

**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) 882-2160

**DATE: 1/16/2024 TIME: 9:00 A.M.**

**TO CONTEST THE RULING:** Before 4:00 p.m. today 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 strongly 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 16.

[https://www.sccscourt.org/general\\_info/ra\\_teams/video\\_hearings\\_teams.shtml](https://www.sccscourt.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.)

**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
<a href="#">LINE 1</a>	23CV417527	Samantha Heinz v. Maryam Mottahed et al.	Hearing Demurrer. SUSTAINED WITH 20 DAYS LEAVE TO AMEND. Ctrl click on Line 1 for tentative ruling.
<a href="#">LINE 2</a>	21CV390457	MIJA O'CONNER v. MIRADRY, INC. et al.	Motion: Compel. GRANTED. Ctrl click on Line 2 for tentative ruling.
<a href="#">LINE 3</a>	17CV309789	Cach, LLC v. Andre Robbins	Motion: Vacate. GRANTED. Ctrl click on Line 3 for tentative ruling.
<a href="#">LINE 4</a>	21CV380572	AMERICAN EXPRESS NATIONAL BANK vs. Lance McAlpine	Motion: Vacate. GRANTED. Ctrl click on Line 4 for tentative ruling.

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<a href="#">LINE 5</a>	21CV289233	AMERICAN EXPRESS NATIONAL BANK vs. Carmen Zelaya	Motion: Vacate. GRANTED. Ctrl click on Line 5 for tentative ruling.
<a href="#">LINE 6</a>	21CV391452	Evan Dowling vs. Santa Clara County	Motion: Vacate. DENIED. Ctrl click on Line 6 for ruling.
<a href="#">LINE 7</a>	21CV389233	AMERICAN EXPRESS NATIONAL BANK vs. CARMEN ZELAYA	Motion: Vacate. OFF-CALENDAR. No proof of service. No amended notice of hearing date.
<a href="#">LINE 8</a>	22CV397011	CAPITOL ONE BANK (USA), N.A. vs ROBERTO LUJANO	Hearing: Other. GRANTED. Ctrl click on Line 8 for tentative ruling.
<a href="#">LINE 9</a>	22CV405280	Pigeon Lift Condominium Association vs. Lorenzo Rios et al.	Motion: hearing. OFF CALENDAR. No proof of service.
<a href="#">LINE 10</a>			
<a href="#">LINE 11</a>			
<a href="#">LINE 12</a>			

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**Calendar Line 1**

**Case Name:** *Samantha Heinz v. Skin Refine Medspa, et al.*

**Case No.:** 23-CV-417527

Demurrer to the 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 complaint, 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. (Complaint 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.) During laser treatment, Nurse Mottahed burned Plaintiff’s leg forcing her to leave her appointment early. (Id. at ¶¶ 10-14.) The employees at the front desk told Plaintiff that Nurse Mottahed’s conduct was just an accident and minimized the severity of the injury. (Id. at ¶ 14.)

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. (Complaint at ¶ 16.) Nurse Corres told Plaintiff to apply an ointment for treatment. (Ibid.)

On June 14, 2022, Plaintiff attended an appointment with her dermatologist, Doctor Harvey Chahal (“Dr. Chahal”). (Complaint at ¶ 17.) During her appointment, Dr. Chahal examined the burn 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.) Dr. Chahal advised Plaintiff to modify her treatment of the burn due to the severity of the injury. (Ibid.) Dr. Chahal also informed Plaintiff that the burn would take over a year to heal. (Ibid.)

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

On October 26, 2023, Defendants filed the motion presently before the court, a demurrer to the complaint. Plaintiff filed written opposition. Defendants filed reply papers.

A case management conference is also set for January 16, 2024.

**Demurrer to the Complaint**

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

**Untimely Opposition**

In reply, Defendants contend Plaintiff filed and served an untimely opposition to the demurrer.

Code of Civil Procedure section 1005, subdivision (b), requires all opposing papers to be filed and served at least nine court days before the hearing. No paper may be rejected for filing on the ground that it was untimely submitted for filing. (Cal. Rules of Court, Rule 3.1300(d).) If the court, in its discretion, refuses to consider a late filed paper, the minutes or order must indicate. (Ibid.)

