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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

DAVID AGRANOV, Plaintiff and Appellant, v. HAROLD MARKOWITZ, M.D., Defendant and Respondent.	B247753 (Los Angeles County Super. Ct. No. BC461171)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael M. Johnson, Judge. Affirmed.

McGuire Coats and Wendy McGuire Coats for Plaintiff and Appellant.

Law, Brandmeyer & Packer, Robert B. Packer and Paul M. Corson for Defendant and Respondent.

David Agranov appeals from a summary judgment issued in favor of Dr. Harold Markowitz. The trial court held that Agranov's malpractice suit against Markowitz was time-barred, having been filed more than one year after his discovery of Markowitz's alleged negligence. We affirm the summary judgment in favor of Markowitz.

FACTS[1]

Agranov first sought treatment from Markowitz on December 9, 2008,[2] for pain, weakness, and giving way in his right knee. An MRI without contrast was performed on his right and left knees on December 18, 2008. The radiologist reported the right knee showed an oblique tear of the posterior horn of the medial meniscus with several small parameniscal cysts present while the left knee showed a nondisplaced tear of the posterior medial meniscus terminating in a lobulated parameniscal cyst. When Agranov saw Markowitz again on December 22, 2008, he complained of pain, clicking, and instability in both knees, but with the right greater than the left. Markowitz recommended physical therapy and Advil, and advised Agranov to return in two weeks. Because his symptoms had not improved, Agranov scheduled surgery with Markowitz.

On January 16, 2009, Markowitz performed surgery on Agranov's right knee. He noted in a post-operative visit on January 26, 2009, that Agranov had done well following the surgery. On February 11, 2009, Agranov saw Markowitz for a post-operative visit for the right knee and a pre-operative visit for the left knee. Markowitz noted that the right knee surgery was successful and Agranov was experiencing minimal pain. Surgery was performed on Agranov's left knee on February 17, 2009, one month after surgery was performed on the right knee.

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[1] The facts are taken from the statement of undisputed facts from the papers supporting the motion for summary judgment.

[2] The undisputed statement of facts shows the first consultation to be on December 8, 2009. This is a typographical error because the supporting documents show the first consultation to be on December 9, 2008.

During a visit seven months after the surgery, Agranov complained to Markowitz about left knee pain over the past several months. Markowitz gave him a steroid injection with Xylocaine and recommended he return in a week. On October 8, 2009, Markowitz placed Agranov on disability and asked him to return in one month. On November 12, 2009, Agranov complained of increased pain in the right knee, but noted the left knee pain had improved somewhat. Markowitz concluded he had sprained the right knee, with consideration for internal derangement. He was told to take Advil and return in one week. Agranov again complained of pain in the right knee in a November 24, 2009 consultation and was sent for an MRI with contrast of the right knee.

The radiologist observed that "there was evidence of prior partial medial meniscectomy with unchanged appearance of the under surface horizontal oblique tear of the posterior horn, in comparison to the prior MRI of December 18, 2008. There is also a small area of chondral damage involving the medial tibial plateau and a new small area of bone marrow edema extending to the level of the subchondral bone plate of the medial tibial plateau." As to the left knee, the radiologist reported, "in comparison to the prior MRI of December 18, 2008, the patient appeared to have a resection of the free edge of the junction of the mid-zone and posterior horn of the medial meniscus. There was an intra-meniscal signal terminating in the previously seen parameniscal cyst." Agranov last saw Markowitz on December 9, 2009, when he complained of pain in both knees with popping and clicking. Markowitz gave him the option of additional therapy, exercise, and medication or surgical arthroscopy to the right knee. Markowitz's notes indicate that Agranov chose surgery. Agranov, however, never returned for treatment with Markowitz.

