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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

JAMES BATCHELDER, Plaintiff and Appellant, v. BRIT O. SMITH, M.D., and HEATHER SMITH PORTER, Defendants and Respondents.	B281841 (Los Angeles County Super. Ct. No. BC536711)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Law Offices of Steven C. Gambardella and Steven C. Gambardella for Plaintiff and Appellant.

Moore McLennan, Raymond R. Moore, Laura C. McLennan, Cole Pedroza and Matthew S. Levinson for Defendants and Respondents.

Plaintiff and appellant James Batchelder (Batchelder) appeals a judgment following a grant of summary judgment in favor of defendants and respondents Bret O. Smith, M.D. (Dr. Smith) and Heather Smith Porter (Porter) in a medical malpractice action.

Batchelder brought Dr. Smith and Porter into the action by way of Doe amendments. However, the Doe amendments were invalid because at the time Batchelder filed his action, he was aware of the identity of Dr. Smith and Porter and he also was aware of his potential claim against them for failing to diagnose the kidney stone which was the cause of his back pain; it is undisputed that in August 2013, Batchelder was advised by Dr. Anna Fuchs that his prior physicians had failed to diagnose the kidney stone which was the source of his back pain. Because the Doe amendments were invalid, and Batchelder failed to file suit against Dr. Smith and Porter within one year of August 14, 2013, when he discovered their alleged negligence (Code Civ. Proc., § 340.5.),[1] the grant of summary judgment was proper.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

Dr. Smith is a physician and Porter is his physician's assistant. Between 2006 and 2013, they were Batchelder's primary care providers, and he saw Porter about once every three months. In November 2010, Batchelder first complained to Porter of "low left back spasms." After that appointment, Batchelder did not return to Dr. Smith and Porter for nearly a year. In the meantime, he consulted various other physicians

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[1] All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

regarding his back pain, and kept Porter "in the loop" by having those physicians forward their records to her.

In October 2011, Batchelder returned to see Porter, complaining that his low left back spasms had become more frequent and severe. Porter did not diagnose a kidney stone at that time and she referred him to a spine clinic. Batchelder again saw Porter in January 2012 and she referred him to another physician. In addition to referrals to other providers, Porter administered a cortisone injection to him, and he also was prescribed pain medication.

On August 6, 2013, Batchelder underwent a CT scan, and the radiology report identified the presence of a kidney stone. On August 10, 2013, Batchelder obtained a copy of the CT report and then looked up the meaning of the results on the Internet. Batchelder then emailed his family and employer that the kidney stone had been causing his pain all along.

Upon being diagnosed with the kidney stone, Batchelder contacted Dr. Fuchs, a urologist, who removed it on August 14, 2013. Dr. Fuchs informed Batchelder that "the kidney stone was the cause of all of his pain in the prior few years, . . . his studies from Renaissance Imaging were interpreted incorrectly and the kidney stone was missed." The removal of the kidney stone caused Batchelder to think that " 'the problem had been found and solved.' "

Batchelder's final appointment with Dr. Smith and Porter was on September 24, 2013. Batchelder brought a printout from the CT scan that showed the kidney stone, and told Porter the problem had been "found." According to Batchelder, upon seeing the CT image, Porter became flushed and pale and stated, " 'Yes, you had a kidney stone.' "

2. *Pleadings.*

On February 21, 2014, Batchelder commenced this action for medical negligence, and filed the operative first amended complaint (FAC) on July 16, 2014. The first cause of action of the FAC, which named 16 physicians, pled in relevant part:

"6. At all times herein mentioned, the [D]octor Defendants Nick Shamie, M.D. [et al.] and DOES 51-100 (hereinafter the Doctor Defendants) were and are physicians licensed by the State of California to practice medicine, individually, or in association with other doctors, medical groups, and joint ventures. [¶] . . . [¶]

