SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 18
Honorable Shella Deen, Presiding
Farris Bryant, Courtroom Clerk
191 North First Street, San Jose, CA 95113

DATE: June 18, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

****Please specify the issue to be contested when calling the Court and Counsel****

LAW AND MOTION TENTATIVE RULINGS

FOR APPEARANCES: Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. Audio-only appearances are permitted, but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

SCHEDULING MOTION HEARINGS: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion before you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

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https://www.scscourt.org/general_info/court_reporters.shtml

RECORDING IS PROHIBITED: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
1.	23CV410259	John Doe vs Gelareh Homayounfar et al	**Motion to Strike (anti-SLAPP).** The motion was filed and served on Plaintiff, by mail and electronically, on May 8, 2024, at addresses used by Plaintiff in his own May 14, 2024 filed Proof of Service. Any opposition was due to be filed by June 5, 2024. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Moving parties meet their burden of proof. Good cause appearing, the Motion is GRANTED. Moving parties shall prepare a formal order after hearing.

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LAW AND MOTION TENTATIVE RULINGS

2.	24CV434418	MULJADI CHANDRA vs JEFF CURRAN et al	**Motion to Quash**. The motion was filed and served on Plaintiff, by mail and electronically, on May 6, 2024 (Proof of Service, filed May 6, 2024). Any opposition was due to be filed by June 5, 2024. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Moving parties meet their burden of proof. Good cause appearing, the Motion is GRANTED. Moving parties shall prepare a formal order after hearing.
3.	21CV382651	Gregory Gilbert, MD vs Stanford Health Care et al	**Motion for Summary Judgment.** This motion has been reset to November 14, 2024 (May 14, 2024 Minute Order).
4.	22CV402289	Jordin Simons et al vs Kenneth Follmar II, DDS et al	**Motion for Summary Judgment.** Scroll down to Line 4 for Tentative Ruling.

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LAW AND MOTION TENTATIVE RULINGS

5.	21CV392439	Joetta Vest vs Costco Wholesale Corporation et al	**Motion for Protective Order.** Defendant Costco Wholesale Corporation does not seek to withhold documents from production but seeks a single tier protective order to avoid the disclosure of its proprietary and confidential information outside of this litigation. A court ordered protective order may include directions that "a trade secret or other confidential research, development, or commercial information not be disclosed, or be disclosed only to specified persons or only in a specified way." (Code Civ. Proc., §2031.060 (b) (5), Evidence Code §1060 and Civil Code §3426 et seq.). Good cause appearing, the Motion is GRANTED. Moving party shall prepare a formal order after hearing and prepare a Protective Order that conforms with the Model Protective Order on this court's website.

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LAW AND MOTION TENTATIVE RULINGS

6.	23CV425715	Rita Gutierrez vs General Motors LLC et al	**Motion to Compel.** See Court's ruling of June 13, 2024: Motions to Compel (1) Form Interrogatories, (2) Requests for Admission, (3) Requests for Production of Documents, and (4) Special Interrogatories. All four motions are CONTINUED to August 6, 2024, at 9 a.m. in Department 18. Thus far Plaintiff's meet and confer "efforts" do not appear to be reasonable or in good faith. As such, the parties are ordered to conduct good faith, reasonable and meaningful meet and confers, either in person, by phone or video conference, to try to narrow the many issues in these motions. If any issues remain after the meet and confer efforts, which may span several sessions, the parties shall file an updated joint statement no later than July 23, 2024, which shall identify the remaining items in dispute and the reasons why further responses should/should not be compelled. Moving party to prepare the formal order after hearing.
7.	23CV425715	Rita Gutierrez vs General Motors LLC et al	**Motion to Compel.** See ruling in Line 6 above.
8.	20CV366400	Maria Elena Benitez et al vs Michelle Rodriguez et al	**Motion for Reconsideration.** This motion will be heard by Judge Takaichi on July 18, 2024 at 10:00 a.m. in Dept. 2.

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LAW AND MOTION TENTATIVE RULINGS

9.	22CV393277	Second Osborn LLC vs Le Garden HB, LLC	**Motion for Protective Order and Sanctions**. It is unclear to the Court if this motion has been resolved by the entry of the Protective Order on May 7, 2024. Parties to appear.
10.	22CV402218	Dolores Mattson vs Adi De La Zerda et al	**Motion to Withdraw as attorney**. Parties to appear.
11.	22CV402218	Dolores Mattson vs Adi De La Zerda et al	**Hearing re: Compromise**. Parties to appear.
12.	22CV402218	Dolores Mattson vs Adi De La Zerda et al	**Hearing: Dismissal after Settlement**. Parties to appear.