Agranov sued Markowitz on May 9, 2011. Markowitz moved for summary judgment on July 11, 2012. He argued that Agranov's claim was barred by the statute of limitations, that he complied with the applicable standard of care, and that his actions were not a substantial factor in causing Agranov's injuries. In support, Markowitz submitted a separate statement of undisputed facts which present the sequence of events described above. Agranov opposed the motion, submitting a declaration from

Dr. Leonard Kalfuss, who opined that surgery was performed far too soon on the left knee after surgery on the right knee. Kalfuss also believed the surgeries performed by Markowitz fell below the standard of care for orthopedic surgeons in the area. Agranov presented his own declaration stating he sought a second opinion from Dr. Scott Powell the day after his last consultation with Markowitz. Powell performed surgery on both of his knees. On March 2, 2010, Powell advised Agranov that Markowitz had committed malpractice in performing the previous surgeries and that it contributed to Agranov's continuing knee problems and healing issues. According to Agranov, this was the first time he learned of Markowitz's malpractice.

The trial court granted the motion for summary judgment. It found Agranov's claim was barred by the statute of limitations under Code of Civil Procedure[3] section 340.5. The trial court also found, "Defendant has presented uncontroverted expert opinion testimony that he complied with the standard of care at all times; nothing Defendant did or failed to do was a substantial factor in causing Plaintiff's injuries . . . ." Judgment in Markowitz's favor was entered on January 30, 2013, and served on February 5, 2013. Agranov timely filed his notice of appeal on March 26, 2013.

DISCUSSION

I. Standard of Review

"We review the trial court's summary judgment rulings de novo, viewing the evidence in a light favorable to the plaintiff as the losing party, liberally construing the plaintiff's evidentiary submission while strictly scrutinizing the defendant's own showing, and resolving any evidentiary doubts or ambiguities in the plaintiff's favor." (*Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1438.) A motion for summary judgment must be granted "if all the papers submitted show that there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant has met his burden of showing that a cause of action has no merit if he has shown that there is a complete defense to that

[3] All further section references are to the Code of Civil Procedure unless otherwise specified.

cause of action. Once the defendant has met that burden, the burden shifts to the plaintiff to show a triable issue of one or more material facts exists as to that cause of action. (*Id*., subd. (p)(2); see *Weber, supra*, 143 Cal.App.4th at p. 1437.)

"In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers . . . and all inferences reasonably deducible from the evidence . . . ." (Code Civ. Proc., § 437c, subd. (c).) In some instances, however, "evidence may be so lacking in probative value that it fails to raise any triable issue." (*Advanced Micro Devices, Inc. v. Great American Surplus Lines Ins. Co.* (1988) 199 Cal.App.3d 791, 795.) "A court generally cannot resolve questions about a declarant's credibility in a summary judgment proceeding [citations], unless admissions against interest have been made which justify disregard of any dissimulation. [Citation.]" (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064-1065.)

Application of the statute of limitations, including the question of belated discovery, is usually a factual issue to be decided by a trier of fact. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810; *Jolly v. Eli Lilly & Co*. (1988) 44 Cal.3d 1103, 1112 (*Jolly*).) However, "where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper. [Citation.]" (*Jolly, supra*, at p. 1112; *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487.)

II. Statute of Limitations

Although the trial court granted summary judgment to Markowitz on several grounds, the primary issue on appeal is whether it properly found as a matter of law that Agranov's claim was time-barred. The statute of limitations for medical malpractice actions such as this one is set forth in sections 340.5 and 364. Section 340.5 specifies, "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."

(§ 340.5.) Section 364 extends the time for commencement of the action by 90 days when notice of an intention to commence an action is provided within 90 days of the expiration of the applicable statute of limitations. (§ 364, subd. (d).)

Markowitz performed surgery on Agranov's right knee on January 16, 2009, and on his left knee on February 17, 2009. Agranov's May 9, 2011 complaint was filed well within the three year limitations period specified in section 340.5. Nonetheless, Markowitz contends Agranov's suit is time-barred under the discovery rule because Agranov discovered or should have discovered the injury caused by the surgeries by the time of his final consultation with Markowitz on December 9, 2009. Agranov provided Markowitz with a section 364 notice of intent to commence action on February 9, 2011. He then filed his complaint on May 9, 2011. Section 364 therefore extended the statutory period to 15 months, rather than 12 months, after discovery. If calculated from December 9, 2009, the discovery rule renders Agranov's complaint, filed 17 months afterwards, time-barred.