Here, Defendants filed the instant demurrer on October 26, 2023. The hearing on the motion is scheduled for January 16, 2024. Thus, opposition must be filed no later than January 2, 2024 to be considered timely.<sup>1</sup> Plaintiff however did not file and serve her opposition until January 4, 2024, two days beyond the deadline imposed by the rules of court. Nevertheless, Defendants timely filed and served reply papers addressing the substantive merits of the opposition. The court therefore will consider the opposition on its merits as there appears to be only minimal prejudice to Defendants. (See *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 (*Fox*) [courts have a policy favoring disposition of cases on the merits rather than on procedural grounds]; see also *Kapitanski v. Von's Grocery Co.* (1983) 146 Cal.App.3d 29, 32-33 [“Cognizant of the strong policy favoring the disposition of cases on their merits...judges frequently consider documents which have been untimely filed.”].) The court admonishes Plaintiff’s counsel to comply with court rules and procedures with respect to future filings.

## **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, supra*, 35 Cal.4th at p. 806.) It “strikes a balance among

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<sup>1</sup> This deadline accounts for the court holiday on Monday January 15, 2024.

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.” (*Poosh 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**

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.)

Both sides also 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.”].)

As pointed out on demurrer, Plaintiff was aware of her burns received during her laser treatment by Nurse Mottahed on April 12, 2022, the day of her appointment. (See Complaint at ¶¶ 7-14.) Plaintiff alleges she felt pain more intense than her prior treatments and ultimately left her appointment early because “Nurse Mottahed burned her leg.” (*Id.* at ¶¶ 10, 14.) Based on these allegations, Plaintiff was clearly aware of her injury and its negligent cause on April 12, 2022. Since the complaint was not filed until June 23, 2023, the action appears to be time-barred by the one-year statute of limitations under section 340.5.

In opposition, Plaintiff argues she did not discover any appreciable harm from her laser treatment until her appointment with Dr. Chahal on June 14, 2022. Rather, Plaintiff contends she suffered only nominal harm prior to her June 14th appointment. (See OPP at p. 5; see also *San Francisco Unified School Dist. v. W.R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1326 [“The 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.”].) This contention however is not persuasive as there are no allegations demonstrating Plaintiff suffered only nominal harm in connection with her laser treatment on April 12, 2022. And, as pointed out in the reply, while Plaintiff later learned the severity of her burn with Dr. Chahal, this does not change the fact that she was aware of the leg burn during her appointment on April 12, 2022 to trigger the one-year limitations period.

Alternatively, Plaintiff asserts the one-year statute of limitations was tolled either by: (1) Defendants providing payment as an accommodation to Plaintiff under Insurance Code section 11583; or (2) equitable tolling when Defendants intentionally concealed the harm they caused Plaintiff. (See OPP at pp. 6-7.) But, the complaint is devoid of facts to support any tolling of the statute of limitations in this case. (See *State Comp. Ins. Fund v. Dept of Ins.* (2023) 96 Cal.App.5th 227, 240 [equitable tolling applies when three elements are present: (1) timely notice; (2) lack of prejudice to the defendant; and (3) reasonable and good faith conduct on the part of plaintiff].) Nor does the statute allow for tolling by intentional concealment with respect to the one-year limitations. (See *Gutierrez, supra*, 39 Cal.3d at p. 896.)

Accordingly, the demurrer to the complaint is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND on the ground that the pleading is time-barred by the one-year statute of limitations. (See *City of Stockton v. Super. Ct.* (2007) 42 Cal.4th 730, 747 [if the plaintiff has not had an opportunity to amend the pleading in response to a motion challenging the sufficiency of the allegations, leave to amend is liberally allowed as a matter of fairness, unless the pleading shows on its face that it is incapable of amendment].)

**Disposition**

The demurrer to the complaint is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND on the ground that the pleading is time-barred by the one-year statute of limitations.

The court will prepare the order.

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## **Calendar Line 2**

**Case Name:** *MIJA O'CONNER vs. MIRADRY, INC. et al.*

**Case No.:** 21CV390457

Good cause appearing, Plaintiff Mija O'Conner ("Plaintiff")'s motion to compel defendant MiraDry, Inc. ("MiraDry") to produce the appropriate person most knowledgeable (PMK) witness(es) for each of the PMK categories (Nos. 1 through 28) at issue within 30 calendar days of the court's order is GRANTED. MiraDry shall produce the appropriate PMK witness(es) for each of the PMK categories (Nos. 1 through 28) at issue within 30 calendar days of this order.

Plaintiff's deposition notice describes the matters on which examination is requested (in Categories Nos. 1 to 28) with "reasonable particularity", accordingly, the Code requires that "the deponent [MiraDry] shall designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent." (CCP section 2025.030.)

MiraDry's objections end with the language "Following this sale, Deponent, a holding company, *employs no personnel with knowledge* responsive to this Category." (Emphasis added.) This objection is not valid or sufficient under the Code.