"9. Between December 2010, and August 2013, Plaintiff James Batchelder sought care from the Doctor Defendants for severe pain. Each of the Doctor Defendants failed to diagnose, treat and/or refer Mr. Batchelder for the competent treatment of his pain which was a kidney stone and failed to refer treatment of this condition to another specialist for competent care and treatment of this condition. During the course of the prolonged failure to competently diagnose, treat and refer Mr. Batchelder, the Doctor Defendants and hospital defendants instead subjected Plaintiff to unnecessary surgeries, drugs, and other medical procedures, none of which solved . . . the cause of his pain or were therapeutic for his condition, a kidney stone, and some of which caused new pain and injuries. After Plaintiff consulted with a kidney specialist, Mr. Batchelder received appropriate treatment for kidney stones. The Doctor Defendants' failure to correctly diagnose, treat and/or refer Mr. Batchelder for competent diagnosis and treatment resulted in harmful and unnecessary surgeries, prescription of medications that concomitantly were addictive and had side effects, resulted in the extended delay in appropriate diagnosis and treatment, which was below the

standard of care and was the direct and legal cause of Mr. Batchelder's damages."

3. *In 2016, following their depositions, Batchelder filed Doe amendments naming Dr. Smith and Porter.*

Dr. Smith and Porter were deposed on January 21, 2016. In response to the accompanying request for production of documents, they produced Batchelder's chart, which included his urinalysis results from December 2012 that indicated microscopic blood in his urine.[2]

On January 22, 2016, Batchelder filed an amendment to the FAC substituting Dr. Smith for Doe 5. On February 3, 2016, Batchelder filed another amendment, substituting Porter for Doe 6.[3] No new allegations were made against them and the FAC remained the operative pleading. It continued to allege that the Doctor Defendants were negligent in failing to correctly diagnose

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[2] Batchelder subsequently asserted in his interrogatory responses that Dr. Smith and Porter were negligent in clearing him for back surgery despite the urinalysis that showed blood in his urine. However, the operative FAC only pled negligence by the Doctor Defendants in failing to diagnose and treat the kidney stone which was the cause of his pain.

[3] It appears these two amendments, naming Smith and Porter as Does 5 and 6, respectively, contained multiple clerical errors in that Does 4 through 50 of the FAC "were corporations . . . engaged in developing, manufacturing, . . . and/or selling pharmaceuticals and medications." However, for purposes of this appeal, we disregard the clerical errors. We construe these two Doe amendments as relating to Batchelder's cause of action alleging negligence by the Doctor Defendants, including Does 51 to 100, in failing to diagnose his kidney stone.

and treat the kidney stone which was the source of Batchelder's back pain.

4. *Summary judgment proceedings.*

On or about September 2, 2016, Dr. Smith and Porter filed a motion for summary judgment on the ground the action against them was time-barred (§ 340.5)[4] and was not subject to the delayed discovery rule. The moving defendants contended that by August 14, 2013, Batchelder admittedly had been informed by Dr. Fuchs that the kidney stone was the cause of his back pain in the prior few years, and therefore, he "had actual or presumptive knowledge regarding the alleged failure to diagnose or treat his kidney stone as to all defendants, including Moving Defendants, as of August 14, 2013." Therefore, to be timely, Batchelder's complaint against Dr. Smith and Porter needed to be filed by August 14, 2014 at the latest, but he did not file suit against them until January 22, 2016 and February 3, 2016, respectively.

In opposition, Batchelder contended the "relation back" doctrine was applicable to his claims against Dr. Smith and Porter, and the Doe amendments were proper pursuant to section 474.[5] Batchelder argued the first time he was made aware of any

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[4] Section 340.5 states 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*." (Italics added.)

[5] Section 474 states in relevant part: "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading

facts that may have raised a suspicion of wrongdoing by them was after their depositions in January 2016. "Prior to that time, I was not aware of the positive urinalysis or of the need to have this checked out[.]" Batchelder explained, "until the revelation during their depositions of the positive finding of blood in his urine, which is a potential sign of a kidney stone, they were not brought into this case."

