the same foot. She was unable to participate in her daily activities, and standing and walking made the pain worse.

On September 11, 2007, defendants operated on Notley's heel to remove the hardware from the 2002 surgery. In addition, defendants improperly and negligently performed a left subtalar arthrodesis. Such negligence included carelessly failing to use the proper hygienic and sanitary protocol before, during, and after the procedure. Notley thereafter developed symptoms of a postoperative infection. Defendants failed to refer her for the proper care and treatment of the infection.

After the 2007 surgery, Notley “returned to defendants on at least 12 occasions . . . with complaints of increased pain and discomfort, swelling, and drainage in the area of her left ankle and heel. She was unable to walk for any distance or period of time.”

In response to Notley's complaints, defendants continuously assured her "there were no signs of infection, the screws were in place and the alignment of her ankle was excellent." Notley saw defendants for the last time on November 23, 2009.

Rather than undergo another surgical procedure as recommended by defendants, Notley "began to seek other medical opinions." On April 7, 2010, Notley was informed that the screws placed by defendants during the September 2007 surgery were improperly placed.

On January 18, 2011, Notley underwent a third surgery to repair the damage caused by defendants. Her foot had to be reset because it was improperly aligned in the earlier surgery.

Defendants' negligence caused Notley severe physical pain and illness, emotional distress, and other pain and suffering.

Plaintiffs filed their complaint on February 23, 2011.

III. STANDARDS OF REVIEW

In reviewing a judgment following the sustaining of a demurrer, we review the complaint de novo to determine whether it contains sufficient facts to state a cause of action. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865; *RealPro, Inc. v. Smith Residual Co., LLC* (2012) 203 Cal.App.4th 1215, 1219 [Fourth Dist., Div. Two].) "[W]e are not bound by the construction placed by the trial court on the pleadings but must make our own independent judgment thereon" (*Glen Oaks Estates Homeowners Assn. v. Re/Max Premier Properties, Inc.* (2012) 203 Cal.App.4th 913,

918.) “We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.]” (*City of Dinuba v. County of Tulare, supra*, at p. 865.)

“A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. [Citation.] In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred.” (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.)

When the demurrer is sustained without leave to amend, we review that decision for abuse of discretion. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) If there is a reasonable possibility the plaintiff can cure the pleading by amendment, “the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

IV. DISCUSSION

Defendants’ demurrer is based on the ground that the plaintiffs’ claims are barred by the statute of limitations set forth in section 340.5. This statute provides, in relevant part: “In an action for injury or death 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. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person.”

The statute thus has two limitations periods: a one-year period beginning with the date on which the plaintiff discovered, or with reasonable diligence should have discovered, the injury; and a three-year period (subject to tolling) beginning with the date of injury. Both “hurdles” must be overcome: “[I]f a malpractice litigant brings her action within three years from the date of injury, she must still satisfy the one-year limitations period or the action is time barred. Conversely, if the action is properly brought within one year of reasonable discovery, the action is nevertheless barred if the three-year period is not also satisfied.” (*Hills v. Aronsohn* (1984) 152 Cal.App.3d 753, 758.) Here, defendants contend that plaintiffs did not commence this action within either period.

A. *The One-year Limitations Period*

The one-year limitations period is a “discovery rule.” (See *Chosak v. Alameda County Medical Center* (2007) 153 Cal.App.4th 549, 563.) “[U]nder the ‘discovery rule,’ the statute of limitations commences in a medical malpractice case only when the plaintiff discovers the injury *and its negligent cause* or through the exercise of reasonable diligence should have discovered them.” (*Osborne v. County of Los Angeles* (1979) 91

Cal.App.3d 366, 370.) There are thus “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 v. Nordquist* (2000) 81 Cal.App.4th 1384, 1391.)