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LAW AND MOTION TENTATIVE RULINGS

13.	23CV423952	Santa Clara Valley Transportation Author vs Lenzen Associates, LLC, a California limited liability company et al	**Application for Withdrawal of Deposit of Probable Just Compensation.** Before the Court is an application by Defendant Lenzen Associates, LLC. to withdraw the probable just compensation of $369,000 deposited in this eminent domain proceeding. In its opposition, Plaintiff Santa Clara Valley Transportation Authority identified *other* defendants that may claim an interest or compensation in this action (those defendants included the City of San Jose, Wells Fargo Bank, Bank of America, PRLAP, Inc., Federal Home Loan Mortgage Corporation and the County of Santa Clara.) On June 6, 2024, the City of San Jose, filed a notice of non-opposition to the application. However, the remaining defendants were not served with the application to allow them to oppose or consent to the application, though they appear to have been served with summons in this action. Parties to appear to clarify the interests and claims of the named defendants, other than the City of San Jose.
14.	24CV434290	Manuel Panilag vs Armando Contreras et al	**Petition Compel Arbitration.** Scroll down to Line 14 for Tentative Ruling.

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LAW AND MOTION TENTATIVE RULINGS

15.	23CV424871	LEVEL 5 SECURITY, INC. vs JULIE PUGA	**Motion for Sanctions.** Plaintiff seeks terminating, issue, evidence, deemed admitted, and monetary sanctions for Defendant's failure to comply with this Court's April 12, 2024 order ("Order"), which ordered Defendant to serve "complete and compliant responses" to Plaintiff's discovery. The Order does not compel any further production of *documents* by Defendant, but only compels further *responses* to Plaintiff's discovery. Defendant's argument that she "has produced all" of her documents is irrelevant. Plaintiff appears to take issue with the factual veracity of Defendant's responses, which is also irrelevant for the purposes of this motion and, indeed, the underlying discovery motion. However, Defendant must comply with the Order by serving full and complete, code complaint responses – this includes answering all subparts of a request and adhering to the instructions for responding to discovery set forth in Code Civ. Proc., §§ 2030 et seq. The Court does not find willful disobedience, a repeated or chronic delay by Defendant or that Plaintiff has been prejudiced. As such, Plaintiff's motion for terminating, issue, evidence and deemed admitted sanctions is DENIED. Defendant is ordered to comply with the Order within 5 calendar days of the service of this order; failure to do so may result in more severe sanctions, upon application by Plaintiff. Good cause appearing, Plaintiff is awarded monetary sanctions in the amount of $1500 to be paid by Defendant, also within 5 calendar days of the service of this order. (Code Civ. Proc., § 2023.030 (a)). Moving party to prepare the formal order.

Calendar Line 4
Case Name: *Jordin Simons, et al. v. Kenneth Earl Follmar II, DDS, et al.*
Case No.: 22CV402289

Before the court is defendants' motion for summary judgment. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

I. Background.

On February 23, 2021, plaintiff Jordin Simons ("Simons") consulted the dental office of defendant Kenneth Earl Follmar II, DDS ("Dr. Follmar") for extraction of her wisdom teeth at the recommendation of her general dentist. (Complaint, ¶10.)

On March 4, 2021, defendant Dr. Follmar extracted plaintiff Simons's wisdom teeth numbers 1, 16, 17, and 32. (Complaint, ¶11.) Following extraction, plaintiff Simons suffered severe pain followed by numbness of her tongue and loss of taste. (*Id.*) At the March 11, 2021 post-operative visit, plaintiff Simons informed defendant Dr. Follmar of her complaints of tongue numbness, diminished taste, and pain in the lower left extraction site. (*Id.*) Defendant Dr. Follmar reassured plaintiff Simons that her complaints would go away with time. (*Id.*)

On May 13, 2021, plaintiff Simons was seen by defendant Dr. Follmar for a further post-operative visit regarding her complaints of tongue numbness, diminished taste, electrical shock sensation in her lower gums and along the sides of her tongue, and speech impediment. (*Id.*) Defendant Dr. Follmar could not explain the cause of plaintiff Simons's complaints and incorrectly advised plaintiff Simons that her complaints were due to other medical conditions and/or medications. (*Id.*)

Defendant Dr. Follmar and his staff negligently diagnosed, planned treatment, and extracted plaintiff Simons's wisdom teeth and negligently failed to refer plaintiff Simons to a nerve repair specialist. (Complaint, ¶11.) As a result, plaintiff Simons suffered permanent injury and her condition worsened. (Complaint, ¶¶13, 15 – 17.)