In their reply papers below, Dr. Smith and Porter argued that irrespective of the urinalysis report, by August 14, 2013, Batchelder was aware of the alleged failure of his treating physicians to diagnose the kidney stone, rendering his action against them time-barred.

On December 16, 2016, the trial court granted summary judgment in favor of these moving defendants. The trial court ruled as follows: When a complaint sets forth a cause of action against a defendant designated by a fictitious name and his true name is thereafter discovered and substituted by amendment, he is considered a party to the action from its commencement so that the statute of limitations stops running as of the date the original complaint was filed. However, for this rule to apply, it is necessary that the plaintiff actually be ignorant of the name or identity of the fictitiously named defendant. Batchelder argued that Dr. Smith and Porter's identities were unknown up until their depositions in January 2016, and therefore the Doe amendments naming them were timely. The trial court rejected the argument. It found that although the urinalysis records were

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or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly[.]"

not known to Batchelder until January 2016, other relevant facts were known to him when he filed suit, making his reliance on the Doe amendments unavailing.

Batchelder filed a timely notice of appeal from the judgment.

CONTENTIONS

Batchelder contends the trial court failed to properly apply the "relation back doctrine" to the Doe amendments naming Smith and Porter and therefore erred in granting summary judgment in their favor.

DISCUSSION

1. *Standard of appellate review*.

"On appeal, we conduct a de novo review of the record to 'determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law.' [Citations.] We apply the same procedure used by the trial court: We examine the pleadings to ascertain the elements of the plaintiff's claim; the moving papers to determine whether the defendant has established facts justifying judgment in its favor; and, if the defendant did meet this burden, plaintiff's opposition to decide whether he or she has demonstrated the existence of a triable issue of material fact. [Citations.]" (*Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 805–806.)[6]

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[6] The respondents' brief misstates the standard of appellate review. Respondents contend the summary judgment should be affirmed because it is supported by substantial evidence, and that

2. *General principles re filing of Doe amendments.*

Batchelder's naming of Doe defendants, and his subsequent amendment to substitute Dr. Smith and Porter for two of the Does, is governed by section 474. As explained in *McOwen v. Grossman* (2007) 153 Cal.App.4th 937 (*McOwen*), "section 474 is not to be confused with the statute of limitations. [¶] The rule that applies to this case has been stated in *General Motors Corp. v. Superior Court* (1996) 48 Cal.App.4th 580, 587–588: 'When a lawsuit is first initiated after the applicable period of limitations has expired and the plaintiff is entitled to claim the benefit of a delayed discovery rule (that is, when for one reason or another the plaintiff is granted an extended period within which to file suit), the relevant inquiry is what the plaintiff knew or, through the exercise of due diligence, reasonably could have discovered at an earlier date." (*McOwen*, *supra*, at p. 942, italics omitted.)

But " 'where, as here, a lawsuit is initiated within the applicable period of limitations against someone . . . and the plaintiff has complied with section 474 by alleging the existence of unknown additional defendants, the relevant inquiry when the plaintiff seeks to substitute a real defendant for one sued fictitiously is *what facts the plaintiff actually knew* at the time the original complaint was filed.' [¶] A plaintiff can avail himself

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when a matter is tried on declarations the appellate court must defer to the trial court's determination of credibility. These arguments miss the mark. The role of the trial court on summary judgment is solely to determine whether triable issues of material fact exist that must be resolved through a trial—*not* to resolve the merits of such issues. (*EHP Glendale, LLC v. County of Los Angeles* (2011) 193 Cal.App.4th 262, 270–271.) Thereafter, as explained above, our review is de novo.

or herself of section 474 if the plaintiff is ignorant of facts that give rise to a cause of action against a person who is otherwise known to the plaintiff. 'In keeping with th[e] liberal interpretation of section 474, it is now well established that even though the plaintiff knows of the existence of the defendant sued by a fictitious name, and even though the plaintiff knows the defendant's actual identity (that is, his name), the plaintiff is "ignorant" within the meaning of the statute if he lacks knowledge of that person's connection with the case or with his injuries.' (*General Motors Corp. v. Superior Court*, *supra*, 48 Cal.App.4th at pp. 593–594.) As put by another court: 'The phrase "ignorant of the name of a defendant" is broadly interpreted to mean not only ignorant of the defendant's identity, but also ignorant of the facts giving rise to a cause of action against that defendant.' (*Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 117; see generally 4 Witkin, Cal. Procedure (4th ed. 1997) §§ 445, 446, pp. 540–545.)" (*McOwen*, *supra*, 153 Cal.App.4th at pp. 942–943.)

