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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DEBRA VOTTA,

Plaintiff and Appellant,

v.

RED ALINSOD et al.,

Defendants and Respondents.

G046388

(Super. Ct. No. 30-2009-00323060)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Luis A. Rodriguez, Judge. Reversed.

Law Offices of Ramin R. Younessi, Ramin R. Younessi and Gabriel J. Pimental for Plaintiff and Appellant.

Law, Brandmeyer + Packer, Yuk K. Law; and David J. Ozeran for Defendants and Respondents.

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The court granted summary judgment against plaintiff Debra Votta and in favor of defendants Red Alinsod and South Coast Urogynecology, Inc. on her complaint for medical malpractice and professional negligence, respectively. Plaintiff appeals, contending the court erred when it ruled the statute of limitations barred her action. She argues it incorrectly determined the date the statute was triggered; any statute was tolled because reasonable investigation would not have revealed Alinsod's alleged negligence any sooner; and her actual investigation revealed only a products liability claim. We agree the statute of limitations' accrual date presents a triable issue of material fact and reverse on that basis.

FACTS AND PROCEDURAL HISTORY

Plaintiff suffered from a condition known as pelvic organ prolapse, a condition that caused her bladder, urethra, and rectum to sag. In December 2007 she consulted with Alinsod about surgery to correct the problem. When she asked if she risked infection from the surgery, he stated, "No, not really, it's totally safe, you'll be fine." On that basis she agreed to the surgery.

On December 10, 2007 Alinsod performed the surgery, implanting mesh to support the sagging organs. According to plaintiff's expert, a necessary part of this surgery is an imaging test called a cystoscopy to confirm there was no injury to the bladder or urethra and that the mesh was not misplaced. Alinsod's records of the surgery do not reflect he performed a cystoscopy. The day after the surgery plaintiff began to experience "constant pain in her pelvic area and a throbbing sensation when she urinated" She called Alinsod several times and he assured her this was a normal part of the recovery process. The pain persisted.

On January 17, 2008 plaintiff visited Alinsod and was treated for a bladder infection with antibiotics and pain medications; the pain remained. In February when

plaintiff still complained of pain in her urethra and bladder Alinsod performed a cystoscopy with “reportedly normal” results. Post surgery, plaintiff visited Alinsod at least seven times between early January and May 9, 2008, complaining of pain in her pelvic area. At plaintiff’s request, at each visit Alinsod would order blood and urine tests and continued to tell plaintiff her symptoms and pain were normal. Based on these statements, plaintiff “suspected” her injuries were caused by the mesh.

In May 2008 after all the visits to Alinsod, plaintiff decided to obtain a second opinion and consulted with Dr. Elliot Lander. On May 23, as a result of an imaging test, Lander discovered blockage in plaintiff’s kidney. Plaintiff believed her injury was caused by defective mesh and not negligence on Alinsod’s part. Plaintiff alleges Lander advised her the mesh and suture implanted by Alinsod had “eroded into her kidney, causing it to block her bladder.” Based on his recommendation, she had him perform emergency surgery to try to save her kidney, but it was not successful and she lost the use of her kidney. Lander recommended she have another surgery to remove some of the mesh Alinsod had implanted.

On June 4 plaintiff saw Dr. Roger Hadley, who performed a cystoscopy and saw mesh and a suture in plaintiff’s “left ureteral orifice.” When the test was completed he spent about an hour with plaintiff and her husband explaining what he had found. In his deposition he testified it was “likely” he would have told them the mesh he saw was what Alinsod had implanted.

On June 20, 2008 Hadley performed surgery to remove some of the mesh and reimplant the left ureter. Plaintiff alleged Hadley told her the mesh could have been defective and confirmed her “suspicions” her injury had been caused by the mesh. She further alleged in the year following this surgery she continued to “suspect” her injuries were caused by the mesh based on her five months of postoperative visits with Alinsod and his statements the surgery was “fine,” and Hadley’s statement about the mesh.

On November 26, 2009, plaintiff filed suit against one of the manufacturers of the mesh and defendants, among others. After demurrer, her remaining cause of action against South Coast was for professional negligence by failing to ensure Alinsod performed with due care and against Alinsod for medical malpractice. She alleged he failed to warn her of the risks of her surgery, failed to perform diagnostic tests as part of the surgery and postoperatively, and failed to diagnose the postoperative complications of the surgery.

Defendants filed a motion for summary judgment on several grounds, including that plaintiff did not file suit within the one-year statute of limitations. The court granted the motion on that basis.

DISCUSSION

1. Introduction

Code of Civil Procedure section 437c, subdivision (c)¹ declares summary judgment “shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” A defendant may bring a motion on the ground there is a complete defense to the action. (§ 437c, subd. (o).) If he meets his burden to show a complete defense, the burden shifts to plaintiff to produce evidence showing a triable issue of material fact. (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar v. Atlantic*

¹ All further statutory references are to this code.

Richfield Co. (2001) 25 Cal.4th 826, 850, fn. omitted.) “[A] party . . . ‘must produce admissible evidence raising a triable issue of fact. [Citation.]’ [Citation.]” (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.*, *supra*, 199 Cal.App.4th at pp. 1144-1145.) We review a summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 860.)

2. *Accrual of Statute of Limitations*

Section 340.5, the statute of limitations for a professional negligence claim, provides that “the time for the commencement of [a medical malpractice 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.” “[A] cause of action accrues at ‘the time when the cause of action is complete with all of its elements.’ [Citations.]” (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806-807 (*Fox*).