On August 1, 2022, plaintiffs Simons and her husband, Joseph Dutra ("Dutra") (plaintiffs Simons and Dutra are hereafter collectively referred to as "Plaintiffs"), filed a complaint against defendants Dr. Follmar and Kenneth Earl Follmar II, DDS, Inc. (collectively, "Defendants") asserting causes of action for:

(1) Professional – Dental/Medical Negligence

(2) Loss of Consortium [by plaintiff Dutra]

On November 10, 2022, Defendants jointly filed an answer to the plaintiffs' complaint.

On February 22, 2024, Defendants filed the motion now before the court, a motion for summary judgment.

II. Defendants motion for summary judgment is GRANTED.

A. Statute of limitations.

Defendants move for summary judgment on the ground that Plaintiff's claims[1] are barred by the statute of limitations found at Code of Civil Procedure section 340.5, which states, 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."

Section 340.5[2] was enacted as part of the Medical Injury Compensation Reform Act ("MICRA"), the goal of which was to "sharply reduce[]" the limitations period for medical malpractice plaintiffs in order to "restrict the flow of medical malpractice lawsuits which were threatening the continued efficient delivery of healthcare to Californians." (*Roberts v. County of Los Angeles* (2009) 175 Cal.App.4th 474, 481.) MICRA therefore expresses a clear legislative policy that the statute of limitations is a favored defense in medical malpractice suits. Pursuant to its goal of limiting medical malpractice lawsuits, the Legislature codified in section 340.5 the former one year statute of limitations applicable to wrongful death suits, and added to it an ultimate three year statute of repose. (*Larcher v. Wanless* (1976) 18 Cal.3d 646, 657-658 (*Larcher*).)

Defendants contend the one-year statute of limitation period from section 340.5 applies here.

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[1] "While the losses for which damages are sought in a consortium action may properly be characterized as 'separate and distinct' from the losses to the physically injured spouse [Citation.], the former are unquestionably dependent, legally as well as causally, on the latter. One spouse cannot have a loss of consortium claim without a prior disabling injury to the other spouse." (*Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 999; see also *Danieley v. Goldmine Ski Associates* (1990) 218 Cal.App.3d 111, 119.) Plaintiff Dutra's loss of consortium second cause of action is, therefore, dependent upon plaintiff Simons's first cause of action for professional negligence.

[2] All further statutory references shall be to the Code of Civil Procedure unless otherwise specified.

The one-year period commences when the plaintiff is aware of both the physical manifestation of the injury and *its negligent cause*. [Citations and footnote omitted.]

Our Supreme Court has often discussed the one-year rule's requirement of discovery of the negligent cause of injury. ***When a plaintiff has information which would put a reasonable person on inquiry, when 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.*** "Possession of 'presumptive' as well as 'actual' knowledge will commence the running of the statute."[3] (*Sanchez v. South Hoover Hospital*, *supra*, 18 Cal.3d at pp. 101-102; accord *Jolly v. Eli Lilly & Co.*, *supra*, 46 Cal.3d at pp. 1110-1111; *Gutierrez v. Mofid*, *supra*, 39 Cal.3d at pp. 896-897.) [Footnote omitted.] The plaintiff's ignorance of the identity of the defendant wrongdoer does not toll the one-year period. (*Jolly*, *supra*, at p. 1114; *Gutierrez*, *supra*, at p. 899.)

"***Under the discovery rule, 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***. . . . A plaintiff need not be aware of the specific 'facts' necessary to *establish* the claim [such as failure to test, failure to warn, failure to diagnose]; 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

[3] Accord, *Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1391 (*Kitzig*)—"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. (*Jolly v. Eli Lilly & Co.*, *supra*, 44 Cal. 3d at p. 1110.) The first to occur under these two tests begins the limitations period."

facts; *she cannot wait for the facts to find her*." (*Jolly v. Eli Lilly & Co., supra,* 44 Cal.3d at pp. 1110-1111, italics added.)