The Supreme Court has indicated that by common law tradition, the term "injury," as used in section 340.5, means both "a person's physical condition and its negligent cause." (*Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 99; see also *Mock v. Santa Monica Hospital* (1960) 187 Cal.App.2d 57, 64; *Brown v. Bleiberg* (1982) 32 Cal.3d 426, 433–435.) "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.) "The malpractice litigant is required to diligently pursue her claim through discovery of the cause of her injury. And if she fails to do so she faces the prospect that the action will be time barred." (*Artal v. Allen* (2003) 111 Cal.App.4th 273, 279 (*Artal*).)

The high court applied the discovery rule under section 340.5 in *Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93 (*Sanchez*). There, the plaintiff was admitted to the hospital for the birth of her child. After a difficult two-day labor, the baby was stillborn following a Caesarian section. (*Id.* at p. 95.) Plaintiff's deposition revealed that, when released, she believed she had been a victim of malpractice. Referring to her state of

mind at the time of discharge she said "'Yes, I did think they had done something wrong because of all the time that I stayed there suffering.'" (*Id.* at p. 102.) The trial court granted a motion for summary judgment in favor of the defendant hospital and doctor. (*Id.* at p. 96.) On appeal, the court agreed that, as a result of this admission, the plaintiff became alerted to the necessity for investigation and pursuit of her remedies at the time she was discharged from the hospital. (*Id.* at p. 102.)

Similarly, the court in *Dolan v. Borelli* (1993) 13 Cal.App.4th 816 (*Dolan*) found the statutory period began to run when the plaintiff suspected wrongdoing. In *Dolan*, the plaintiff suffered from carpal tunnel syndrome and sought medical treatment from the defendant doctor. (*Id*. at p. 820.) Two months after her surgery, her symptoms were significantly worse than before the surgery and she believed something had gone wrong. In February 1986, the plaintiff consulted an attorney and told him she believed the defendant doctor had done something wrong. A second surgery was performed on June 27, 1986, and the plaintiff discovered that the defendant had failed to release her carpal tunnel ligament. (*Ibid.*) The trial court granted summary judgment in favor of the doctor, finding that the plaintiff was put on inquiry notice of the negligent cause of her injury no later than February 28, 1986, when she told the attorney she believed the doctor had done something wrong. (*Id.* at p. 821.)

Plaintiff appealed, contending that the lower court erred because she neither reasonably could have discovered nor did discover that defendant had not released her right carpal tunnel ligament until the second operation. The court affirmed the lower court's judgment, holding the plaintiff should have discovered defendant's negligence after the first operation and filed her complaint within a year of such time because plaintiff suspected something had gone wrong with the operation. (*Dolan*, *supra*, 13 Cal.App.4th at p. 824.) The court reasoned, "the essential inquiry is when did [the plaintiff] suspect [the doctor] was negligent, not when did she learn precisely how he was negligent." (*Ibid.*)

As in *Dolan* and *Sanchez*¸ we are concerned here with when Agranov suspected Markowitz was negligent. Markowitz posits that Agranov knew or should have suspected negligence by the time he decided to stop seeking treatment from Markowitz. He relies on Agranov's deposition and interrogatory responses in support of this theory. In response to a form interrogatory, Agranov stated he stopped seeing Dr. Markowitz in late December 2009, "when I 'smelled the Rat' as they say . . ." Agranov also indicated in a deposition that he felt Dr. Markowitz did "something wrong" with respect to the surgeries.

"Q At some point did you make the decision that you were not going to receive any further care from Dr. Markowitz?

A I certainly did.

Q When was that decision made?

A By the end of 2009.

Q What was the reason for that decision, thinking back to 2009, when you made that decision?

A Well, to use legal terms, I thought he behaved in a wanton and reckless way. And to use street language, I thought that he was—he was flawed and inadequate and I didn't feel like I was in good hands.

[¶] . . . [¶]

Q Did you feel that he had done something wrong with respect to the way he did your surgeries, as of the end of '09?

A You could say I started to suspect that that may be the case.

Q I want to go back to this December timeframe though. When Dr. Powell was asking you all these questions, did that further your suspicions that Markowitz had done something improper in his care and treatment of you?