Whether " 'the requirements of section 474 are met' [citation] is different from deciding when the cause of action accrued for the purposes of the statute of limitations. If the identity of the Doe defendant is known but, at the time of the filing of the complaint the plaintiff did not know facts that would cause a reasonable person to believe that liability is probable, the requirements of section 474 are met. 'Section 474 allows a plaintiff in good faith to delay suing particular persons as named defendants until he has knowledge of sufficient facts to cause a reasonable person to believe liability is probable.' [Citation.] 'The fact that the plaintiff had the means to obtain knowledge is irrelevant.' (*General Motors Corp. v. Superior Court*, *supra*,

48 Cal.App.4th at p. 594.) 'In short, section 474 does not impose upon the plaintiff a duty to go in search of facts she does not actually have at the time she files her original pleading.' (*Id*. at p. 596.)" (*McOwen*, *supra*, 153 Cal.App.4th at pp. 943–944.)

A "medical malpractice action must be commenced three years after the date of the injury 'or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first.' (Code Civ. Proc., § 340.5.) While reasonable diligence may be material to the determination of the *accrual* of a cause of action, reasonable diligence is not germane to determining whether a Doe amendment was timely. (*Fuller v. Tucker, supra*, 84 Cal.App.4th 1163, 1170–1171.)" (*McOwen*, *supra*, 153 Cal.App.4th at p. 944.)

3. *The undisputed evidence established that at the time Batchelder filed suit, he knew of facts giving rise to his theory of liability against Dr. Smith and Porter based on their failure to diagnose a kidney stone as the cause of his back pain; therefore, the Doe amendments were improper.*

The parties' respective separate statements of disputed and undisputed facts established the following facts as undisputed: On August 6, 2013, Batchelder underwent a CT scan. The radiology report identified the presence of a kidney stone. After learning of his kidney stone, Batchelder contacted Dr. Fuchs, who diagnosed his kidney stone and removed it on August 14, 2013. At that time, "*Dr. Fuchs informed [Batchelder] that the kidney stone was the cause of all of his pain in the prior few years*, and she indicated that his [earlier] studies from Renaissance Imaging were interpreted incorrectly and the kidney stone was missed. The removal of the kidney stone caused [Batchelder] to think that 'the problem had been found and solved.' " (Italics added.)

Although Batchelder admitted in his responsive separate statement that "[b]y August 14, 2013 at the latest, [he] had actual or presumptive knowledge of the factual basis for his negligence claims against all [the named] defendants," he denied that he had such knowledge as against the *moving defendants*, namely, Dr. Smith and Porter. Batchelder asserted the first time he was made aware of any facts that may have raised a suspicion of wrongdoing with respect to Dr. Smith and Porter was *after their depositions* in January 2016; before then, " '[he] was not aware of the positive urinalysis or of the need to have this checked out, particularly in view of the fact that each of the doctors I was referred to did not have a firm idea of what was causing my back pain." Batchelder asserted, "until the revelation during their depositions of the positive finding of blood in his urine, which is a potential sign of a kidney stone, they were not brought into the case."

In paragraph 4 of his opposing declaration, Batchelder sought to explain why Dr. Smith and Porter were not named as defendants at the inception of the action. He stated: "Attached hereto as Exhibit 1 is a true copy of a document I created on an ongoing basis while I was treating with the defendants in this action, which I called my 'Back Pain Doctor History.' I created this in an effort to keep track of the numerous providers I saw to investigate the cause of my back pain complaints. At no point did I include Dr. Smith or Ms. Porter in this compilation, as I referred to my 'Back Pain Doctors' to be responsible for diagnosing the cause of my back pain."

