SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 3
Honorable William J. Monahan, Presiding
Allison Croft, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2130

DATE: 4/9/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (4/8/2024) you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to **Department 3**.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: 408-882-2430 When you can call: Monday to Friday, 8:30 am to 12:30 pm

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) **Please Note:** Any proposed orders must be submitted with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet). Please include the date, time, dept. and line number.

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	18CV332043	CREDITORS ADJUSTMENT BUREAU, INC. vs SILICON VALLEY TAXI DRIVERS INC. et al	Hearing: Order of Examination ("OEX") of Seyoum Asrat, CEO of Silicon Valley Taxi Drivers, Inc. aka Silicon Valley Taxi Drivers, Inc. dba Green Cab ADBA Golden Star ADBA San Jose City Cab ***C/F 9-29-22, 11-15-22, 2-07-23 & 5-04-2023, 09/12/2023, 10/12/2023 M/O ***, c/f 1/30/24 **Appear in person** (not by Teams). NOTE: OEX witness needs an **Amharic Interpreter.** It was requested for this hearing**.**

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LINE 2	21CV381415	CREDITORS ADJUSTMENT BUREAU, INC. vs CAMPBELL DRY INC.	Hearing: Order of Examination of Jose Cahue, CEO of Campbell Dry Inc. aka Campbell Dry, Inc dba Pegasus Refinishing (per order filed on 2/20/2024 signed by Judge Monahan) OFF-CALENDAR. No proof of service.
LINE 3	23CV417527	Samantha Heinz vs Maryam Mottahed et al	Hearing: Demurrer to the First Amended Complaint by Defendants Maryam Mottahed, et al Ctrl Click (or scroll down) on Line 3 for tentative ruling. The court will prepare the order.
LINE 4	24CV429513	Valarie Phillips vs Chloe Young et al	Hearing: Demurrer to the Complaint by Defendants Chloe Young, Denise Buckner, Nuzhat Shaikh, and Yvette Carpenter Notice of NON-OPPOSITION to Demurrer filed 4/2/2024; Demurrer remains Unopposed and is SUSTAINED with 15 days Leave to Amend.
LINE 5	21CV381412	Irma Soto vs Eduardo Alguera et al	Motion: Compel depo and requests for sanctions by Defendants Defendants M&B Restaurant, Inc.; M&B Restaurant, Inc. dba Carl's Jr.; Mike Boparai; Eduardo Alguera; and Martha Rios (collectively "Defendants")' motion to compel the deposition of plaintiff Irma Soto ("Plaintiff") is GRANTED. Plaintiff has **agreed to appear** for her deposition **on April 26, 2024,** as noticed [in the March 7, 2024, amended notice of deposition by Defendants' counsel] and is ordered to do so**.** Defendants request for monetary sanctions (against Plaintiff and her counsel jointly and severally) is DENIED. The court finds that the one(s) subject to the sanctions acted with substantial justification or that other circumstances make the imposition of sanctions unjust. The court will prepare the order.

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LINE 6	23CV410964	Greg Marinec et al vs Estate of Juan Leyva	Hearing: Compromise of Minor's Claim for Samantha Marinec in accordance with the Petition filed 2/23/2024. Good cause appearing, GRANTED. The court notes that there was a typographical error in the total costs at the bottom of page 5 of the petition where it states total costs were $478.98. However, the correct number for total costs is **$417.98**. This typographical error did not continue on the other pages of the petition. Moving party to submit the proposed order approving compromise of the claim (which has the correct total for costs is $417.98) and the proposed order to deposit funds in blocked account. NOTE: Any proposed orders must be submitted with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet). Please include the date, time, and dept. for this motion on any proposed order.
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Case Name: *Samantha Heinz v. Skin Refine Medspa, et al.*
Case No.: 23-CV-417527

Demurrer to the First Amended Complaint by Defendants Skin Refine Medspa and Maryam Mottahed

Factual and Procedural Background

This is a medical negligence case by plaintiff Samantha Heinz ("Plaintiff") against defendants Skin Refine Medspa ("Medspa") and Maryam Mottahed ("Nurse Mottahed") (collectively, "Defendants").