A I would say that my overall concern was addressing the health issues about getting better and about fixing what had been fowled [*sic*] up. My main focus, as well as Dr. Powell's focus, was on what are we going to do to get me better, in December.

Q Well, let me ask you a different way. As of December of 2009, you felt that your knees had been fowled [sic] up; is that right?

A I had—I had started to suspect that something was not done right.

Q And Dr. Powell confirmed that for you sometime in February, March 2010?

A We can say March 2010."

By Agranov's own admission, he "had started to suspect that something was not done right" by December 2009, and that Powell confirmed his suspicions in March 2010. He also "suspected" Markowitz "had done something wrong with respect to the way he did [the] surgeries, as of the end of '09." As a result, he "smelled the rat" when he decided to seek treatment elsewhere. These admissions compel us to conclude that the statute of limitations began to run on December 9, 2009. Adding the additional 90 days owing to the notice of intention, the statute expired on March 9, 2011. Agranov's May 9, 2011 complaint was thus filed outside of the statutory period.

Agranov attempts to advance the discovery date to March 2, 2010, when Powell allegedly advised him that he believed Markowitz had committed malpractice in the way he performed the surgeries. Under this calculation, the statute of limitations did not expire until June 2, 2011, well after his May 9, 2011 complaint. In support of this theory, Agranov contends that he did not suspect any wrongdoing by Markowitz prior to Powell's disclosure because he attributed his continuing knee pain to his original injury. Agranov argues that his own "declaration, along with his discovery responses, and deposition testimony, create a triable issue of material fact as to when Mr. Agranov actually suspected, and should have suspected, that his knee pain was due to an injury caused by Dr. Markowitz's medical negligence and not simply continuing pain from his original 2008 sports injury."

In his declaration, Agranov stated, "I felt that I had not made sufficient progress in healing" and therefore, "I had no idea as of my last visit with Dr. Markowitz on December 9, 2009 that I had been 'injured' by Dr. Markowitz[.]" When he consulted with Powell on December 10, 2009 for a second opinion, Powell "did not know how or why the injury had occurred." Neither did Powell comment on the work done by

Markowitz. Instead, Powell told Agranov on January 11, 2010, after surgery on the right knee "that he did not know at that time whether Dr. Markowitz had done anything wrong or negligently." It was not until March 2, 2010, when Powell told Agranov that he believed Markowitz had committed malpractice, that Agranov first "'suspected' that Dr. Markowitz had done something wrong, and that [he] suffered an 'injury' as a result of Dr. Markowitz' negligence."

We first note that the trial court sustained Markowitz's evidentiary objections to these portions of Agranov's declaration. On appeal, Agranov contends the trial court abused its discretion in doing so.[4] We need not address the trial court's evidentiary rulings because even if we credit Agranov's declaration, it fails to create a triable issue of material fact. As in *Dolan*, "the essential inquiry is when did [the plaintiff] suspect [the doctor] was negligent, not when did she learn precisely how he was negligent." (*Dolan, supra,* 13 Cal.App.4th at p. 824.) Agranov's deposition plainly shows he suspected Markowitz was negligent by December 9, 2009. He then learned precisely how Markowitz was negligent from Powell on March 2, 2010.

Indeed, Powell's statements to Agranov merely confirmed Agranov's suspicions that Markowitz had done something wrong. The statute of limitations is not tolled pending medical confirmation. (*Knowles v. Superior Court* (2004) 118 Cal.App.4th 1290, 1300 ["It is a plaintiff's *suspicion* of negligence, rather than an expert's *opinion*, that triggers the limitation period" (orig. italics)]; *Rivas v. Safety-Kleen Corp*. (2002) 98 Cal.App.4th at pp. 228-229 [statute began to run when plaintiff had suspicion that someone had done something wrong to him and not when explicitly informed by a physician that a certain substance or product caused the medical disorder or doctor had time to review medical records and specify cause of disorder].) Moreover, this admission

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[4] Markowitz contends that Agranov cannot challenge the adverse evidentiary rulings on appeal because he failed to provide any opposition to them, citing to *Tarle v. Kaiser Foundation Health Plan, Inc.* (2012) 206 Cal.App.4th 219, 226. The *Tarle* court ordered its opinion depublished on June 18, 2012. Markowitz, who filed his respondent's brief on November 25, 2013, may not rely on *Tarle*. (Cal. Rules of Court, rule 8.1115(a).)

is not susceptible of more than one interpretation. Contrary to Agranov's contention, it cannot be interpreted to mean that Agranov suspected Markowitz had not fully treated the original injury. Agranov's attempt to cast this statement in a different light is unavailing.

