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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROSA SIMPSON,

Plaintiff and Appellant,

v.

JIACHANG ZHANG,

Defendant and Respondent.

G053254

(Super. Ct. No. 30-2014-00739942)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Craig L. Griffin, Judge. Affirmed.

Southern California Lawyers Group and Eric Morris for Plaintiff and Appellant.

Ray & Gourde, Burdick M. Ray and Gabriela Marquez for Defendant and Respondent.

\* \* \*

Plaintiff and appellant Rosa Simpson sued defendant and respondent Jiachang Zhang for dental malpractice, alleging his negligence in performing a dental implant procedure permanently damaged a nerve in her jaw. Zhang moved for summary judgment based on the one-year limitations period that Code of Civil Procedure section 340.5 establishes for all professional negligence claims against healthcare providers.<sup>1</sup> The trial court granted the motion and entered judgment against Simpson. We affirm.

Section 340.5's one-year limitations period starts when the plaintiff discovers or reasonably should have discovered both her injury and that someone's wrongdoing likely caused it. Simpson testified she felt an electric shock as Zhang drilled the socket for her implant, and she immediately thought he had done something wrong. The next day Simpson returned to Zhang's office to complain about the pain. After examining Simpson and taking an x-ray, Zhang apologized to Simpson, admitting the implant he used was too large and it had touched or broke a nerve. Simpson later saw two other oral surgeons who confirmed the implant had damaged a nerve and that Simpson's condition likely was permanent because the nerve had not regenerated within the first six months. Simpson saw the last of these two surgeons approximately 21 months before filing this lawsuit. These facts satisfied Zhang's initial summary judgment burden, and Simpson failed to present any evidence establishing a triable issue of material fact on whether she complied with the statute of limitations.

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All statutory references are to the Code of Civil Procedure.

# I

## FACTS AND PROCEDURAL HISTORY<sup>2</sup>

Zhang is a dentist. On June 1, 2012, Simpson visited him to have a dental implant inserted. As Zhang drilled the socket for the implant base, Simpson felt what she described as “electricity,” or an electrical shock. After Zhang completed the procedure and the anesthesia wore off, Simpson experienced headaches, extreme pain, and tingling in her jaw even after taking pain medications. The area where Zhang placed the implant also remained numb and swollen.

Simpson returned to Zhang’s office the next day to complain because her symptoms continued. Zhang took an x-ray and reviewed them with Simpson, admitting the implant base he used was too large and it apparently touched or broke a nerve in Simpson’s jaw. Zhang apologized profusely, stating he thought Simpson was younger

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<sup>2</sup> All opening briefs must include a “summary of the significant facts” (Cal. Rules of Court, rule 8.204(a)(2)(C)), and “[a]n appellant has the duty to summarize the facts fairly in light of the judgment” (*Jones & Matson v. Hall* (2007) 155 Cal.App.4th 1596, 1607). An appellant may not limit the statement of facts to those he or she deems favorable. (See *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1531.) Simpson’s statement of facts, however, is incomplete and one-sided. She provides almost none of the facts that Zhang presented to support his summary judgment motion, and on which the trial court necessarily relied in granting the motion.

Simpson also fails to support many of the facts she presents with citations to *evidence* in the appellate record. The vast majority of Simpson’s record citations refer to large portions of her separate statement. It is improper to cite a separate statement as support for factual assertions in an appellate brief because a separate statement is not evidence; rather, it simply refers to evidence. Such practice improperly leaves the appellate court to search the record for the supporting evidence. (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 816, fn. 5; *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1378-1379.) Based on these deficiencies in her brief, Simpson “has waived any objection that we overlooked any disputed or undisputed material facts.” (*William Jefferson & Co., Inc. v. Orange County Assessment Appeals Bd. No. 2* (2014) 228 Cal.App.4th 1, 6, fn. 2.)

and her jaw would support the larger base. Claiming this had never happened to him before, Zhang appeared nervous and unsure what to do. Zhang agreed to Simpson's suggestion that he remove the implant base because she thought it was the source of her pain. Zhang also said he would refer Simpson to his friend, Dr. Hung Le, who was an oral surgeon and a specialist in nerve issues. On June 4, 2012, Zhang removed Simpson's implant base, but her condition did not improve.

Le examined Simpson on June 9, 2012. She told him all of her symptoms remained the same. After taking x-rays, Le explained the implant base damaged a nerve, it would take time to heal, and assured her things would improve in six weeks. Le also said Zhang should not have removed the implant base because removing it did not change anything.

