Filed 4/12/18 Shannon-Yeganhe v. Cedars-Sinai Medical Center CA2/7

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| JENNIFER L. SHANNON-YEGANHE,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>CEDARS-SINAI MEDICAL CENTER et al.,<br><br>Defendants and Respondents. | B266199<br><br>(Los Angeles County Super. Ct. No. BC518996) |

APPEAL from judgments of the Superior Court of Los Angeles County, Kevin Brazile and Dalila C. Lyons, Judges. Affirmed in part, reversed in part.

Morris S. Getzels Law Office and Morris S. Getzels for Plaintiff and Appellant.

LaFollette, Johnson, DeHaas, Fesler & Ames, Louis H. De Haas and Rebecca Handlin for Defendant and Respondent Eli Baron.

Moore McLennan, Raymond R. Moore and Arthur E. Zitsow for Defendant and Respondent Alen Ternian.

Cole Pedroza, Kenneth R. Pedroza and Matthew S. Levinson for Defendants and Respondents Eli Baron and Alen Ternian.

Lewis Brisbois Bisgaard & Smith, Gregory G. Lynch, Kristi K. Hedrick and John J. Weber for Defendant and Respondent Cedars-Sinai Medical Center.

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## INTRODUCTION

In this medical malpractice action, Jennifer Shannon-Yeganhe appeals from the judgments entered after the trial court granted motions for summary judgment filed by Dr. Alen Ternian, Dr. Eli Baron, and Cedars-Sinai Medical Center. Shannon-Yeganhe contends the trial court erred in denying her motion to set aside the orders granting the doctors' motions for summary judgment, which she brought on the ground her counsel had abandoned her. She also contends the trial court erred in granting Cedars-Sinai's motion for summary judgment because there were triable issues of material fact on the elements of her cause of action and on Cedars-Sinai's statute of limitations defense.

We conclude the trial court did not abuse its discretion in denying Shannon-Yeganhe's motion to set aside the orders granting the doctors' motions for summary judgment, but the court erred in granting Cedars-Sinai's motion for summary judgment. Therefore, we affirm the judgments in favor of Ternian and Baron and reverse the judgment in favor of Cedars-Sinai.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *The Trial Court Grants the Motions by Ternian and Baron for Summary Judgment*

Shannon-Yeganhe filed this action on August 21, 2013, asserting one cause of action for medical malpractice against Cedars-Sinai, Ternian, an anesthesiologist, and Baron, a surgeon. Shannon-Yeganhe alleged the defendants failed to provide proper medical care when, while undergoing surgery at Cedars-Sinai on April 11, 2011, she "went into anaphylactic shock from a reaction to [A]ncef [an antibiotic] that resulted in anoxic brain injury secondary to intraoperative hypotension."[1] In her first amended complaint she alleged she became aware of her injury and its cause on August 22, 2012.

Shannon-Yeganhe was represented by counsel when she filed her complaint and her first amended complaint. On February 24, 2014, however, she filed a substitution of attorney stating she now represented herself.

On March 24, 2014 Ternian filed a motion for summary judgment, contending his care of Shannon-Yeganhe was within the standard of care, he did not cause or contribute to her alleged injuries, and the statute of limitations barred her claims. Ternian submitted a declaration from Dr. Paul Yost, a board-certified anesthesiologist, in support of the first two contentions. In support of his third contention, Ternian cited Shannon-

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[1] "[A]noxic refers to the lack of oxygen." (*In re RJF Intern. Corp. for Exoneration from or Limitation of Liability* (1st Cir. 2004) 354 F.3d 104, 105.) "'[H]ypotension' is '[s]ubnormal arterial blood pressure.'" (*Reaves v. Department of Correction* (D.Mass. 2016) 195 F.Supp.3d 383, 401, fn. 15.)

Yeganhe's deposition testimony that, on the day after her April 11, 2011 surgery, Baron and others at Cedars-Sinai told her that during the surgery she went into anaphylactic shock because of an allergic reaction to Ancef and that she should avoid Ancef in the future. Ternian argued Shannon-Yeganhe was therefore "on inquiry notice" of her alleged injury by April 12, 2011, which meant the applicable one-year statute of limitations expired before she filed her complaint. Ternian set the hearing on his motion for June 10, 2014.

