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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

MARIANNE DOUWES, Plaintiff and Appellant, v. SID SOLOMON, Defendant and Respondent.	B234612 (Los Angeles County Super. Ct. No. SC108112)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman P. Tarle, Judge. Affirmed.

Law Offices of C. Snyder Patin, C. Snyder Patin; Law Offices of Nada L. Edwards and Nada L. Edwards for Plaintiff and Appellant.

Peterson Bradford Burkwitz, George E. Peterson and Richard Barrios for Defendant and Respondent.

Marianne Douwes appeals from the judgment entered after the trial court granted summary judgment in favor of Sid Solomon, D.D.S., on the ground Douwes's action for dental malpractice was untimely under the one-year discovery provision of Code of Civil Procedure section 340.5 (section 340.5). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Douwes's Treatment for Severe Jaw Pain*

Suffering from ongoing and severe jaw pain associated with temporomandibular joint disorder (TMJD), Douwes was treated by Dr. Chun K. Kim from November 2003 through August 2006.[1] Dr. Kim performed a full mouth reconstruction and made repeated adjustments to her bite. Douwes continued to experience pain in her jaw and, unhappy with his care and lack of positive results, advised Dr. Kim she was discontinuing her treatment with him.

On August 9, 2006 Douwes was examined by Dr. Allen Nazeri, who referred her to Dr. Solomon. Douwes first visited Dr. Solomon on August 16, 2006. Her patient information form stated the reason for her visit was "TMJ alignment and cosmetic reconstruction of corner teeth." Douwes subsequently saw Dr. Solomon for evaluation and treatment on multiple occasions from September 15, 2006 through April 15, 2008. That treatment included a full mouth reconstruction, placement of crowns and ceramic veneers and bite adjustments.

On April 20, 2008 Douwes and her husband sent Dr. Solomon an email complaining of increasing discomfort with her bite. Another email was sent on April 23, 2008 in which Douwes listed a variety of complaints including pain in and behind her left ear, pain in her left and right jaw joint and muscle aches in both cheeks. On May 14, 2008 Douwes advised Dr. Solomon she was hesitant to complete her treatment with him because it would not address her continued complaints.

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[1] This factual background is based solely on portions of Dr. Solomon's separate statement of undisputed material facts as to which Douwes has indicated her agreement.

On May 16, 2008 Douwes saw Dr. Leonard J. Feld regarding her complaints of dizziness, ear congestion, ear pain, facial pain, fatigue, headaches, jaw clicking, jaw joint noises, jaw pain, neck pain, pain when chewing, ringing in her ears, shoulder pain and throat pain. Dr. Feld's initial diagnosis included "bilateral articular cartilage disorder, bilateral facial/cervical myositis and bilateral temporal tendinitis." Dr. Feld explained to Douwes she had TMJD. Immediately after starting treatment with Dr. Feld in May 2008, Douwes believed Dr. Solomon "had done something wrong during his care and treatment of her as evidenced by the fact that she had pain in the left temporomandibular joint and to a lesser extent her right temporomandibular joint, had problems with her bite, dizziness, cheek pain on both sides, sleep disorder, fatigue, and headaches in the back." Douwes continued treatment with Dr. Feld until July 2009 and subsequently visited other dentists, including Dr. Steve Tatevossian.

2. *Douwes's Lawsuit for Dental Malpractice; Dr. Solomon's Motion for Summary Judgment*

On May 24, 2010 Douwes filed an action for professional negligence (dental malpractice) and lack of informed consent against Dr. Solomon.[2] Dr. Solomon answered on June 17, 2010 and on April 8, 2011 moved for summary judgment, arguing the undisputed facts established Dr. Solomon had not breached the standard of care and did not cause Douwes's injuries and the claims against him were barred by the limitations period set forth in section 340.5. In support of his motion Dr. Solomon included the declaration of Eric C. Sung, D.D.S., a general and cosmetic dentist, who opined that Dr. Solomon's care and treatment of Douwes was within the applicable standard of care and did not cause or contribute to her injuries. Dr. Solomon also contended the undisputed evidence established Douwes was aware of her injuries and Dr. Solomon's alleged wrongdoing by the time she visited Dr. Feld in May 2008 to obtain a second opinion.

With her opposition to Dr. Solomon's motion for summary judgment, Douwes submitted a detailed declaration from Dr. Tatevossian, a TMJD and sleep disorder

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[2] Douwes failed to designate the complaint for inclusion in the record on appeal.

specialist, who opined, based on his education, training, experience and extensive review of materials relating to Douwes's dental care, that Dr. Solomon had been negligent in his treatment of her and his negligence caused or contributed to her injuries and damage. Dr. Tatevossian testified, "The principal criticism of Dr. Solomon's overall care and treatment as being negligent and falling below the applicable standard of care is that he undertook to perform irreversible treatment, to wit, full-mouth reconstruction without having first diagnosed the underlying etiology of the Plaintiff's symptomatology and complaints. . . . Dr. Solomon's care and treatment did not relieve Plaintiff's symptoms because he had not diagnosed and eliminated the primary pain disorder, which was osteoarthritis of both TMJ's, and articular disc dislocations of both TMJ's."

