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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SHIRLEY A. QUEEN, Plaintiff and Appellant, v. MISSION COMMUNITY HOSPITAL, Defendant and Respondent.	B275928 (Los Angeles County Super. Ct. No. BC574660)

APPEAL from judgment of the Superior Court of Los Angeles County, Michelle Williams Court, Judge. Affirmed.

Shirley A. Queen, in pro. per., for Plaintiff and Appellant.

Ryan Datomi, Christopher A. Datomi and Dawn Cushman, for Defendant and Respondent.

Shirley Queen appeals from the dismissal of her case after the trial court sustained Mission Community Hospital's demurrer without leave to amend. The trial court correctly determined that the claims were time-barred; we affirm.

FACTUAL AND PROCEDURAL HISTORY

Shirley Queen arrived by ambulance at the emergency room of Mission Community Hospital on November 30, 2012, after suffering a fall. During an extended period in the emergency room, in which she complained of strong pain and sought assistance to return to her car, her symptoms and requests were ignored, and she was treated with disrespect by staff. After examination, Queen was diagnosed with back strain and discharged, having been told she would recover within 30 days. Her pain continued, but she did not file suit until December 2014. Mission demurred, and ruling on the demurrer to the Third Amended Complaint, the court sustained the demurrer without leave to amend and dismissed the action.

Queen's initial complaint, filed as a civil matter, alleged general negligence, and asserted she had suffered emotional distress and abuse because of the improper diagnosis and behavior of the emergency room personnel. She attached to her complaint a "Statement of Claim" which was a narrative of the events on the day of her admission to the emergency room. The Statement also included an explanation that she believed her medical diagnosis had been incorrect at the time, and that she was later given another diagnosis by a different physician. She also attached documentation of her visit to that physician, demonstrating that she received the new diagnosis in March 2013. The exhibit also demonstrates that, in 2013, the physician

advised her that her symptoms were "a direct result of the accident on November 30, 2012.

Queen filed her First Amended Complaint on February 24, 2015. This complaint, also alleging general negligence, was filed as an unlimited civil case. This complaint did not include the documents that had been attached to her initial complaint; her statement of claim omitted the subsequent 2013 diagnosis, and instead referred to an x-ray performed in December 2014, which she alleged showed a fracture resulting from the 2012 fall. Mission again demurred, asserting, as it had before, that Queen's claims were barred by the statute of limitations.[1]

Queen filed a Second Amended Complaint on May 4, 2015. Attached as an exhibit to this complaint were hospital records, including a radiology report dated December 8, 2014. In June, the court ordered Queen to serve that complaint. The version served and filed on July 14, 2015, omitted the December 8, 2014 hospital records. Mission again demurred, and asserted Queen's claims were barred by the statute of limitations. The court sustained the demurrer with leave to amend, finding that the pleadings demonstrated that Queen had knowledge of her injury on November 30, 2012, and that her claims were barred by the statute of limitations.

Queen filed her Third Amended Complaint on March 3, 2016. She included no attachments. Mission demurred, and on May 10, 2016, the court sustained the demurrer without leave to amend finding that the applicable statute of limitations barred

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[1] The court's rulings on the demurrers were not included in the Clerk's Transcript.

the claims.[2] The court entered judgment dismissing the case on July 12, 2016.

DISCUSSION

A. Standard of Review

On appeal from an order dismissing an action after the sustaining of a demurrer, we independently review the pleading to determine whether the facts alleged state a cause of action under any possible legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415; *Aubry v. Tri–City Hospital Dist.* (1992) 2 Cal.4th 962, 967 (*Aubry*).) We give the complaint a reasonable interpretation, "treat[ing] the demurrer as admitting all material facts properly pleaded," but do not "assume the truth of contentions, deductions or conclusions of law." (*Ibid)*; accord, *Redfearn v. Trader Joe's Company* (2018) 20 Cal.App.5th 989, 996.) We liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452[3]; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

When a demurrer is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion, and we reverse. (*Zelig v. County of Los*

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[2] Queen had argued the demurrer should be overruled because Mission failed to comply with the meet and confer requirements of Code of Civil Procedure section 430.41, subdivision (a). The court found that statute does not provide grounds to overrule a demurrer, and reached the merits.

[3] All further statutory references are to the Code of Civil Procedure.

Angeles (2002) 27 Cal.4th 1112, 1126.) "'Where the complaint is defective, "[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his [or her] complaint."'" (*Aubry, supra,* 2 Cal.4th at p. 970.) Leave to amend may be granted on appeal even in the absence of a request by the plaintiff to amend the complaint. (*Id.* at p. 971; see Code Civ. Proc., § 472c, subd. (a).) We determine whether the plaintiff has shown "in what manner he [or she] can amend [the] complaint and how that amendment will change the legal effect of [the] pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) We will not, however, grant leave to amend where it would be futile. (*Trader Joe's, supra*, 20 Cal.App.5th at p. 997.)

A. The Relevant Statute of Limitations

The parties agree that the statute of limitations applicable to Queen's claims is set out in section 340.5. That statute provides: "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."

Here, Mission argues, and the trial court found, that Queen was aware of her injury on the date of treatment in November 2012. Her initial complaint, filed just over two years later, would only be timely if, as Queen argues, she did not discover her injury until what she alleges was the diagnosis of a fracture arising from her fall, a diagnosis made in 2014.

