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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MILTON BIEBER,

Plaintiff and Appellant,

v.

WILLIAM F. PEARCE,

Defendant and Respondent.

G046848

(Super. Ct. No. 30-2009-00294049)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Franz E. Miller, Judge. Affirmed.

Milton Bieber, in pro. per, for Plaintiff and Appellant.

Schmid & Voiles and Denise H. Greer for Defendant and Respondent.

Milton Bieber filed a complaint against William Pearce alleging medical malpractice. The trial court entered judgment in favor of Pearce after ruling that the statute of limitations had expired before the complaint was filed. Bieber appeals.

#### BACKGROUND

Bieber sought out treatment from Pearce, a medical doctor of urology, for a second opinion after another urologist diagnosed him with prostate cancer. On October 22, 2007, Pearce performed prostate cancer surgery on Bieber. Three weeks later, on November 7, 2007, Bieber went to Pearce's office to have his catheter replaced because it was "leaking through the urethra tube." Pearce handed Bieber three paper towels and removed the catheter. The paper towels quickly became saturated, but Pearce refused to give more paper towels to Bieber. Although Bieber's bladder continued to leak, Pearce decided not to replace the catheter. At that point, Bieber became disgusted with Pearce and never returned to his care. Bieber claims he has suffered from incontinence since that time as a result of the surgery.

Bieber served Pearce with a notice of intent to sue (Code Civ. Proc., § 364) on August 26, 2008; on February 20, 2009, he served a demand for arbitration. In July 2009, Bieber and Pearce stipulated that Bieber would forego his demand for arbitration and file an action against Pearce in the Orange County Superior Court for professional negligence. "All parties agree the filing of the Complaint in Superior court will relate back to the date[] of the . . . arbitration demand[] . . . . All parties agree that any claims or defenses in existence as of the date[] of the . . . arbitration demand[] remain in effect in the . . . Superior Court Action to be filed by Milton Bieber." Bieber's complaint was filed on August 18, 2009.

The case went to trial in March 2012, apparently only on the issue of whether Pearce informed Bieber of the risks of the prostate surgery.<sup>1</sup> At the close of Bieber's case, the trial court granted nonsuit in favor of Pearce on the ground that the statute of limitations had expired before the complaint was filed. The trial court told Bieber, "You will have an opportunity to bring post-trial motions, which will give you an opportunity if you think I'm wrong after further research to convince me of that. If I am, then the remedy will be to grant you another trial."

Bieber filed an ex parte application for reconsideration, arguing the date he discovered his injuries should be 12 months after the surgery, because some patients regain urinary control within that timeframe. The application was denied.

#### DISCUSSION

We review a judgment of nonsuit by viewing the facts in the light most favorable to the plaintiff. "The rule is that a trial court may not grant a defendant's motion for nonsuit if plaintiff's evidence would support a jury verdict in plaintiff's favor." (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1214.) The record on appeal contains no evidence to support a different result.

The statute of limitations applicable to an action for medical negligence is Code of Civil Procedure section 340.5. That section provides that the action must be commenced within one year from the date the plaintiff discovers the injury. The trial court found Bieber was aware of his injuries "at the very latest" by November 7, 2007.

Bieber claims in his opening brief that he "never set a date when [the] injury was discovered," and he "was never ask[ed] at anytime from start of case to end of trial" when he discovered the injury. But the only evidence in the record supports the

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<sup>1</sup> The record is woefully inadequate. Bieber designated the reporter's transcript only for March 15, 2012, which was the second and final day of trial. The clerk's transcript contains only the ex parte application for reconsideration, the order denying the application, and the judgment. Pearce augmented the record with the complaint and its attachments.

trial court's finding. The trial court asked Bieber: "Do you argue that you did not have knowledge that you had physical problems from this surgery until sometime after November 7, [2007]?" Bieber replied: "Oh, I knew it -- I knew it within three weeks, I believe. Once it wouldn't stop leaking, my bladder would not stop leaking on me. . . ." We have no record of Bieber's direct testimony or Pearce's cross-examination of him, which occurred on the first day of trial.

Bieber served Pearce with his notice of intent to sue on August 26, 2008, which was within 90 days of November 7, 2008, the day the one-year statute of limitations would have expired. The expiration of the statute of limitations was thereby tolled for 90 days, until February 5, 2009. (Code Civ. Proc., § 364, subd. (d); *Woods v. Young* (1991) 53 Cal.3d 315, 328.) Although the parties stipulated that the complaint would relate back to the service of the arbitration demand, they also stipulated that they would retain all claims and defenses existing as of that date. The arbitration demand was served on February 20, 2009, 15 days after the statute of limitations expired. Thus, Pearce was not precluded from relying on that defense.

Bieber argues Pearce committed a battery when Pearce operated on him without his informed consent. Bieber claims the trial court should have applied the two-year statute of limitations for personal injury (Code Civ. Proc., § 335.1) rather than the one-year statute for medical negligence (Code Civ. Proc., § 340.5). Bieber is wrong.

"[B]attery and lack of informed consent are separate causes of action. A claim based on lack of informed consent — which sounds in negligence — arises when the doctor performs a procedure without first adequately disclosing the risks and alternatives. In contrast, a battery is an intentional tort that occurs when a doctor performs a procedure without obtaining any consent." (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324.) Furthermore, Bieber waived the issue on appeal because he did not raise it in the trial court. (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767.)

DISPOSITION

The judgment is affirmed. Pearce is entitled to costs of appeal.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

MOORE, J.