Whether a plaintiff exercised reasonable diligence for purposes of the discovery rule is, “especially in malpractice cases,” essentially a question of fact (*Brown v. Bleiberg* (1982) 32 Cal.3d 426, 436 (*Brown*)) and, therefore, not usually amendable to resolution on demurrer (*Call v. Kezirian* (1982) 135 Cal.App.3d 189, 199). The question may be decided as a matter of law, however, “when all of the facts to answer the question are alleged within or on the face of the complaint.” (*Ibid.*; see also *Baright v. Willis* (1984) 151 Cal.App.3d 303, 311.)

Here, Notley alleges that she was informed on April 7, 2010, that the screws defendants placed in her foot were “improperly placed.” (She does not allege any earlier date of actual knowledge or suspicion of wrongdoing.) The complaint was filed less than one year thereafter. In opposing the demurrer, Notley argued that the allegation of her discovery of the improper placement of screws “is sufficient to show that a timely cause of action for medical negligence is asserted” However, this argument addresses only the subjective test concerning her actual suspicion of wrongdoing.

Under the objective test for the discovery rule, even if plaintiff did not have actual knowledge of the negligent cause of her injury until April 7, 2010, the one-year

limitations period will commence “once a patient knows, *or by reasonable diligence should have known*, that he has been harmed through professional negligence.” (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 896, italics added.) Because of this “reasonable diligence” requirement, a medical malpractice plaintiff is “charged with ‘presumptive’ knowledge” of her injury once she has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to her investigation. (*Id.* at pp. 896-897.) “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. [Citation.]” (*Id.* at p. 897.)

“On the other hand, the patient is fully entitled to rely upon the physician’s professional skill and judgment while under his care, and has little choice but to do so. It follows, accordingly, that during the continuance of this professional relationship, which is fiduciary in nature, the degree of diligence required of a patient in ferreting out and learning of the negligent causes of his condition is diminished.” (*Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 102; see also *Gilbertson v. Osman* (1986) 185 Cal.App.3d 308, 317 [Fourth Dist., Div. Two], overruled on another point in *Woods v. Young* (1991) 53 Cal.3d 315, 328, fn. 4.) “Such reliance on the fiduciary role of the physician may naturally continue after the physician-patient relationship has terminated” (*Brown, supra*, 32 Cal.3d at p. 438, fn. 9.)

In support of their argument that Notley would have discovered defendants' negligence if she had used reasonable diligence, defendants point to Notley's allegations that she experienced pain, discomfort, and swelling, among other problems, for many years before the filing of the lawsuit. These problems, however, do not necessarily give rise to a suspicion of negligence. "The fact an operation did not produce the expected result would not necessarily suggest to the ordinary person the operation had been performed negligently." (*Unjian v. Berman* (1989) 208 Cal.App.3d 881, 885.) As our Supreme Court has explained: "The best medical treatment sometimes fails, or requires long and difficult recuperation, or produces bad side effects. Thus, even if a patient is unhappy with his condition, he may not suspect he has been wronged. Lacking medical knowledge, he may reasonably rely upon his negligent physician's soothing disclaimers." (*Gutierrez v. Mofid, supra*, 39 Cal.3d at p. 899.)

In *Brown, supra*, 32 Cal.3d 426, the plaintiff had surgery on her foot in 1965 to remove some corns. After the surgery, she "was in great pain and observed that her feet were 'all cut up'" (*Id.* at p. 430.) The defendant surgeon informed her that he had found and removed "'a whole lot of little tumors and they were going to be painful,'" and assured her that "nothing was amiss." (*Ibid.*) She continued under the defendant's care, "making continual complaints to him about the pain in her feet." (*Ibid.*) The defendant assured her that it would be all right. However, the plaintiff's feet never improved. She "walked 'like a duck,'" had trouble walking if she stood on her feet for a prolonged period, and was ridiculed by her friends for her "'ugly' feet." (*Ibid.*) She stopped seeing

the surgeon when he moved away in 1965, and stopped seeing a second defendant physician in 1972. Her niece, a registered nurse, urged her to see another doctor. (The plaintiff also had some nursing training.) (*Id.* at p. 431.) In 1978, the plaintiff saw a podiatrist who informed her that the 1965 operation was not for the removal of tumors, but was a procedure that removed portions of the bones of her feet. (*Id.* at p. 431.)