Douwes also argued, although she felt something was wrong when she first visited Dr. Feld in May 2008 because of her continuing and worsening symptoms, she did not know until approximately May 2009 that what was wrong resulted from Dr. Solomon's negligence. She did not cite any evidence to support that assertion and did not describe what she learned in May 2009 that changed the situation.[3]

In his reply memorandum Dr. Solomon conceded for purposes of his motion Douwes (through Dr. Tatevossian's declaration) had presented sufficient evidence to establish triable issues of fact with respect to breach of the standard of care and causation. However, he asserted the undisputed evidence demonstrated Douwes had a suspicion of wrongdoing no later than May 2008 when she discontinued her treatment with

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[3] In her memorandum of points and authorities in the trial court, Douwes twice stated it was not until May 2009 that she began to suspect her continuing dental problems were the result of Dr. Solomon's professional negligence. No evidence was cited to support that assertion. In her response to Dr. Solomon's separate statement of undisputed material facts, Douwes again stated, although she suspected wrongdoing as of May 2008, she was unaware of the underlying negligent cause until approximately May 2009; in this document she cited to three lines from her unverified complaint as her only supporting evidence. Without explanation Douwes has altered her position on appeal and now contends she was unable to learn of Dr. Solomon's negligence through reasonable investigation until Dr. Tatevossian performed complicated testing and evaluation procedures sometime after she began seeing him in August 2009.

Dr. Solomon. Accordingly, her lawsuit, filed two years after the date of discovery, was time-barred.

3. *The Trial Court's Ruling Granting Summary Judgment*

On June 20, 2011, after hearing oral argument, the court granted Dr. Solomon's motion for summary judgment on the ground it was barred by section 340.5's one-year limitations period. The court relied principally on Douwes's acknowledgement she thought Dr. Solomon "had done something wrong" or "something not right" by April or May 2008 because she had more symptoms after she saw him and her symptoms had become worse, which led her to discontinue treatment with Dr. Solomon and see a different dentist. That suspicion of wrongdoing meant Douwes was on notice at that time of information or circumstances sufficient to require a reasonable person to inquire further, triggering the one-year limitations period. Douwes's response that Dr. Feld had advised her she should give Dr. Solomon a chance to correct the problem, the court explained, did nothing to create a triable issue of fact material as to the issue whether by that time she suspected her injury was caused by Dr. Solomon's wrongdoing. The court further noted Douwes's additional assertion she did not become aware her problem may have been caused by professional negligence until May 9, 2009 cited as evidence only an allegation in her unverified complaint and therefore failed to create a triable issue of material fact.

Judgment in favor of Dr. Solomon was entered on July 12, 2011. Douwes filed a timely notice of appeal.

DISCUSSION

1. *Standard of Review*

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of

law. (*Schachter v. Citigroup, Inc*. (2009) 47 Cal.4th 610, 618; *Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) The evidence must be viewed in the light most favorable to the nonmoving party. (*Schachter,* at p. 618.)

2. *Section 340.5: The Governing Statute of Limitations*

Section 340.5 provides, in 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." "It is well established that, '"[t]he 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.)

As the Supreme Court explained in *Fox v. Ethicon Endo-Surgery, Inc*. (2005) 35 Cal.4th 797, 808-809, "[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." "[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.)

3. *The Trial Court Properly Granted Summary Judgment on the Ground Douwes's Dental Malpractice Claims Were Time-barred*

Because much of Dr. Solomon's treatment of Douwes occurred within three years of the filing of her lawsuit, the limitations question under section 340.5 is whether Douwes should have discovered Dr. Solomon's alleged professional negligence more than a year prior to May 24, 2010. On the undisputed record before the trial court, the

answer is plainly yes: As of May 2008 when she discontinued treatment with Dr. Solomon and started seeing Dr. Feld, Douwes's pain and discomfort had increased notwithstanding two years of extensive dental work by Dr. Solomon and she believed her symptoms had worsened because Dr. Solomon "had done something wrong" or "something not right"—a concern she expressed in office visits and emails sent to Dr. Solomon. Nothing more than that knowledge of injury and suspicion of wrongdoing was required to trigger section 340.5's one-year limitations period.[4]