Instead of filing an opposition to the motion for summary judgment, Shannon-Yeganhe appeared ex parte on May 20, 2014, the day her opposition to the motion was due, to ask the trial court to continue the hearing on the motion. Shannon-Yeganhe argued she needed more time to conduct discovery and prepare an opposition because her former counsel had not conducted any significant discovery before he substituted out of the case and Shannon-Yeganhe, despite diligently searching for new counsel, had not yet been able to replace him.

Because Shannon-Yeganhe had not given proper notice of the ex parte application, the trial court continued the hearing on the application to May 23, 2014, at which time attorney Eric Nordskog substituted in as counsel for Shannon-Yeganhe and appeared on her behalf to argue the ex parte application. After hearing argument, the trial court denied the application, but, finding the case to be a "complicated" personal injury case, the court transferred it from the personal injury court to an individual calendar court and vacated all hearing dates.

On June 24, 2014 Ternian re-filed his motion for summary judgment in the new department, and nine days later Baron also filed a motion for summary judgment. Baron contended he did

not cause or contribute to Shannon-Yeganhe's alleged injuries, a contention he supported with the declaration of Dr. Patrick Hsieh, a board-certified neurological surgeon. Baron, citing Shannon-Yeganhe's deposition testimony, also argued her action was barred by the statute of limitations. Shannon-Yeganhe did not file written oppositions to either motion.

On September 23, 2014 the trial court, Judge Kevin Brazile, heard the doctors' motions for summary judgment. Shannon-Yeganhe appeared at the hearing without counsel and stated she was representing herself. When the court pointed out she had not filed written opposition to either motion, Shannon-Yeganhe stated she found out "seconds ago" her attorney, Nordskog, would not be appearing at the hearing. She presented the court with what she described as "doctors' letters to [her] attorney . . . which state[d] that it fell below the standard of care for . . . the entire group that operated on me." The trial court stated: "Still doesn't change the statute of limitations argument because that's the basis for granting the motion. Failure to file a separate statement, failure to file opposition, and, more importantly, it's barred by the statute of limitations."

In the trial court's order granting Ternian's motion, the court, "[a]fter full consideration of the evidence," ruled that Dr. Yost's declaration established Ternian's treatment of Shannon-Yeganhe "was well within the standard of care in the community," Dr. Yost's declaration established to a reasonable degree of medical probability Ternian did not cause or contribute to Shannon-Yeganhe's alleged injuries, and the applicable statute of limitations barred the action. In the court's written order granting Baron's motion, the court, "[a]fter full consideration of the evidence," the papers, and oral argument, ruled that Baron

had "shown by admissible evidence and reasonable inferences therefrom, not contradicted by other evidence or inferences," the action against him had no merit and there were no triable issues of material fact.

### B. *The Trial Court Denies Shannon-Yeganhe's Motion To Set Aside the Orders Granting the Motions by Ternian and Baron for Summary Judgment*

On December 23, 2014 Shannon-Yeganhe, represented by new counsel, filed an ex parte application for an order setting aside the orders granting Ternian's and Baron's motions for summary judgment.[2] Suggesting the trial court had granted the motions "by default," Shannon-Yeganhe argued the court should set aside the orders granting the motions because her former attorney, Nordskog, had abandoned her without filing oppositions to the motions and she had been unable to oppose the motions without counsel because of her brain damage. In support of the application, new counsel for Shannon-Yeganhe filed a declaration stating he became involved in the case in late October 2014, substituted in as counsel for Shannon-Yeganhe on November 3, 2014, but was unable to work on the case from November 8 to November 24, 2014 because of a pre-paid vacation. "Otherwise," he stated, "I would have filed this ex parte application earlier."

The trial court deemed the ex parte application a "Motion to Set Aside the Default Summary Judgments," set a deadline for filing opposition, and scheduled the matter for hearing on

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[2] The application also sought to vacate all hearing dates for pending motions, including a motion for summary judgment filed by Cedars-Sinai, which the court had scheduled to hear on January 15, 2014.