According to the first amended complaint ("FAC"), on October 8, 2021, Plaintiff purchased a laser hair removal therapy treatment course at Medspa, consisting of six "bikini Brazilian" treatments and six "upper leg" treatments. (FAC at ¶ 6.) On April 12, 2022, Plaintiff attended her fourth treatment of laser hair removal therapy where Nurse Mottahed was available to treat her. (Id. at ¶ 7.) Plaintiff was burned during her laser treatment and left her appointment early. (Id. at ¶¶ 10-16.) The employees at the front desk told Plaintiff that Nurse Mottahed's conduct was just an accident and provided her with the contact information for MedSpa Director Teri Wilson ("Ms. Wilson"). (Id. at ¶ 16.)

On April 14, 2022, Plaintiff attended an appointment with Nurse Corres who documented the burn but did not inform Plaintiff to the degree that she had been burned. (FAC at ¶ 18.) Nurse Corres recommended that Plaintiff apply a prescription cream to the affected area of her leg. (Ibid.) Ms. Wilson later confirmed that the cream would be paid for by Medspa and provided to Plaintiff for free. (Id. at ¶ 19.)

On May 27, 2022, Ms. Wilson texted Plaintiff, "Hi Samantha, I'm confirming that we agreed to give you a full refund." (FAC at ¶ 21.)

On June 14, 2022, Plaintiff attended an appointment with her dermatologist, Doctor Harvey Chahal ("Dr. Chahal"). (FAC at ¶ 24.) During her appointment, Dr. Chahal examined the affected area on Plaintiff's leg and reviewed pictures she took during the healing process. (Ibid.) Dr. Chahal determined that the burn was a deep second degree and possibly a third-degree burn. (Ibid.) Plaintiff has never been burned worse than a sunburn, and only understood the true nature of her injury when Dr. Chahal explained it to her. (Ibid.) Plaintiff only understood she had been harmed in a way that was more than nominal after visiting Dr. Chahal. (Id. at ¶ 25.)

In May 2023, Plaintiff reached out to Medspa and spoke with Ms. Wilson about receiving the refund that she was promised. (FAC at ¶ 26.) Ms. Wilson told Plaintiff that only after she signed the "release paperwork" would she be issued a "a full refund for 4 treatments." (Ibid.) During negotiations, Ms. Wilson believed that Medspa providing the cream should be considered a partial payment of damages made as an accommodation to Plaintiff. (Ibid.) Ms. Wilson eventually agreed to authorize a refund for all treatments. (Ibid.)

On June 7, 2023, Plaintiff traveled to Medspa to review and sign what had been conveyed to her as termination of their client clinic relationship. (FAC at ¶ 27.) In reality, the paperwork was a settlement agreement. (Ibid.) As Plaintiff read the paperwork, she noticed a clause that would prohibit her from communicating about her experience at Medspa. (Ibid.) She inquired about the clause and Ms. Wilson told her that it was just boilerplate and Medspa had never enforced it. (Ibid.) Plaintiff asked for the clause to be removed and Ms. Wilson said she would get back to her. (Ibid.)

Ms. Wilson thereafter told Plaintiff the clause could not be removed and that if she wanted a refund, then she would need to accept the condition. (FAC at ¶ 28.) When Plaintiff stated she would not sign the agreement with the speech restriction, Ms. Wilson told her that the statute of limitations had run and she should consider the settlement generous. (Ibid.) This was the first time that Plaintiff was informed of the one-year statute of limitations. (Ibid.) Plaintiff was not informed in writing in accordance with Insurance Code section 11583. (Ibid.)

On June 14, 2023, Plaintiff filed a complaint against Defendants alleging a single cause of action for medical negligence.