Douwes's situation is analogous to the circumstances in *Dolan v. Borelli* (1993) 13 Cal.App.4th 816 in which a patient (Dolan) sued her doctor (Borelli) for medical malpractice following surgery to release the right carpal tunnel ligament to eliminate pain associated with carpal tunnel syndrome. (See *id.* at p. 819.) The doctor had told Dolan she should be free from pain within 60 days after the surgery. Initially, instead of the expected minor surgical pain, Dolan felt worse pain than before the operation. By 60 days after surgery, her symptoms were significantly worse than before the surgery; and she "believed something had gone wrong, [the doctor] had performed her surgery improperly, and she was worse than before the operation." (*Id*. at p. 820.) As her symptoms and disability worsened, Dolan saw another physician, who concluded her pain was psychological rather than physiological. (*Ibid*.) Approximately 14 months after the initial surgery, Dolan saw yet another doctor, 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 thus not discovered until the second operation, our colleagues in Division One of this court rejected Dolan's contention section 340.5's limitations period did not begin to run until the date of the second surgery: "Her claim essentially amounts to an argument that, while she suspected [the initial doctor] was negligent, she did not know his negligence

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[4] Section 340.5's one-year discovery rule applies to Douwes's cause of action for lack of informed consent as well as to her claim for professional negligence. (See *Massey v. Mercy Medical Center Redding* (2009) 180 Cal.App.4th 690, 698-699; *Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1200.)

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.)

Similarly in the case at bar, although Dr. Feld, who treated Douwes between May 2008 and July 2009, apparently never told Douwes that Dr. Solomon had been negligent and the precise nature of Dr. Solomon's alleged dental malpractice may not have been known until after Dr. Tatevossian performed additional diagnostic tests beginning in August 2009, Douwes had enough information by May 2008 when she discontinued treatment with Dr. Solomon with ever-worsening symptoms to suspect a type of wrongdoing had injured her. "[A] plaintiff need not know the precise manner in which a wrongdoer was negligent in order to discover his or her injury, within the meaning of section 340.5." (*Knowles v. Superior Court, supra*, 118 Cal.App.4th at p. 1298; see *Fox v. Ethicon Endo-Surgery, Inc., supra,* 35 Cal.4th at p. 807 ["Under the discovery rule, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period. . . . Rather than examining whether the plaintiffs suspect facts supporting each specific legal element of a particular cause of action, we look to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them."]; *Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1393 ["the subjective prong of the discovery rule requires merely a suspicion '"that someone has done something wrong" to him'"].) Far from presenting evidence from which a trier of fact could conclude Douwes did not suspect in May 2008 that her continuing dental problems were caused by Dr. Solomon (cf. *Kitzig*, at p. 1394), Douwes admitted she believed Dr. Solomon had done something wrong when she began treatment with Dr. Feld at that time.[5]

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[5] Douwes argues in this court her concession she believed Dr. Solomon had done something wrong could have simply meant the treatment was unsuccessful and not necessarily that it failed due to his negligence or fault. Even if this reinterpretation of her deposition testimony was otherwise plausible, Douwes did not file a declaration in

Douwes's response that a jury could determine she had exercised due diligence in attempting to determine the source of her ongoing pain but did not actually know until 2009 that her worsening condition was the result of Dr. Solomon's negligence misapprehends the delayed discovery rule. The question is not whether Douwes's own conduct after she discontinued treatment with Dr. Solomon was, in retrospect, appropriate, but whether, given her belief Dr. Solomon had done something wrong, a reasonable investigation of all potential causes of her continuing jaw pain at that time would have revealed a factual basis for her malpractice claim against him. (See *Fox v. Ethicon Endo-Surgery, Inc., supra*, 35 Cal.4th at pp. 803, 808-809.) Douwes has presented no evidence that the testing and evaluation done by Dr. Tatevossian starting in August 2009 could not have been done earlier (that is, for example, by Dr. Feld in May 2008) or that Dr. Tatevossian's diagnostic testing of her deteriorating condition is not properly considered within the definition of a reasonable investigation of the potential causes of her injury. To the contrary, Dr. Tatevossian testified in his declaration in opposition to Dr. Solomon's motion for summary judgment that Dr. Solomon's failure to order those very tests was a primary aspect of his negligent treatment of Douwes.

In sum, by May 2008 Douwes knew she was injured and suspected Dr. Solomon's wrongdoing was responsible. Her cause of action for professional negligence accrued at that time, and her lawsuit filed two years later was barred by section 340.5's one-year limitations period.

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opposition to Dr. Solomn's summary judgment motion and offered no other evidentiary support for this revised construction of her statement. (See generally *Shiin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12 ["a party cannot create an issue of fact by a declaration which contradicts his prior discovery responses"]; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22.)

DISPOSITION

The judgment is affirmed. Dr. Solomon is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.