On July 20, 2012, Simpson saw Le again because more than six weeks had elapsed and her symptoms remained the same. He explained he could not do anything to fix her condition, and she would have to wait and see if her symptoms improved over time. Le further explained that if her symptoms did not improve in four to six weeks, they probably would not get any better. Simpson also saw Zhang on July 20, 2012, and provided him with an update regarding her condition. Zhang again apologized to Simpson, and said his church would pray for her to get better. After that date, Simpson never saw Zhang or Le again and her symptoms remained the same.

On November 14, 2012, Simpson saw Dr. Mark Conover, an oral surgeon, to get another opinion about her symptoms. Conover confirmed the implant base was too large and had damaged a nerve. He explained microsurgery might fix the damage, but there was no guarantee it would work. He also explained her condition would not improve without surgery because any nerve regeneration would have occurred within the first six months. Simpson elected not to have the microsurgery because there was no guarantee it would alleviate her symptoms. Since seeing Conover, Simpson has not seen any other doctor or dentist about her symptoms and her condition has not improved.

On July 7, 2014, Simpson served Zhang with a notice of intent to sue under section 364. She filed this lawsuit on August 15, 2014, alleging a single claim for professional negligence against Zhang.<sup>3</sup> Zhang deposed Simpson, and she testified to the foregoing facts. She also testified that she believed Zhang had done something wrong in performing the implant procedure when she felt the electrical shock as he drilled the socket for the implant base, and also the next day when he repeatedly apologized for using an oversized implant base and damaging the nerve.

Based on this testimony, Zhang moved for summary judgment. He argued section 340.5's one-year limitations period barred Simpson's claim because she discovered, or should have discovered, Zhang's negligence caused her injuries no later than Conover's examination. The trial court agreed, granted Zhang's motion, and later entered judgment.

## II

### DISCUSSION

#### A. *Governing Summary Judgment Principles*

“““The purpose of a summary judgment proceeding is to permit a party to show that material factual claims arising from the pleadings need not be tried because they are not in dispute.”” ( *Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 888 ( *Carlsen* ).) “A ‘motion for 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.’” ( *Id.* at p. 889.)

“A defendant moving for summary judgment bears the initial burden to show the plaintiff's action has no merit. [Citation.] The defendant can meet that burden

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<sup>3</sup> The complaint also named Le and Pacifica Oral & Maxillofacial Surgery as defendants, but they are not parties to this appeal and the record does not disclose the status of Simpson's claims against these defendants.

by either showing the plaintiff cannot establish one or more elements of his or her cause of action or there is a complete defense to the claim.” (*Carlsen, supra*, 227 Cal.App.4th at p. 889.) Although a defendant may show the plaintiff’s claim has no merit by negating a single element of the plaintiff’s claim, a defendant seeking summary judgment based on an affirmative defense must show the undisputed facts support every element of the defense. (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.) “To meet this burden, the defendant must present evidence sufficient to show he or she is entitled to judgment as a matter of law.” (*Carlsen*, at p. 889.)

“Once the defendant meets that burden, the burden shifts to the plaintiff to present evidence establishing a triable issue exists on one or more material facts.” (*Carlsen, supra*, 227 Cal.App.4th at p. 889.) “A triable issue of material fact exists “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.”” (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 631 (*Lawlor*)). “An issue of fact can only be created by a conflict of evidence. It is not created by “speculation, conjecture, imagination or guess work.” [Citation.] Further, an issue of fact is not raised by “cryptic, broadly phrased, and conclusory assertions” [citation], or mere possibilities [citation]. “Thus, while the court in determining a motion for summary judgment does not ‘try’ the case, the court is bound to consider the competency of the evidence presented.” [Citation.]’ [Citation.] Responsive evidence that ‘gives rise to no more than mere speculation’ is not sufficient to establish a triable issue of material fact.” (*Carlsen*, at pp. 889-890.)

“We review de novo a trial court’s ruling on a summary [judgment] motion. [Citation.] “[I]n practical effect, we assume the role of a trial court and apply the same rules and standards that govern a trial court’s determination of a motion for summary [judgment].” [Citation.] “Regardless of how the trial court reached its decision, it falls to

us to examine the record de novo and independently determine whether that decision is correct.”” (Lawlor, supra, 222 Cal.App.4th at p. 631.)