Additionally, it is well established that "a party cannot create an issue of fact by a declaration which contradicts his prior discovery responses." (*Shin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12.) In determining whether any triable issue of material fact exists, the trial court may give "great weight" to admissions made in discovery and "disregard contradictory and self-serving affidavits of the party." (*Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1451.) The Supreme Court has explained that such admissions "have a very high credibility value," particularly when they are "obtained not in the normal course of human activities and affairs but in the context of an established pretrial procedure whose purpose is to elicit facts." (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 22 (*D'Amicoi*).) "Where a declaration submitted in opposition to a motion for summary judgment clearly contradicts the declarant's earlier deposition testimony or discovery responses, the trial court may fairly disregard the declaration and '"conclude there is no substantial evidence of the existence of a triable issue of fact."'" (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1087, italics omitted; *D'Amico, supra,* at p. 21.) Thus, we conclude Agranov's declaration that he did not suspect Markowitz had done something wrong until March 2, 2010, is not substantial evidence to contradict his earlier admission that he "suspected" Markowitz "had done something wrong with respect to the way he did [the] surgeries, as of the end of '09."

Agranov argues *Artal, supra,* 111 Cal.App.4th at page 273 compels us to reverse the trial court's ruling. We disagree. *Artal* addressed whether the plaintiff exercised reasonable diligence in seeking to discover the negligent cause of her injury. There, the plaintiff sued the anesthesiologist who intubated her during her pelvic surgery. (*Id.* at p. 275.) After surgery, the patient had severe throat pain and subsequently saw at least 20 specialists in the 18 months following the surgery, as the pain persisted. Each specialist attributed her pain to different causes. (*Id.* at pp. 275-276.) Among the doctors she

sought treatment from, the patient also saw a pain specialist and in response to the question "What do YOU think is the cause of your pain?," she wrote, " I don't know. I feel that some sort of trauma was caused during intubation." (*Id.* at p. 276, italics omitted.)

After undergoing exploratory surgery to determine the cause of the pain, the plaintiff was informed the pain was caused by a thyroid cartilage fracture. The plaintiff filed suit less than one year after the exploratory surgery. (*Artal, supra,* 111 Cal.App.4th at pp. 276-277.) The trial court denied a motion for summary judgment on statute of limitations grounds. However, after a bifurcated bench trial, the trial court ruled the action was barred by the statute of limitations because her answer to the pain specialist more than one year before her lawsuit indicated she suspected negligence. (*Ibid.*)

On review, the court found nothing in the record to show the patient could have, through greater diligence, discovered the negligent cause of her harm any earlier than the exploratory surgery. The patient's response to the pain specialist merely showed that she suspected there was a connection between the intubation and her throat pain. The appellate court concluded it did not support the conclusion that she knew, or by reasonable diligence should have known, that the throat pain was caused by professional negligence. The cause was determined only after exploratory surgery. (*Artal, supra,* 111 Cal.App.4th at p. 281.)

Artal does not help Agranov. Here, Agranov suspected Markowitz had done something wrong. In *Artal*, the plaintiff merely suspected there was a connection between the intubation and her pain, not that the anesthesiologist did anything wrong. Further, the court found the *Artal* plaintiff *could not* have discovered the cause of her pain, as evidenced by her diligent efforts in seeking treatment from 20 specialists, none of whom were able to determine the cause of her pain. Agranov presents no evidence that he *could not* have discovered the cause of his injury. *Artal* is distinguishable.

Because we find Agranov's complaint is time-barred, we need not reach his remaining arguments regarding whether triable issues of fact exist as to causation or the standard of care.

DISPOSITION

The summary judgment is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.