On October 26, 2023, Defendants filed a demurrer to the complaint on the ground that the pleading was barred by the statute of limitations under Code of Civil Procedure section 340.5. The demurrer was scheduled for hearing on January 16, 2024. Neither side appeared at the hearing nor contested the tentative ruling. Thus, this court adopted the tentative ruling as its final order and sustained the demurrer with leave to amend.

On February 6, 2024, Plaintiff filed the operative FAC against Defendants asserting medical negligence.

On March 5, 2024, Defendants filed the motion presently before the court, a demurrer to the FAC. Defendants submitted a request for judicial notice in conjunction with the motion. Plaintiff filed written opposition. Defendants filed reply papers.

A further case management conference is set for May 14, 2024.

Demurrer to the FAC

Defendants argue the FAC is time barred by the statute of limitations under Code of Civil Procedure section 340.5.

Request for Judicial Notice

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.)

In support of the demurrer, Defendants request judicial notice of the original complaint, FAC, and this court's order sustaining the demurrer to the complaint. The court may take judicial notice of these exhibits as records of the superior court under Evidence Code section

452, subdivision (d). (See *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].)

Accordingly, the request for judicial notice is GRANTED.

Legal Standard

"In reviewing the sufficiency of a complaint against a general demurer, we are guided by long settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213–214.)

"The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. … [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 850.)

Statute of Limitations

A statute of limitations prescribes the period "beyond which a plaintiff may not bring a cause of action. [Citations.]" (*Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4th 797, 806.) It "strikes a balance among conflicting interests. If it is unfair to bar a plaintiff from recovering on a meritorious claim, it is also unfair to require a defendant to defend against possibly false allegations concerning long-forgotten events, when important evidence may no longer be available." (*Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797.)

"A plaintiff must bring a claim within the limitations period after accrual of the cause of action. In other words, statutes of limitation do not begin to run until a cause of action accrues. Generally speaking, a cause of action accrues at the time when the cause of action is complete with all its elements." (*V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 509-510, internal citations and quotation marks omitted.)

Although the statute of limitations is a factual issue, it can be subject to demurrer if the pleading discloses that the statute of limitations has expired regarding one or more causes of action. (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 962.) If a demurrer demonstrates that a pleading is untimely on its face, it becomes the plaintiff's burden "even at the pleading stage" to establish an exception to the limitations period. (*Aryeh v. Cannon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1197.)

A court may sustain a demurrer on the ground of failure to state sufficient facts if "the complaint shows on its face the statute [of limitations] bars the action." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315 (*E-Fab, Inc.*).) A demurrer is not sustainable if there is only a possibility the cause of action is time-barred; the statute of limitations defense must be clearly and affirmatively apparent from the allegations in the pleading. (*Id.* at pp. 1315-1316.)

When evaluating whether a claim is time-barred, a court must determine (1) which statute of limitations applies and (2) when the claim accrued. (*E-Fab, Inc., supra,* 153 Cal.App.4th at p. 1316.)

Analysis

Like the prior demurrer, both sides acknowledge that the current action for medical negligence is governed by the statute of limitations under Code of Civil Procedure section 340.5. That section 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…" (Code Civ. Proc., § 340.5.)

Again, both sides concede the one-year limitations period, as opposed to the three-year period, applies to the facts of this case. Thus, according to statute, the patient must bring suit within one year after he discovers, or should have discovered the injury.

The one-year limitation period begins when the plaintiff discovers both his injury and its negligent cause. (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1189.) "Thus, once a patient knows, or by reasonable diligence should have known, that he has been harmed through professional negligence, he has one year to bring his suit." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 896 (*Gutierrez*).)