January 14, 2015. After receiving oppositions and additional briefing, the court continued the hearing to February 18, 2015.[3] On that date the court, Judge Dalila C. Lyons, heard argument and denied the motion without prejudice on the ground the court lacked "jurisdiction to rule on the merits." In her written ruling, Judge Lyons stated that the motion was "truly a [m]otion for [r]econsideration" of the orders granting the doctors' motions for summary judgment and that, if Shannon-Yeganhe wanted to re-file the motion, she should do so in the department to which the judicial officer who had issued the orders, Judge Brazile, had since moved.

Three months later, on May 12, 2015, Shannon-Yeganhe filed a motion to set aside the orders granting the doctors' motions for summary judgment to be heard by Judge Brazile. She argued the court should exercise its inherent equitable powers to set aside the orders in light of Nordskog's "abandonment" of her. She also suggested Code of Civil Procedure section 473 authorized the court to set aside the orders, although she did not explain how that statute applied.[4] After receiving oppositions and additional briefing, Judge Brazile denied the motion on June 25, 2015.

In his written ruling, Judge Brazile stated that, "[i]f Plaintiff is attempting to rely on the mandatory relief provision of [section] 473(b), that relief does not apply to summary judgments" and that, "[i]f Plaintiff is seeking relief under

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[3] The court also took off calendar Cedars-Sinai's pending motion for summary judgment.

[4] Undesignated statutory references are to the Code of Civil Procedure.

[section] 473(b)'s discretionary relief provision, Plaintiff has failed to comply with the requirements for this relief." Specifically, concerning the requirements for discretionary relief, the court ruled Shannon-Yeganhe had not submitted a "copy of the answer or other pleading proposed to be filed" and had not sought relief "within a reasonable time." (§ 473, subd. (b).) Judge Brazile found it was not reasonable for Shannon-Yeganhe to wait nearly three months after Judge Lyons denied her previous motion without prejudice before filing this motion. He also concluded Nordskog's "failure to timely oppose the summary judgment motion, being conduct below the professional standard of care, is not a ground for relief under CCP § 473(b)'s discretionary provision."

Judge Brazile also ruled Shannon-Yeganhe had not satisfied the requirements for obtaining relief under the court's inherent equitable power. Among other considerations, Judge Brazile noted the case fell "far short of the 'attorney abandonment' upon which relief was granted in the cases" Shannon-Yeganhe had cited. Unlike the moving parties in those cases, for example, Shannon-Yeganhe was aware of relevant hearing dates, attended and made arguments at the hearing on the summary judgment motions, and demonstrated familiarity with litigation procedures and the capability of representing herself by filing various court papers as a self-represented litigant, including a 77-page ex parte application to continue the hearing date on Ternian's motion for summary judgment. Noting that Nordskog made several court appearances on Shannon-Yeganhe's behalf over a four-month period, Judge Brazile also concluded Shannon-Yeganhe had not shown "Nordskog's total failure to represent her; instead, the

complained-of acts merely constitute neglect for which this relief is not available."

The trial court entered judgments in favor of Ternian and Baron, and Shannon-Yeganhe timely appealed.[5]

### C. *The Trial Court Grants Cedars-Sinai's Motion for Summary Judgment*

Meanwhile, Cedars-Sinai moved for summary judgment, arguing it did not breach any duty to Shannon-Yeganhe, it did not cause her any injury, and the statute of limitations barred her action. In support of its motion, Cedars-Sinai submitted the declarations of Dr. Yost and Dr. Hsieh (who had submitted declarations in support of the motions for summary judgment filed by Ternian and Baron, respectively), as well as a declaration by Margaret A. Morley, a registered nurse, clinical nurse specialist, and registered nurse practitioner with a doctorate in nursing practice. Based on her review of the medical records, Shannon-Yeganhe's deposition testimony, and the declarations of Dr. Hsieh and Dr. Yost, Morley opined that Cedars-Sinai's staff,

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[5] After the trial court entered the judgments, Shannon-Yeganhe filed a motion for reconsideration of the order denying her motion to set aside the orders granting the doctors' motions for summary judgment. The motion for reconsideration sought "to put further evidence before the Court that attorney Eric Nordskog abandoned" her, including evidence that Nordskog, "while concealing his address and whereabouts from the California State Bar, has absconded to Bend, Oregon where he is now located." The trial court ruled it lacked jurisdiction to consider the motion because, among other reasons, Shannon-Yeganhe filed it after entry of judgment. Shannon-Yeganhe does not challenge that ruling.

including its nurses, acted within the standard of care when treating Shannon-Yeganhe and did nothing to cause or contribute to any injury to her.