B. *Simpson’s Claim Is Time-Barred*

1. Section 340.5’s Limitations Period

Section 340.5 establishes the limitations period for professional negligence claims against healthcare providers, including dentists. (*Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1391 (*Kitzig*)). The limitations period has two parts. (*Kaplan v. Mamelak* (2008) 162 Cal.App.4th 637, 642.) 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,” or “three years after the date of injury,” “whichever occurs first.” (§ 340.5.) The three-year period is an outside, absolute time limit, but it may be tolled based on fraud, concealment, or the presence of a foreign body inside the plaintiff. (*Ibid.*; *Kaplan*, at p. 642.)

The one-year limitations period is at issue because it is undisputed Simpson filed this action within three years of the dental implant procedure that caused her injury. The one-year period begins when “the plaintiff is aware of her injury and its negligent cause. [Citation.] A plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation or sources open to her.” (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 (*Jolly*), fn. omitted; see *Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1189 (*Drexler*)).

Under this standard, “the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. . . . [T]he limitations period begins once the plaintiff ““has notice or information of circumstances to put a reasonable person *on inquiry* . . . .”” [Citations.] A plaintiff need not be aware of the specific ‘facts’ necessary to establish the claim; that is a process contemplated by pretrial discovery.

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 a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.” (*Jolly, supra*, 44 Cal.3d at pp. 1110-1111; see *Knowles v. Superior Court* (2004) 118 Cal.App.4th 1290, 1299 [“*Jolly*’s discussion of the discovery rule applies to actions involving section 340.5”].)

“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. [Citation.] The first to occur under these two tests begins the limitations period.” (*Kitzig, supra*, 81 Cal.App.4th at p. 1391.)

“[Although] resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper.” (*Jolly, supra*, 44 Cal.3d at p. 1112.)

2. Zhang Presented Evidence Showing Simpson Discovered or Should Have Discovered Her Injury and Its Negligent Cause More Than One Year Before Filing This Lawsuit

Zhang contends section 340.5’s one-year limitations period bars Simpson’s claim because not only would a reasonable person have suspected Zhang’s wrongdoing caused Simpson’s injury more than one year before she filed suit, but she subjectively suspected Zhang negligently performed the surgery more than one year before filing this lawsuit. We agree.

Zhang presented evidence showing he performed Simpson’s dental implant procedure on June 1, 2012. As he drilled the socket for the implant base, Simpson testified she felt an electrical shock. At that point, she believed Zhang had done

something wrong in performing the procedure. After the anesthesia wore off, Simpson grew concerned because she experienced severe pain that did not lessen even when she took pain medication for her numb and tingling jaw.

On June 2, 2012, Simpson returned to Zhang's office to complain about her pain. After reviewing new x-rays, Zhang apologized profusely and admitted the implant base he used was too large and apparently touched or broke a nerve. He explained he thought Simpson was younger than she was and her jaw would support the larger base. Simpson testified Zhang appeared very nervous and unsure of what to do, and eventually agreed to her suggestion to remove the implant base, which Zhang did on June 4, 2012.

Zhang also referred Simpson to Le because Le was an oral surgeon and Zhang believed he would know how to treat Simpson's nerve damage. On June 9, 2012, Le examined Simpson and confirmed the implant base had damaged a nerve in Simpson's jaw. He told her the nerve should heal in about six weeks. Simpson returned to Le on July 20, 2012, after her symptoms did not improve. He told her there was nothing he could do, and she needed to be patient to see if the nerve would heal. He also explained her symptoms would either improve in the next four to six weeks or become permanent. On that same day, Simpson saw Zhang to provide an update on her condition. He again apologized to Simpson, and said his church was praying she would heal.

On November 14, 2012, Simpson saw Conover to obtain another opinion because her symptoms had not improved. Conover confirmed the implant had damaged a nerve, and that it was unlikely her condition would improve on its own because nearly six months had elapsed and any spontaneous return of nerve function would occur within the first six months. He explained she could try microsurgery to repair the nerve, but he could not guarantee the procedure would work. Conover was the last dentist or doctor Simpson saw about her condition, and her symptoms never have improved. She filed this lawsuit on August 15, 2014, or approximately 21 months after she saw Conover.