The declaration of Carolyn Taylor in support of MiraDry's opposition states "[MiraDry] is now a shell company that has no operations, employees, or documents. (*Id.* at para 6.) However, it does *not* state that MiraDry has no "officers" or "directors." If the deponent is the party's officer or director, an entity has substantial practical control to compel the attendance of these individuals, including the ability to end its relationship with its officer or director. (See *Twin Lock Inc. v. Superior Court* (1959) 52 Cal.2d 754, 759.)

Plaintiff's request for monetary sanctions is GRANTED against MiraDry and its attorneys of record Carolyn Taylor, Esq., Doug Chapman, Esq., and Clark Hill LLP (jointly and severally) in the reasonable amount of \$3,321. This amount is payable in full to Plaintiff within 15 calendar days of this order.

Plaintiff's alternative request (in its reply papers) for an order prohibiting MiraDry from producing any witness to testify on its behalf at the trial in this matter with respect to the same categories of inquiry for which it now refuses to produce a PMK is DENIED WITHOUT PREJUDICE.

The court will prepare the order.



**Calendar Line 3**

**Case Name:** *CACH, LLC v. Andre Robbins*

**Case No.** 17CV309789

Good cause appearing, Plaintiff CASH LLC (“Plaintiff”)’s motion to vacate judgment entered in favor of Plaintiff and against defendant Andre Robbins (Defendant”) and this matter be dismissed with prejudice is GRANTED. The judgment by default filed April 20, 2020, is vacated and this matter is dismissed with prejudice.

The court will prepare the order.

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**Calendar line 4**

**Case Name:** *AMERICAN EXPRESS NATIONAL BANK vs. Lance McAlpine*

**Case No.:** 21CV380572

Good cause appearing, Plaintiff American Express National Bank (“Plaintiff”)’s motion to vacate the conditional dismissal and for entry of judgment pursuant to Code of Civil Procedure (“CCP”) section 664.6) in favor of Plaintiff and against Defendant Lance McAlpine (Defendant) on the grounds that Defendant has failed to make payments consistent with the settlement agreement and that this court has jurisdiction to enter a judgment consistent with the agreement between Plaintiff and Defendant under CCP section 664.6 is GRANTED. Plaintiff is awarded judgment against Defendant in the sum of \$36,662.48 plus costs of \$563 for a total of \$37,225.48. Plaintiff shall promptly submit the [proposed] judgment (with the required Judgment-Proposed cover sheet) to the court for signature.

The court will prepare the order.

**Calendar Line 5**

**Case Name:** *AMERICAN EXPRESS NATIONAL BANK vs. Carmen Zelaya*

**Case No.:** 21CV289233

Good cause appearing, Plaintiff American Express National Bank ("Plaintiff")'s motion to vacate the conditional dismissal and for entry of judgment pursuant to Code of Civil Procedure ("CCP" section 664.6) in favor of Plaintiff and against Defendant Carmen Zelaya (Defendant) on the grounds that Defendant has failed to make payments consistent with the settlement agreement and that this court has jurisdiction to enter a judgment consistent with the agreement between Plaintiff and Defendant under CCP section 664.6 is GRANTED. Plaintiff is awarded judgment against Defendant in the sum of \$4,589.56 plus costs of \$353 for a total judgment of \$4,949.56. Plaintiff shall promptly submit the [proposed] judgment (with the required Judgment-Proposed cover sheet) to the court for signature.

The court will prepare the order.

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**Calendar Line 6**

**Case Name:** *Evan Dowling vs. Santa Clara County*

**Case No.:** 21CV391452

Plaintiff Evan Dowling ("Plaintiff")'s motion for order vacating and/or setting aside the judgment in this matter pursuant to Code of Civil Procedure (CCP) section 473 is DENIED. The court will prepare the order.

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**Calendar Line 7**

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**Calendar Line 8**

**Case Name:** *CAPITAL OLNE BANK (USA), N.A. vs. ROBERT LUJANO*

**Case No.:** 22CV397011

Motion: Set Aside and Vacate Dismissal

Good cause appearing, Plaintiff Capital One Bank (USA), N.A. (“Plaintiff”)’s motion to set aside and vacate the Dismissal entered against Plaintiff on 6/24/22 under Code of Civil Procedure (“CCP”) section 473(b) on the grounds that the Dismissal was entered against Plaintiff was the result of the mistake, inadvertence, surprise and neglect of its attorneys, the Law Offices of Patenaude & Felix is GRANTED. The Dismissal entered on 6/24/2022 is set aside and vacated.

The court will prepare the order.

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**Calendar line 9**

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**Calendar line 13**

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