"A patient 'is charged with "presumptive" knowledge of his negligent injury, and the statute commences to run, once he has " 'notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his investigation… .'" ' [Citation.] 'It is irrelevant that the plaintiff is ignorant of his legal remedy or the legal theories underlying his cause of action.' [Citation.]" (*Carrillo v. County of Santa Clara* (2023) 89 Cal.App.5th 227, 235.) Instead, a plaintiff discovers the cause of action when he simply suspects someone has done something wrong to him in accordance with a "lay understanding," not in any technical sense. (*Nogart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398; see *Gutierrez, supra,* 39 Cal.3d at p. 898 ["[I]f one has suffered appreciable harm and knows or suspects that professional blundering is its cause, the fact that an attorney has not yet advised him does not postpone commencement of the limitations period."].)

Like the prior demurrer, Defendants argue Plaintiff became aware of her burns received during her laser treatment by Nurse Mottahed on April 12, 2022, the day of her appointment. (See Demurrer at p. 5:22-25.) Since the original complaint was not filed until June 23, 2023, Defendants assert the action is time-barred by the one-year statute of limitations under section 340.5.

But, " 'the term "injury," as used in section 340.5, means both "a person's physical condition *and* its 'negligent cause.'"' [Citation.] The word 'injury' for purposes of section 340.5 is a term of art that 'refer[s] to the damaging effect of the alleged wrongful act and not to the act itself.' [Citation.] The injury is not necessarily the ultimate harm suffered, but instead occurs at 'the point at which "appreciable harm" [is] first manifested.' [Citations.]" (*Brewer v. Remington* (2020) 46 Cal.App.5th 14, 24.) Thus, "[t]he limitation period of section 340.5 may commence, as a matter of law, once appreciable harm unambiguously manifests which causes actual suspicion of wrongdoing." (*Id*. at p. 25; see *McNall v. Summers* (1994) 25 Cal.App.4th 1300, 1309 [section 340.5 limitation periods commence when there is "appreciable harm or the point in time at which appreciable harm is first manifested"].) In the statute of limitations context, "[t]he mere breach of duty—causing only nominal damages, speculative harm or the threat of future harm not yet realized—normally does not suffice to create a cause of action." (*San Francisco Unified School Dist. v. W.R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1326.)

Here, the court previously sustained the demurrer in part because Plaintiff did not include allegations demonstrating she suffered only nominal harm in connection with her laser treatment on April 12, 2022. In her FAC, Plaintiff now alleges she did not suffer any appreciable harm in connection with her laser treatment and believed it only to be a "temporary pain." (See FAC at ¶ 15.) Plaintiff later alleges she experienced *only* nominal harm up until her visit with Dr. Chahal on June 14, 2022. (See FAC at ¶ 24.) Reading these allegations together, the court may reasonably infer that Plaintiff did not suffer any appreciable harm until her visit with Dr. Chahal on June 14, 2022. (See *Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517 ["The complaint must be construed liberally by drawing reasonable inferences from the facts pleaded."].) Since any appreciable harm did not manifest until at least June 14, 2022, the filing of the original complaint on June 14, 2023 would appear be timely. While Defendants may dispute the pleaded facts, the court must accept them as true for purposes of demurrer.[1] (See *Olson v. Toy* (1996) 46 Cal.App.4th 818, 823 [for purposes of demurrer, we accept these allegations as true].)

Alternatively, Plaintiff contends the one-year statute of limitations was tolled by Defendants providing payment as an accommodation to Plaintiff under Insurance Code section 11583. (See OPP at pp. 7:25-8:19.) That section provides in its entirety:

> "No advance payment or partial payment of damages made by any person, or made by his insurer under liability insurance as defined in subdivision (a) of Section 108, as an accommodation to an injured person or on his behalf to others or to the heirs at law or

[1] In reply, Defendants argue the demurrer should be sustained based on the sham pleading doctrine. (See Reply at pp. 2:17-3:17.) The court however declines to consider this argument as it is being raised for the first time in the reply papers. (See *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [points raised for first time in a reply brief will ordinarily be disregarded because other party is deprived of the opportunity to counter the argument].) Nor is the court persuaded that the doctrine applies under the facts of this case.