In reversing a summary judgment that was granted based on section 340.5, the *Brown* court stated: “Plaintiff says she was told by [defendant] that the surgery which resulted in the pain and disfigurement of the feet was necessitated by his discovery of ‘tumors’ there. So far as she knew, her condition was an unavoidable consequence of a ‘necessary’ operation. [¶] . . . Though the pain in her feet persisted for a long time, she could reasonably expect that after serious surgery. [Defendant] told her that her condition would improve, but did not say when. Neither her friends’ ridicule, nor her niece’s urgings to see a doctor to have her feet checked, nor her nursing training amount to conclusive evidence that plaintiff was on notice of defendants’ wrongdoing.” (*Brown, supra*, 32 Cal.3d at pp. 434-435, fns. omitted.) Thus, despite suffering through 12 years of pain and discomfort caused by the defendant’s negligence, the Supreme Court held that triable issues of fact existed as to when the one-year statute of limitations commenced. (*Id.* at p. 436.)

Osborne v. County of Los Angeles, supra, 91 Cal.App.3d 366 is also instructive. In that case, the plaintiff had suffered from infection and osteomyelitis following surgery in which screws and pins had been inserted into his hip. (*Id.* at p. 368.) In 1968, the

defendant physicians operated to remove these pins and screws, but negligently left one in place; this prevented the infection from healing and caused it to worsen. (*Id.* at pp. 368-369.) The plaintiff remained with the defendants as a patient until 1972, although he continued to suffer from infection and was confined to a wheelchair. (*Ibid.*) The plaintiff became a patient at another medical center, where he was eventually informed of the remaining screw in 1976. (*Id.* at p. 369.) Despite the ongoing physical and medical problems spanning eight years and the plaintiff's termination of his relationship with the defendants in 1972, the plaintiff's action was not barred by the statute of limitations because "[t]he record shows no awareness or reasonable suspicion on plaintiff's part that the screw was *improperly* left in his hip." (*Id.* at p. 370.)

These cases make clear that ongoing and continuing medical problems following a negligently performed operation do not establish, as a matter of law, that the plaintiff should have discovered the defendant's negligence. This is especially so when the plaintiff has continued in the care of the defendants for some time after the operation and is assured that nothing is amiss. (See, e.g., *Unjian v. Berman*, *supra*, 208 Cal.App.3d at p. 885.)

Here, Notley alleges she continued in defendants' care and that defendants assured her after the 2007 operation that "there were no signs of infection, the screws were in place and the alignment of her ankle was excellent." Such care and assurances diminished the degree of diligence required of her in ferreting out and learning of the negligent causes of her condition. (*Sanchez v. South Hoover Hospital*, *supra*, 18 Cal.3d

at p. 102; *Enfield v. Hunt* (1979) 91 Cal.App.3d 417, 423.) Notley’s allegations of pain, discomfort, and other symptoms are no more suggestive of negligence than the chronic problems suffered by the plaintiffs in *Brown and Osborne*, which did not trigger the statute of limitations. Moreover, there are no allegations that anyone made any comments or suggestions to Notley prior to April 7, 2010, that would raise any suspicion that her physical problems were the result of defendants’ negligence.