Under section 340.5 a one-year statute of limitations begins to run when a plaintiff discovers, or using reasonable diligence should have discovered, a defendant’s negligence. “A plaintiff has reason to discover a cause of action when he or she ‘has reason at least to suspect a factual basis for its elements.’ [Citations.] . . . Under the discovery rule, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period. [Citations.]” (*Fox, supra*, 35 Cal.4th at p. 807.) “The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action.” (*Ibid.*)

The issue here is when plaintiff was on inquiry notice. Alinsod agrees with the trial court that plaintiff had a duty to inquire by at least June 20, 2008 when Hadley removed part of the mesh and a suture from plaintiff’s ureteral orifice. He argues she knew of her pain and other problems during the five months following the surgery and

Alinsod had not properly advised her this could happen. Further, despite Alinsod's assurances she was "fine," she was not. Alinsod also claims plaintiff knew the mesh was not in the correct place since it was blocking her ureter.

Plaintiff asserts she did not know nor should she reasonably have known of Alinsod's possible negligence until she spoke to her attorney in 2009, pointing to the following facts as the basis for her claim.

Alinsod repeatedly assured her her pain was part of the normal recovery process and that she was fine. She believed him and had no reason to think he had harmed her. Neither Hadley nor Lander told her anything to cause her to suspect Alinsod had incorrectly inserted the mesh and she never asked them.

Lander testified he would have told plaintiff the mesh was in her bladder and she needed surgery. He "choose[s his] words very carefully when [he] see[s] something that shouldn't be there." It was likely he would say merely that the mesh was "in the wrong place," not that it was "misplace[d]." He is "very careful not to point fingers" and if a patient asked the cause he would tell them to speak to the surgeon. His "custom" is not "to focus on any causes[,] just the problem at hand." If a patient asked whether the problem was related to the prior surgery he would say something to the effect that "[i]t's very likely."

As to Hadley, plaintiff stated he led her to believe her injuries were the result of defective mesh. He never said the mesh was misplaced. Hadley himself testified his practice is "not to speculate on how [the current problem] happened," just to take care of it. He did not specifically remember plaintiff asking about Alinsod or the surgery, although it was "likely" he told her the mesh in her bladder was what Alinsod had implanted. But, plaintiff maintains, the blocked ureter itself does show she knew it was due to Alinsod's surgery.

The date the statute of limitations begins to run is usually a fact question. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1108.) As defendant notes, "“where the

uncontradicted facts . . . are susceptible of only one legitimate inference, summary judgment is proper. [Citation.]”” (*Ibid.*) But that is not the case here. The facts are not uncontradicted nor are they capable of only one inference. Plaintiff declared she did not know nor did she have reason to believe her injury could have been caused by Alinsod. That is a fact issue.

Alinsod argues the reasonable person issue is a question of law and based on the evidence in the record only one conclusion can be reached, that plaintiff was on inquiry notice more than a year before she filed the action. But fact finders customarily decide what a reasonable person would know or believe. (See *Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, 107, fn. 3.) There is both a jury instruction (CACI No. 455) and a verdict form (CACI VF-410) where the jury makes factual findings as to delayed discovery.

Alinsod relies on *Jolly*: “Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.” (*Jolly v. Eli Lilly & Co., supra*, 44 Cal.3d at p. 1111.) “Because a plaintiff is under a duty to reasonably investigate and because a suspicion of wrongdoing, coupled with a knowledge of the harm and its cause, will commence the limitations period, suits are not likely to be unreasonably delayed” (*Id.* at p. 1112, italics omitted.) “In sum, the limitations period begins when the plaintiff suspects, or should suspect, that she has been wronged.” (*Id.* at p. 1114.) Alinsod again emphasizes his claim plaintiff had a duty to inquire and failed to do so.

Based on the record, we are not persuaded. Assuming there was such a duty, plaintiff fulfilled it. She consulted with two doctors after Alinsod’s surgery. Neither told her Alinsod had done anything improper. Even had she asked their customary answers were vague and unspecific and would not have informed her Alinsod

might be at fault. Given all this, there is a triable issue of fact as to whether a reasonable person should have inquired further.

Plaintiff states that her investigation, primarily her consultations with Hadley and Lander, disclosed only that she had a products liability cause of action. There was a similar situation in *Fox, supra*, 35 Cal.4th 797.

In *Fox*, during gastric bypass surgery on the plaintiff, her small intestine was perforated by a staple, causing fluid to pass into her abdomen. The defendant surgeon was unsuccessful in his attempt to repair it. In his postoperative report he failed to note the cause for the perforation. The plaintiff sued the surgeon, the medical center and the hospital for medical malpractice. During the surgeon's deposition he identified the staple and stated it had caused leaks in prior surgeries. The plaintiff then filed an amended complaint naming Ethicon as a defendant in a products liability cause of action, also alleging she did not discover, nor would an investigation have disclosed, the staple as a cause of her injury until the surgeon's deposition. Ethicon filed a demurrer based on a one-year statute of limitations, which the trial court sustained without leave to amend.

When the case reached the Supreme Court it posed the question as to whether, when a plaintiff knows or suspects negligence on the part of one defendant, the statute of limitations accrues as to all defendants. (*Fox, supra*, 35 Cal.4th at p. 802.) In answering in the negative, it held 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.)

Here, there is a disputed factual question as to whether plaintiff was reasonably required to conduct further investigation to obtain facts on which to base a claim against Alinsod. It cannot be decided on summary judgment.

3. *Claim Against South Coast*

Plaintiff's cause of action against South Coast for professional negligence is based on its failure to properly supervise Alinsod. The statute of limitations for this claim is also section 340.5. (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 413.) Because this cause of action is based on Alinsod's alleged negligence, summary judgment against South Coast must also be reversed.

DISPOSITION

The judgment is reversed. Plaintiff is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.