dependents of a deceased person because of an injury or death claim or potential claim against any person or insured shall be construed as an admission of liability by the person claimed against, or of that person's or the insurer's recognition of such liability, with respect to such injured or deceased person or with respect to any other claim arising from the same accident or event. Any such payments shall, however, constitute a credit and be deductible from any final settlement made or judgment rendered with respect to such injured or deceased person which does not expressly take into account such advance payments. **Any person, including any insurer, who makes such an advance or partial payment, shall at the time of beginning payment, notify the recipient thereof in writing of the statute of limitations applicable to the cause of action which such recipient may bring against such person as a result of such inquiry or death, including any time limitations within which claims are required to be made against the state or any local public entity when such payments are made on behalf of such public entities. Failure to provide such written notice shall operate to toll any such applicable statute of limitations or time limitations from the time of such advance or partial payment until such written notice is actually given**. That notification shall not be required if the recipient is represented by an attorney." (Ins. Code, § 11583, emphasis added.)

"The purpose of section 11583, as interpreted by our courts, is to encourage early payments on prima facie meritorious claims while at the same time avoid the risk that such early payments would lull a claimant into a sense of complacency about filing a lawsuit because of the apparent cooperativeness of the defendant and/or the defendant's insurer in making the advance or partial payment of the claim." (*Evans v. Dayton Hudson Corp.* (1991) 234 Cal.App.3d 49, 54.)

In support, Plaintiff alleges: (1) Nurse Corres recommended that Plaintiff apply a prescription cream to the affected area of her leg; (2) Ms. Wilson confirmed that the cream would be paid for by Medspa and provided to Plaintiff for free; (3) during negotiations with Plaintiff, Ms. Wilson believed that Medspa providing the cream should be considered a partial payment of damages made as an accommodation to Plaintiff; (4) after supplying the cream, Defendants did not inform Plaintiff about the statute of limitations in writing in accordance with Insurance Code section 11583. (See FAC at ¶¶ 18-19, 26, 28.) Such allegations appear to be sufficient to establish tolling under section 11583 for pleading purposes.

In reply, Defendants argue tolling is not available under section 11583 as that statute applies only to payments made under a liability insurance policy. (See Reply at p. 3:19-24.) This argument however is not persuasive as the statute allows for advance or partial payments made by any person ***or*** by an insurer under his/her liability insurance. Defendants also contend the alleged cream or ointment does not constitute monetary compensation and thus cannot trigger section 11583. (Id. at p. 4:5-10; see *Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 396 [" 'Damages' are the monetary compensation awarded to parties who suffer detriment for the unlawful act or omission of another; they are assessed by a court against wrongdoers for the commission of a legal wrong of a private nature."].) On this point, neither side cites any legal authority directly analogous to the facts in this case. Nevertheless, at least one California appellate court has determined that "a defendant's voluntary assumption of the cost of providing treatment is the advance payment of damages under Insurance Code section 11583." (See *Doe v. Doe 1* (2012) 208 Cal.App.4th 1185, 1194, examining *Maisel v. San Francisco State University* (1982) 134 Cal.App.3d 689.) Similarly, Defendants supplied a cream at no

cost to Plaintiff as a treatment and partial payment of damages to support tolling under Insurance Code section 11583. (See FAC at ¶¶ 18-19, 26, 28.)

Based on these allegations, the court finds sufficient facts have been pled to defeat the statute of limitations defense for purposes of general demurrer. It should be noted the court's ruling represents only a challenge to the sufficiency of the pleading. Defendants may renew their statute of limitations defense by way of dispositive motion for summary judgment or at the time of trial.

Consequently, the demurrer to the FAC on the ground that the pleading is time-barred by the one-year statute of limitations is OVERRULED. Having overruled the demurrer on these grounds, the court declines to consider whether equitable tolling applies in this case.

Disposition

The demurrer to the FAC on the ground that the pleading is time-barred by the one-year statute of limitations is OVERRULED.

The court will prepare the Order.

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