Defendants further argue that the one-year limitations period commenced no later than November 23, 2009—the last time Notley saw defendants. This was one year three months before the complaint was filed. The complaint, however, does not indicate why Notley saw defendants for the last time on that date. If it was because she suspected or had reason to suspect her injury was caused by defendants’ negligence, the action might be time-barred. However, as *Brown and Osborne* illustrate, discontinuing care by the negligent physician to undergo treatment by other physicians does not by itself commence the statute of limitations. Even if seeking out another medical opinion as to treatment might suggest dissatisfaction with the treating physician, it does not necessarily trigger the running of the statute of limitations. As one court stated, even when a second opinion is motivated by a “possible suspicion—however momentary—that her doctor was ‘doing something wrong,’” the statute of limitations does not necessarily begin to run. (*Kitzig v. Nordquist, supra*, 81 Cal.App.4th at p. 1393.) Holding otherwise, the court explained, “would hinder a patient’s ability to obtain the best medical care.” (*Ibid.*)

Defendants rely on *Kleefeld v. Superior Court* (1994) 25 Cal.App.4th 1680, and assert that Notley is in a similar position to the plaintiff in that case. In *Kleefeld*, the plaintiff's wife died of a ruptured aortic aneurysm. (*Id.* at p. 1682.) Five days later, the plaintiff contacted the Board of Chiropractic Examiners expressing his concern that the defendant may have excessively treated his wife. Three months later, the plaintiff met with an investigator and expressed his view that the defendant's inappropriate treatment might have caused his wife's death. (*Ibid.*) He sued the defendant approximately two years after his wife's death. (*Id.* at p. 1683.) The Court of Appeal held that the action was barred by the statute of limitations, stating: "We are only concerned with the time when plaintiff became suspicious that the cause of death might be related to the defendant's treatment. Plaintiff acknowledged that these suspicions occurred at or soon after the date of death. The one-year limitation commenced at that time and clearly had run well before the commencement of the action two years later." (*Id.* at pp. 1684-1685.)

Kleefeld is easily distinguishable. It was a wrongful death case—there was no continuing treatment or assurances by the defendant regarding ongoing problems. The undisputed evidence in support of summary judgment in that case established that the plaintiff suspected wrongdoing by the defendant soon after his wife's death. Here, by contrast, Notley was under the continuing care of defendants, who assured her that there was nothing wrong. *Kleefeld* has no application here.

In summary, whether the problems Notley experienced following her operations or other circumstances are such that they would have reasonably aroused suspicions of

wrongdoing by defendants is a question of fact that cannot be determined based on the allegations in the complaint. Accordingly, the one-year statute of limitations in section 340.5 is not available as a ground for demurrer.

B. The Three-year Limitations Period and Leave to Amend

Subject to tolling for specified reasons, the three-year statute of limitations in section 340.5 creates an “outside limit on the period after plaintiff’s injury in which an action for ‘professional negligence’ may be commenced, regardless of the patient’s belated discovery of the cause of action.” (*Brown, supra*, 32 Cal.3d at p. 437.) The three-year period commences upon the “date of injury.” (§ 340.5.)

Courts have referred to the “injury” as “the damaging effect of the alleged wrongful act” (*Larcher v. Wanless* (1976) 18 Cal.3d 646, 656, fn. 11), “the point at which ‘appreciable harm’ was first manifested” (*Brown, supra*, 32 Cal.3d at p. 437, fn. 8), and “the moment the plaintiff discovers the harm caused by the alleged negligence” (*Hills v. Aronsohn, supra*, 152 Cal.App.3d at p. 762).

It is not clear from the complaint when appreciable harm from defendants’ alleged negligence was first manifested. We need not determine the precise date of injury, however, because Notley does not dispute that her injury occurred more than three years before she filed her complaint. Indeed, in her reply brief on appeal, she states that “the injury occurred on September 11, 2007 during the second surgery.” This was more than three years six months before the complaint was filed.

Notley argues that the three-year statute of limitations was tolled because of defendants' fraud and intentional concealment, as provided in section 340.5. The principal allegation in the complaint suggesting fraud or concealment is the allegation that following the 2007 surgery, defendants "continued to assure Plaintiff that there were no signs of infection, the screws were in place and the alignment of her ankle was excellent." Notley implies that these assurances were false because her "foot had to be re-set because it was improperly aligned in the earlier surgery by defendants." These allegations do not satisfy the elements of fraud.