(*Rose v. Fife* (1989) 207 Cal.App.3d 760, 768 – 769; italics original; emphasis added.)

According to Defendants, plaintiff Simons's testimony establishes that she suspected her injury was caused by some wrongdoing, i.e., that plaintiff Simons suspected that Dr. Follmar had done something wrong to her, and that this suspicion arose no later than May 13, 2021. Since plaintiff Simons did not send Defendants a "Notice of Intention to Bring Legal Action" until more than one year later, on May 31, 2022, and did not commence this action until August 1, 2022, Defendants contend the action is barred.

To support this argument, Defendants proffer the following evidence: On March 4, 2021, defendant Dr. Follmar extracted plaintiff Simons's wisdom teeth.[4] Plaintiff Simons returned to see defendant Dr. Follmar for a post-operative appointment on March 11, 2021.[5] As of her March 11, 2021 post-operative appointment with defendant Dr. Follmar, plaintiff Simons had begun experiencing various symptoms, including the loss of taste, numbness, and burning/ tingling on 2/3 of her tongue, and electrical shocks along the bottom of her gum line or bottom jaw.[6] As of her March 11, 2021 post-operative appointment with defendant Dr. Follmar, plaintiff Simons attributed the various symptoms she was experiencing (loss of taste, numbness, electrical shocks) to the extraction of her wisdom teeth by Dr. Follmar.[7]

Plaintiff Simons returned to see Dr. Follmar for another post-operative appointment on May 13, 2021.[8] Other than the initial post-operative swelling going away, plaintiff Simons symptoms had not improved between March 11, 202 and May 13, 2021.[9] Plaintiff Simons and her husband, plaintiff Dutra, were "concerned" and "worried" about plaintiff Simons's symptoms on May 13, 2021.[10] As of her May 13, 2021 post-operative appointment with defendant Dr. Follmar, plaintiff Simons felt her symptoms were "there to stay" or going to be

[4] See Separate Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment ("Defendants' UMF"), Fact No. 1.
[5] See Defendants' UMF, Fact No. 2.
[6] See Defendants' UMF, Fact No. 3.
[7] See Defendants' UMF, Fact No. 4.
[8] See Defendants' UMF, Fact No. 5.
[9] See Defendants' UMF, Fact No. 6.
[10] See Defendants' UMF, Fact No. 7.

"more long-term."[11] As of her May 13, 2021 post-operative appointment with defendant Dr. Follmar, plaintiff Simons had told plaintiff Dutra that "[s]he wondered if during the procedure, a mess-up happened, a nerve was damaged, and she wondered if the medication that put her asleep, if there was an error in that."[12] Plaintiff Dutra shared in plaintiff Simons's concern that something had gone wrong during the procedure and they had conversations "on a daily basis" about the "constant kind of issues throughout the day that she would experience."[13]

At her May 13, 2021 post-operative appointment with defendant Dr. Follmar, plaintiff Simons did not believe what she was being told by defendant Dr. Follmar regarding why she was experiencing the symptoms she had, "[i]t definitely crossed [her] mind" that defendant Dr. Follmar was hiding something from her, and she had a "red flag" and "cause for alarm."[14]

Based upon defendant Dr. Follmar's conduct at her May 13, 2021 post-operative appointment, plaintiff Simons wanted to seek a second opinion "to get some treatment for her symptoms [she] was experiencing or see if something may have been wrong."[15] At this time, plaintiff Simons was "not entirely sure if a mistake had been made or something had gone wrong," but "[i]t just didn't seem – something was off and [she] kind of went on that instinct."[16] Plaintiff Simons did not want to return to see defendant Dr. Follmar following her May 13, 2021 appointment with him.[17] May 13, 2021 was plaintiff Simons's last appointment with defendant Dr. Follmar.[18]

Plaintiffs sent Defendants their "Notice of Intention to Bring Legal Action" on May 31, 2022.[19] Plaintiffs' complaint was filed on August 1, 2022 alleging a cause of action for professional (dental/ medical) negligence on behalf of plaintiff Simons and a cause of action for loss of consortium on behalf of plaintiff Dutra.[20]

In opposition, Plaintiffs do not dispute section 340.5 is the applicable statute of limitations. Plaintiffs do, however, take issue with when the cause of action accrued arguing