This evidence satisfies Zhang's initial burden on summary judgment because it shows not only that Simpson actually suspected, but also that a reasonable person would have suspected, Zhang's negligence caused Simpson's injury no later than November 14, 2012. Indeed, well over a year before she filed suit, Simpson had three different dentists or oral surgeons tell her that the implant base Zhang placed in her jaw damaged a nerve, Zhang admitted he had used an oversized implant base and repeatedly apologized for causing Simpson's injury, and Le and Conover told Simpson her nerve damage likely was permanent. Nothing more was required to start the limitations period.<sup>4</sup>

Citing *Kitzig*, Simpson argues her complaints of pain and suspicion that Zhang might have done something wrong were not enough to start the limitations period. Simpson misconstrues *Kitzig* and ignores much of the evidence Zhang presented.

In *Kitzig*, the defendant dentist performed several implant and reconstructive surgeries on the plaintiff over an extended period. Following one of these surgeries, the plaintiff discovered a hole in her sinuses that would allow water and bubbles to come out her nose when she ate or brushed her teeth. The defendant assured her everything was fine, and the plaintiff continued the course of treatment with the defendant. While on a business trip with her husband, the plaintiff consulted another dentist for a second opinion. That dentist confirmed everything looked "okay," and told the plaintiff to return to the defendant to have him close the hole. The plaintiff did so, but

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<sup>4</sup> On July 7, 2014, Simpson served Zhang with a notice of intent to sue under section 364, which requires a plaintiff to serve such notice at least 90 days before filing a lawsuit against a healthcare provider based on professional negligence. Under section 364, subdivision (d), the time to commence the action is extended 90 days if the notice of intent to sue is served within 90 days of the applicable limitations period's expiration. Simpson does not argue this extension applies, and the evidence shows the limitations period expired before any possible extension under this provision.

later sued for malpractice based on a number of other issues. (*Kitzig, supra*, 81 Cal.App.4th at pp. 1387-1390.)

In affirming a judgment for the plaintiff, the *Kitzig* court rejected the contention that the plaintiff's claim was time-barred because she filed it more than one year after she suspected the defendant might have done something wrong and sought a second opinion about the hole in her sinuses. (*Kitzig, supra*, 81 Cal.App.4th at p. 1387.) The appellate court explained this short-lived suspicion was not enough to start the limitations period because the other dentist reassured the plaintiff everything was fine, and the plaintiff was entitled to rely on the defendant's assurances because she remained under his care for additional treatment. (*Id.* at pp. 1392-1394.)

*Kitzig* is inapposite. Here, more than two years before Simpson filed suit, Zhang admitted to her that he used an oversized implant base and damaged her nerve. He also repeatedly apologized to Simpson for doing so. None of the other dentists Simpson consulted told her everything was fine. To the contrary, both Le and Conover confirmed that Zhang's implant procedure damaged a nerve. Le initially told Simpson she would heal if she was patient. The assurance Simpson would heal, however, did not change the fact Zhang had injured Simpson. More importantly, six weeks later Le told Simpson there was nothing he could do to repair that damage, and her condition would improve either in the next four to six weeks or not at all. That time passed without any improvement in Simpson's symptoms. Four months later, and approximately 21 months before Simpson filed this lawsuit, Conover confirmed that Simpson's symptoms likely were permanent. Simpson's suspicion of wrongdoing is much different than the short-lived suspicion in *Kitzig*, and it was sufficient to start the limitations period.

### 3. Simpson Failed to Present Evidence Establishing a Triable Issue

Simpson contends she presented sufficient evidence to establish a triable issue of fact on whether Zhang's misrepresentations about her symptoms delayed the

accrual of her cause of action. According to Simpson, Zhang falsely assured her that her symptoms would resolve over time and she justifiably relied on those assurances because she remained under Zhang's care. In support, Simpson cites one of the separate statements she filed in the trial court, which refers the reader to her declaration. This evidence fails to create a triable issue for several reasons.

First, those assurances are irrelevant to the question of when Simpson's cause of action accrued and the limitations period began to run. As explained above, the period started when Simpson became aware of her injury and its negligent cause. (*Jolly, supra*, 44 Cal.3d at p. 1109; *Drexler, supra*, 4 Cal.App.5th at p. 1189.) That occurred no later than November 14, 2012, after Zhang admitted he used the wrong implant base and damaged Simpson's nerve, Le and Conover confirmed the implant base damaged the nerve, and Le and Conover told Simpson her symptoms likely were permanent because the six-month period in which nerves regenerate had elapsed. Zhang's alleged assurances that Simpson's condition would improve over time does not change Simpson's knowledge that Zhang had damaged her nerve in negligently performing the implant procedure.