The elements of fraud are "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." [Citation.] (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Even if Notley's reliance and resulting damages are implicit in the allegations, the complaint fails to allege defendants' knowledge of the falsity of their statements or the intent to defraud. The complaint does not, therefore, adequately allege fraud for purposes of tolling under section 340.5.

"Intentional concealment" must be specifically alleged. (*Donabedian v. Manzer* (1986) 187 Cal.App.3d 1021, 1027.) In *Brown*, the Supreme Court found sufficient facts to support tolling by concealment where the defendant "misrepresented the nature of the operation he performed on [the plaintiff] in order to conceal plaintiff's cause of action" (*Brown, supra*, 32 Cal.3d at p. 437.) Here, there is no explicit allegation of

intentional concealment or, as in *Brown*, an allegation that defendants intentionally misrepresented plaintiff's condition *in order to conceal their malpractice*. Notley has not, therefore, adequately alleged facts that would toll the running of the three-year statute of limitations period.

In her opening brief on appeal, Notley states the following in support of her tolling argument: “On multiple (at least twelve) visits following the second surgery, [plaintiff] complained to [Dr. Friscia] of swelling and pain in her foot. On each occasion, Dr. [Friscia] advised her that the screws were in their proper place and that the alignment of her foot was excellent and that it was healing as it should. . . . These representations were in fact false. The screws were not in their proper place and the foot was not aligned correctly, preventing proper healing. This was discovered in the April 7, 2010 MRI and confirmed in the January 18, 2011 surgery. . . . At the time that Dr. Friscia made these representations, he either knew or should have known that they were false. In the majority of the appointment in which he advised Plaintiff that the screws were in place, he had taken and reviewed new x-rays which showed the location and placement of the screws. Nonetheless, he repeatedly advised Plaintiff that everything was as it should be and went so far as to suggest arthritis as the cause of her pain. Because of defendant's repeated misrepresentations, the three year time period tolled the entire time that [plaintiff] treated with [Dr. Friscia] and did not begin to run until November 23, 2009 when [plaintiff] stopped treating with [him].”

A problem with this argument is that—except for the facts that defendants told Notley that the screws were in place and the alignment of her foot was excellent—these facts are not alleged in the complaint.³ Indeed, Notley acknowledges “that there are no allegations in the complaint that the fraud and concealment was ‘intentional,’” but adds that she “was deprived of any opportunity to amend the complaint to add the allegation of intentional fraud and concealment.” She contends that denial of leave to amend was error. We agree.

“[I]f there is a reasonable possibility that a defect in the complaint can be cured by amendment . . . , a demurrer should not be sustained without leave to amend.” (*Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 118.) When, as here, “the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment.” (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747.)

The complaint in this case was Notley’s first attempt at pleading a cause of action. As explained above, her failure to do so is solely because she did not plead sufficient facts to prove intentional fraud or concealment for purposes of tolling the statute of

³ We do not suggest that pleading the facts asserted in plaintiff’s brief would necessarily satisfy the pleading requirements for tolling the three-year statute of limitations. With respect to the three-year statute of limitations, we address only the narrow questions presented on appeal: (1) whether the complaint adequately alleges facts sufficient to establish tolling under section 340.5; and (2) if it does not, whether the court erred in denying leave to amend.

limitations. She has, however, already alleged that defendants made assurances to her regarding the placement of screws and the alignment of her foot that were false.

Although she did not specifically plead facts satisfying all elements of fraud or intentional concealment, she has indicated a reasonable possibility that she can do so by amendment. As a matter of fairness, she should be given that opportunity.

V. DISPOSITION

The judgment is reversed. The trial court is directed to vacate its order sustaining defendants' demurrer without leave to amend and to enter a new order sustaining the demurrer with leave to amend.

Plaintiffs shall recover their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.