Dr. Smith and Porter objected to this portion of Batchelder's declaration, arguing that his "decision to not include his long-time family physician on a list of specialists he saw is

irrelevant, and does not impact [the] facts he knew regarding his treatment with [Dr. Smith and Porter]." Although the trial court did rule on the evidentiary objections, the ruling does not appear to be in the record on appeal.

In any event, paragraph 4 of Batchelder's declaration is insufficient to raise a triable issue of material fact. Notwithstanding Batchelder's assertion that Dr. Smith and Porter were not among his "Back Pain Doctors," the evidence is undisputed that they did treat him for his back pain, including prescribing pain medication, administering a cortisone injection, reviewing his medical records, and referring him to other physicians. Therefore, Dr. Fuch's advisement to Batchelder in August 2013 that his physicians had failed to diagnose a kidney stone as the cause of his back pain alerted him to his claim that Dr. Smith and Porter, along with his other providers, had misdiagnosed his back pain.

Further, the undisputed evidence defeats Batchelder's assertion that before he took the depositions of Dr. Smith and Porter in January 2016, he was unaware of any facts that may have raised a suspicion of negligence by them in failing to diagnose and treat the kidney stone. By August 14, 2013, Dr. Fuchs informed Batchelder that a kidney stone was the cause of all of his pain in the prior few years, and that the kidney stone had been missed by his prior physicians. Six months later, in February 2014, Batchelder filed suit against 16 of his physicians (but not Dr. Smith and Porter) for failing to properly diagnose and treat him.

Dr. Fuchs's advisement to Batchelder in August 2013 with respect to the missed diagnosis negates his argument that he was ignorant of the facts giving rise to a cause of action against

Dr. Smith and Porter until January 2016. Irrespective of the urinalysis obtained by Dr. Smith and Porter in December 2012, which indicated blood in Batchelder's urine and thus a potential kidney stone, a fact that Batchelder did not discover until January 2016, Batchelder was made aware by Dr. Fuchs in August 2013 of facts giving rise to potential liability by Dr. Smith and Porter based on their failure to diagnose his kidney stone.

In an attempt to establish that his Doe amendments were timely, Batchelder seeks to predicate his negligence claim against Dr. Smith and Porter on their clearing him for back surgery despite his positive urinalysis results, a fact unknown to him until the January 2016 depositions. However, on review of a ruling on a motion for summary judgment, the issues are framed by the pleadings. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252.) Batchelder's pleadings did not allege that Dr. Smith and Porter were negligent in clearing him for back surgery despite the presence of blood in his urine. Batchelder himself concedes that "the pre-operative clearance was a separate and distinct . . . medical service . . . and the claim of improper clearance for surgery exists separate and apart" from the diagnosis of complaints of back pain. Thus, Batchelder's theory of negligent clearance for surgery is simply outside the scope of the pleadings in this case.

In sum, the gravamen of this action is that, as pled in the operative FAC, "[e]ach of the Doctor Defendants failed to diagnose, treat and/or refer [him] for the competent treatment of his pain which was a kidney stone." Based on Dr. Fuchs's advisement to Batchelder in August 2013 that his ongoing back pain was due to a kidney stone, at the time Batchelder filed suit on February 21, 2014, he was not ignorant of facts giving rise to a

cause of action against Dr. Smith and Porter based on their failure to diagnose and treat the kidney stone. (*McOwen*, *supra*, 153 Cal.App.4th at pp. 942–943.) Therefore, the two Doe amendments, filed January 22, 2016 and February 3, 2016, were improper. Accordingly, Batchelder's failure to file suit against Dr. Smith and Porter within one year of August 14, 2013, when he discovered their alleged negligence (§ 340.5), entitled them to the grant of summary judgment.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.