"Traditionally, a claim accrues '"'when [it] is complete with all of its elements"'—those elements being wrongdoing [or breach], harm, and causation.'" (*Aryeh v. Canon Business*

Solutions, Inc. (2013) 55 Cal.4th 1185, 1191; accord, *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 815.) "This is [known as] the 'last element' accrual rule. . . ." (*Aryeh,* at p. 1191, see *ibid.* ["ordinarily, the statute of limitations runs from 'the occurrence of the last element essential to the cause of action'"]; *Howard Jarvis,* at p. 815; *Quarry v. Doe I* (2012) 53 Cal.4th 945, 960.)

An exception to the general rule of accrual is the delayed discovery rule, "which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Fox v. Ethicon Endo–Surgery, Inc.* (2005) 35 Cal.4th 797, 807.) "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." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110.) "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." (*Id.* at p. 1111.)'" (*Stella v. Asset Mgmt. Consultants, Inc.* (2017) 8 Cal.App.5th 181, 191–192 [discovery of misrepresentations in limited partnership action at time of purchase based on documentation disclosing the facts at issue].)

B. The Trial Court Correctly Applied the Statute

1. The Pleadings Demonstrate Discovery No Later Than 2013

Queen, in every successive pleading, either added new exhibits, or deleted exhibits and allegations contained in previous iterations of the complaint. In considering whether she has stated a cause of action that is not barred by the applicable statute of limitations, however, we not only assume the truth of the facts pleaded in the version of the complaint under review, but also take judicial notice of her earlier pleadings. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877-878 ["A plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false. [Citation.] Likewise, the plaintiff *may not plead facts that contradict the facts or positions that the plaintiff pleaded in earlier actions or suppress facts that prove the pleaded facts false.* [Citation.]"].)

Where exhibits are attached, we accept facts appearing in those exhibits as true, accepting them over allegations which they contradict. (*Nolte v. Cedars Sinai Medical Center* (2015) 236 Cal.App.4th 1401, 1406.) Unexplained inconsistencies with earlier pleadings may be disregarded, as a plaintiff may not omit harmful information to avoid challenges to the pleading. (*Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 343-344.)

In this case, without any explanation, Queen has set forth changing versions of her knowledge of her injury in each complaint. Initially, she alleged that she knew, as she left the emergency room, that she had been misdiagnosed; she alleged she went directly to another hospital to seek additional care. In

the next version of her pleadings, she alleged that she learned she had been misdiagnosed in 2013, when she sought treatment from a different physician. Finally, she alleged that she did not know the nature of her injury until she received the results of testing in 2014. She failed, however, to explain to the trial court, or this Court, the basis for these shifting allegations concerning her knowledge of her injury.

The trial court concluded, after reviewing all of the pleadings, that she was aware of receiving negligent treatment that caused both physical pain and emotional distress on the date of her injury in 2012. There is no dispute in this record that Queen had all of the facts relating to the lack of attention to her pain, and the delays in assisting her, on that date. Even assuming she needed to know that she had been misdiagnosed and not given adequate medical treatment, she had that knowledge in 2013, when she was told that the 2012 diagnosis was wrong.

2. Queen Did Not Need To Know The Actual Cause of Her Injury

The statute of limitations in this case began to run prior to the third diagnosis in 2014. "The term 'injury,' as used in section 340.5, means both a person's physical condition and its negligent cause.'" [Citation.] However, a person need not *know* of the actual negligent cause of an injury; mere *suspicion* of negligence suffices to trigger the limitation period." (*Knowles v. Superior Court* (2004) 118 Cal.App.4th 1290, 1295.) (See also *Garabet v. Superior Court* (2007) 151 Cal.App.4th 1538, 1545 ["the issue on appeal usually is whether the plaintiff actually suspected, or a reasonable person would have suspected, that the injury was caused by wrongdoing."].)

"[A] potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light." (*Fox, supra,* 35 Cal.4th at pp. 808–809. "[U]nder the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action." (*Id.* at p. 803.)

In *Dolan v. Borelli* (1993) 13 Cal.App.4th 816, Dolan sued Dr. Borelli for medical malpractice following carpal tunnel surgery. Borelli told Dolan to expect that she would be pain free within 60 days; instead her symptoms became significantly worse, and she believed something had gone wrong. (*Id.* at p. 820.) As her symptoms and disability worsened, Dolan saw another physician; and, approximately 14 months after the initial surgery, Dolan saw a third physician, who performed a second operation on her right wrist and discovered the initial surgeon had not performed a carpal tunnel release. (*Ibid.*) Although the nature of the first physician's negligence was not discovered until the second operation, the court rejected Dolan's argument that the statute had not begun to run until that surgery: "Her claim essentially amounts to an argument that, while she suspected [the initial doctor] was negligent, she did not know his negligence consisted of failing to release her right carpal tunnel ligament, as opposed to improperly performing that procedure. [¶] As

discussed in *Jolly* [*v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103], the essential inquiry is when did Dolan suspect Borelli was negligent, not when did she learn precisely how he was negligent." (*Id.* at p. 824.)[4] The same is true here.

Queen experienced pain for a period of time well beyond that which she was told to expect on the date of injury. That, in combination with the emotional distress she suffered on the day of injury, and her belief at the time, demonstrated by the fact that she immediately sought a second opinion, demonstrated that not only had she manifested appreciable harm, but that she suspected it was caused by negligence. The statute began to run at that time even if she did not know either the full extent of her injury or her ultimate diagnosis.

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J. SEGAL, J.

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[4] Injury "is not necessarily the ultimate harm suffered, but instead occurs at "the point at which 'appreciable harm' is first manifested." (*Brown v. Bleiberg* (1982) 32 Cal.3d 426, 437, fn. 8; see *Hills v. Aronsohn* (1984) 152 Cal.App.3d 753, 762 ["appreciable harm" may become apparent before the ultimate harm or diagnosis].)