Second, any reliance on Zhang's alleged assurances was not reasonable as a matter of law based on the information Simpson received from Le and Conover. Both of them told Simpson that Zhang's implant damaged her nerve, and that her symptoms would improve within the first six months or not at all. Simpson saw Conover approximately six months after Zhang performed the implant procedure, and she then waited an additional 21 months before filing this lawsuit. Simpson contends her reliance was nonetheless reasonable because she remained under Zhang's care until 2014, but the record shows the last service Zhang performed for Simpson was the removal of the implant base on June 4, 2012, and the last time she saw Zhang was on July 20, 2012, when she informed him about her second examination by Le.

Third, Simpson's declaration contradicts her deposition testimony. When asked what Zhang told her about her condition when she complained on June 2, 2012, and when Zhang removed the implant base on June 4, 2012, Simpson did not mention that Zhang assured her the symptoms would resolve over time. To the contrary, she testified Zhang repeatedly apologized for using the wrong implant base, appeared nervous and unsure what to do, and referred her to Le because he would know how to treat her. "[I]n opposing a summary judgment motion, a plaintiff may not create a disputed issue of fact by contradicting his or her deposition testimony with an affidavit or declaration." (*Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 177; see *Archdale v. American Internat. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 473 ["Where a party's self-serving declarations contradict credible discovery admissions and purport to impeach that party's own prior sworn testimony, they should be disregarded"]; *Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1613.)

Simpson also contends evidence Zhang concealed or failed to disclose that the State of California had suspended his "Oral Conscious Sedation Certification" created a triable issue on when her cause of action accrued. Zhang's licensing status, however, has no effect on Simpson's discovery of her injury and its negligent cause. To the extent Simpson sought to state a claim based on Zhang's licensing status, she had to seek leave to amend before the hearing on the summary judgment motion, but failed to do so. Simpson's complaint says nothing about Zhang's license being suspended or revoked, and a party may only oppose a summary judgment motion based on claims alleged in the operative pleading. (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493; *Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264-1265.) If a party seeks to oppose the motion based on an unpleaded claim, the party must seek leave to amend before the hearing or forfeit the claim. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1254; *Distefano*, at pp. 1264-1265.)

At oral argument, Simpson argued section 340.5 did not apply to her claim because Zhang's license to practice dentistry was suspended, and therefore he was not a healthcare provider under section 340.5. This argument fails for two reasons. First, Simpson forfeited it by waiting until oral argument to raise it. Her opening brief does not dispute section 340.5 establishes the governing limitations period and she did not file a reply brief. (*Collins v. Navistar, Inc.* (2013) 214 Cal.App.4th 1486, 1508, fn. 8.) Second, the "license" that was suspended was not Zhang's license to practice dentistry, but rather his "Oral Conscious Sedation Certification." Simpson provides no explanation how the suspension of this certification prevented Zhang from being a healthcare provider, nor does she establish a causal connection between her nerve injury and the suspension of Zhang's certification to use oral conscious sedation.

C. *Zhang's Procedurally Improper Request for Appellate Sanctions is Denied*

In his respondent's brief, Zhang requests that we impose monetary sanctions against Simpson for bringing a frivolous appeal and filing an opening brief that fails to comply with several California Rules of Court.<sup>5</sup> (See § 907; Cal. Rules of Court, rule 8.276.) We deny the request because it is procedurally improper.

A responding party may not make a sanctions request in a respondent's brief. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 919.) Rather, the party must file a separate motion. (*Ibid.*; see *Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 858-859; *Kajima Engineering and Construction, Inc. v. Pacific Bell* (2002) 103 Cal.App.4th 1397, 1402.) Moreover, it must be supported by a

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<sup>5</sup> We agree Simpson's opening brief is deficient in several respects. For example, in addition to its failure to provide a proper statement of facts and citations to the record as described above, Simpson's brief also lacks a statement of appealability (Cal. Rules of Court, rule 8.204(a)(2)(B)) and fails to address the governing standard of review (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465). Simpson did not file a reply brief to address or otherwise attempt to correct any of these deficiencies.

declaration that would enable us to determine the appropriate amount of sanctions. (*Leko v. Cornerstone Bldg. Inspection Service* (2001) 86 Cal.App.4th 1109, 1124.) Zhang filed neither a separate motion nor a supporting declaration.

III

DISPOSITION

The judgment is affirmed. Zhang shall recover his costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.