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[11] See Defendants' UMF, Fact No. 8.
[12] See Defendants' UMF, Fact No. 9.
[13] See Defendants' UMF, Fact No. 10.
[14] See Defendants' UMF, Fact No. 11.
[15] See Defendants' UMF, Fact No. 12.
[16] See Defendants' UMF, Fact No. 13.
[17] See Defendants' UMF, Fact No. 14.
[18] See Defendants' UMF, Fact No. 15.
[19] See Defendants' UMF, Fact No. 16.
[20] See Defendants' UMF, Fact Nos. 17 – 18.

that plaintiff Simons was not aware of the negligent cause of her injuries until some time on or after June 9, 2021[21] when plaintiff Simons consulted with Peter Lyu, DDS, an oral and maxillofacial surgeon, who told plaintiff Simons that what she was experiencing was "not normal."[22] Plaintiff Simons avers in her declaration with regard to the May 13, 2021 second post-operative consultation, "I did not think that Dr. Follmar had done anything wrong or had any reason to suspect any wrongdoing by him."[23] However, plaintiff Simons's declaration appears to contradict her own deposition testimony. "A party cannot evade summary judgment by submitting a declaration contradicting his own prior deposition testimony." (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1120.)

In her deposition testimony, particularly page 61, line 4 through page 64, line 20, plaintiff Simons was asked about the May 13, 2021 second post-operative consultation. Plaintiff testified that she described her "ongoing nerve issues" and "nerve pain" to Dr. Follmar, but that Dr. Follmar did not believe her, was "dismissive," and "on the defensive." Plaintiff Simons testified that Dr. Follmar's responses gave her "cause for alarm," "really bothered" her, and raised a "red flag" because Dr. Follmar attributed plaintiff Simons's symptoms to her "medications, diabetes or metal fillings" when plaintiff Simons knows she does "not have diabetes or metal fillings." This caused plaintiff Simons to distrust what Dr. Follmar had been saying and to think that Dr. Follmar had been hiding something from plaintiff Simons. Of most significance, plaintiff Simons's deposition testimony included the following exchange at page 60, lines 1 – 20:

> Q: At this May 2021 appointment did you think Dr. Follmar was hiding something from you?
>
> A: It definitely crossed my mind and it made me want to seek a second opinion if, for anything else, to get some treatment for the symptoms I was experiencing or see if something may have been wrong. I don't know.

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[21] Pursuant to section 364, subdivision (d), plaintiffs' service of a notice of intention to commence an action upon Dr. Follmar, if done within 90 days ***prior to*** the expiration of the statute of limitations, extends the time to commence the action by 90 days. There is no dispute plaintiff served Dr. Follmar with a notice of intention to bring legal action on May 31, 2022. The issue turns on whether plaintiff's claim accrued on May 13, 2021 as Defendants assert or on or after June 9, 2021 as Plaintiffs assert.

[22] See ¶¶12 – 14 of Plaintiff Jordin Simons' Declaration in Support of her Opposition to Defendants' Motion for Summary Judgment ("Declaration Simons").

[23] See ¶9 of the Declaration Simons.

Q: At the May 2021 appointment based on what Dr. Follmar was saying and his attitude of being defensive, slightly aggressive and so forth, did you think that something may have gone wrong with the extractions?

A: I wasn't entirely sure if a mistake had been made or something had gone wrong. It just didn't seem – something was off and I kind of went on that instinct.

Q: You used the word red flags or alarms.

A: That's correct.

Q: And you wanted to get a second opinion to see what was going on?

A: That's correct.

In the court's view, this deposition testimony by plaintiff Simons is evidence of "actual suspicion by the plaintiff that the injury was caused by wrongdoing." Plaintiff Simons suggests in opposition that her testimony is equivocal with regard to whether she suspected wrongdoing because in her testimony, plaintiff Simons testified she "wasn't entirely sure if a mistake had been made or something had gone wrong." However, the statute of limitations is not triggered only after plaintiff acquires some level of certainty. As explained above, the statute of limitations commences upon plaintiff's ***suspicion*** of wrongdoing. The evidence before the court is that plaintiff Simons held such a suspicion.

In her opposition, plaintiff Simons attempts to fit within the holding in *Kitzig*, *supra*, 81 Cal.App.4th at p. 1393 where the court wrote:

> it is not the law that a person who obtains a second medical opinion while under the care of her personal physician and the second physician confirms that her physician is "doing nothing wrong" and then she continues her treatment with her physician, is under an obligation--as a matter of law--to bring suit within one year. Although the subjective prong of the discovery rule requires merely a suspicion " 'that someone has done something wrong' to him" (*Norgart v. Upjohn Co.*, *supra*, 21 Cal. 4th at p. 397), a 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." (*Sanchez v. South Hoover Hospital* (1976) 18 Cal. 3d

93, 102 [132 Cal. Rptr. 657, 553 P.2d 1129]; *Unjian v. Berman* (1989) 208 Cal. App. 3d 881, 886 [256 Cal. Rptr. 478].) While this reliance may not be justified if the patient actually suspects wrongdoing (see *Sanchez v. South Hoover Hospital*, *supra*, 18 Cal. 3d at p. 102), this suspicion must be meaningful by having some effect on the patient's ongoing relationship with her doctor. (See *Brown v. Bleiberg* (1982) 32 Cal. 3d 426, 438, fn. 9 [186 Cal. Rptr. 228, 651 P.2d 815]; see also *Kilburn v. Pineda* (1982) 137 Cal. App. 3d 1046, 1048-1050 [187 Cal. Rptr. 548].)

Here, however, the evidence before the court is that plaintiff Simons did ***not*** rely on Dr. Follmar. As summarized above, Dr. Follmar's dismissed plaintiff Simons's symptoms, denied wrongdoing, and attributed plaintiff's symptoms to reasons other than his own negligence, all of which led to plaintiff's disbelief. The evidence before the court is that plaintiff Simons did have an actual suspicion of wrongdoing and that such suspicion led to a breakdown of the relationship between plaintiff Simons and Dr. Follmar. (See Defendants' UMF, Fact Nos. 14 – 15.) Plaintiff's assertion in opposition that Dr. Follmar had not actually discharged her does not controvert Defendants' evidence that Plaintiff did not want to and did not, in fact, return to see Dr. Follmar after the May 13, 2021 post-operative visit.

Plaintiff Simons also attempts to create a triable issue by presenting evidence that under an objective test, a reasonable person in her circumstances would NOT have suspected the injury was caused by wrongdoing. However, by Plaintiffs' own acknowledgment in citing to *Kitzig* (see fn. 3, *supra*), an objective test is of no consequence if it is established that plaintiff had a subjective or actual suspicion of wrongdoing. Similarly, Plaintiffs' reliance on *Artal v. Allen* (2003) 111 Cal.App.4th 273 (*Artal*) is misplaced since *Artal* also concerns the adequacy of evidence to support a finding that the one-year statute of limitations of section 340.5 accrued under an *objective* test.

For all the reasons discussed above, Defendants' motion for summary judgment is GRANTED.

The Court will prepare the formal order.

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Calendar Line 14
Case Name: *Manuel Panilag vs Armando Contreras et al*
Case No.: 24CV434290

Defendants petition this court to compel arbitration and stay this action. The party moving to compel arbitration bears the burden of establishing the existence of a valid agreement to arbitrate, and the party opposing arbitration bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. The role of the trial court is to sit as a trier of fact, weighing any affidavits, declarations, and other documentary evidence, together with oral testimony received at the court's discretion, to reach a determination on the issue of arbitrability. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413–414.) "[C]laims of fraud in the execution of the entire agreement are not arbitrable under either state or federal law. If the entire contract is void *ab initio* because of fraud, the parties have not agreed to arbitrate any controversy; under that circumstance, a court is not required to order arbitration. (*Id.* 416, 417.) "The determination of arbitrability is a legal question subject to de novo review. [Citation omitted.] We will uphold the trial court's resolution of disputed facts if supported by substantial evidence. [Citation omitted.]" *Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1277.)

Plaintiff asserts that he lacked capacity to consent because of dementia, he was defrauded into thinking he was getting a loan modification rather than transferring his title, the contract was unconscionable, and that his signature is a forgery.

Both parties have submitted evidence. Defendants submit evidence disputing and calling into question whether Plaintiff has/had dementia. The court resolves this factual dispute in favor of Plaintiff; it is supported by substantial evidence in the form of Plaintiff's declaration, Plaintiff's daughter's (Jean Ng) declaration, and Plaintiff's doctor's declaration (Dr. Peter L. Nguyen). Defendants' objections to the declarations submitted in support of Plaintiff's opposition are overruled. Sufficient competent evidence has been presented by Plaintiff to support the conclusion that Plaintiff has/had dementia and, thus, the inability to consent. As such, the motion to compel arbitration and stay this litigation is DENIED.

Plaintiff to prepare the order following hearing.

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