Shannon-Yeganhe (represented by her new counsel) filed a written opposition to the motion. In support of her opposition, Shannon-Yeganhe submitted declarations from herself; her attorney; her treating physician, Dr. Richard J. Kroop; Dr. Richard J. Novak, an anesthesiologist and diplomate of the American Board of Anesthesiology and the American Board of Internal Medicine; and Dr. Burton Bentley II, a fellow of the American Academy of Emergency Medicine who is also certified by the American Board of Emergency Medicine.

In her declaration, Shannon-Yeganhe stated that, on the day after her surgery, doctors at Cedars-Sinai told her she had a "slight allergic reaction to Ancef [that] was not a big deal and was nothing to worry about"; that "from the time of her surgery until September[] 2012" her neurologist, Dr. Elizabeth Yoo, told her "there was nothing wrong with [her] brain"; that "Dr. Kroop had MRIs taken of [her] brain after the April 11, 2011 surgery, and the results were all normal, not indicating any brain damage";[6] and that, until Dr. Kroop sent her to a different neurologist, Dr. Gene L. Tran, in August 2012, "all of [her] doctors were telling [her] that [she] did not have brain damage." Shannon-Yeganhe stated she therefore did not suspect she had physical brain damage until August 22, 2012, when Dr. Tran wrote Dr. Kroop with his assessment that Shannon-Yeganhe had a "possible

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[6] An MRI is a test performed using magnetic resonance imaging. (*People v. Banks* (2014) 59 Cal.4th 1113, 1136, disapproved on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

anoxic brain injury" from experiencing a drop in blood pressure during the April 11, 2011 surgery. Shannon-Yeganhe's declaration attached a copy of Dr. Tran's August 22, 2012 letter, as well as a copy of an August 22, 2013 letter from him reporting that a recent SPECT scan of Shannon-Yeganhe was "supportive of the diagnosis of anoxic brain injury."[7]

Counsel for Shannon-Yeganhe attached to his declaration a letter that Nordskog had obtained from Dr. Mark Schlesinger, a diplomate of the American Board of Anesthesiology. In that letter Dr. Schlesinger opined that Ternian's treatment of Shannon-Yeganhe during her April 11, 2011 surgery fell below the standard of care in several respects, including that "after ten minutes of hypotension consideration should have been given to awakening the patient to assess neurological condition before proceeding with a lengthy (six hour) elective procedure." "In this area," Dr. Schlesinger stated in the letter, "all members of the operative team would likely be judged equally culpable."

Dr. Kroop stated in his declaration that he had treated Shannon-Yeganhe since June 2010. Based on his review of the medical records and Dr. Schlesinger's letter, he opined that "the Cedars-Sinai Medical Center staff that worked on the April 11,

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[7] "[A] single photon emission computed tomography (SPECT) scan[ is] a nuclear imaging test that employs glucose injected with radioactive material to measure brain activity." (*People v. Banks*, *supra*, 59 Cal.4th at p. 1136.) "A SPECT scan is a type of nuclear imaging test, using a radioactive substance and a special camera to create 3-D pictures. While imaging tests like X-rays can show what the structures inside the body look like, a SPECT scan produces images that show how the organs work." (*Brooks v. Commissioner of Social Sec.* (M.D. Fla., Sept. 2, 2014, No. 2:13-cv-179-FtM-29CM) 2014 WL 4346903, at p. 8, fn. 17.)

2011 operation for [Shannon-Yeganhe], which includes the Cedars-Sinai Medical Center staff that worked to support the surgery as well as the Cedars-Sinai Medical Center staff that took care of her after the surgery, fell below the standard of care" and that, "[a]s a result, she has severe hypoxic and anoxic brain injuries." Among the specific facts he cited showing conduct below the standard of care were "unexplained breaks in the Anesthesia Record when anesthesia was not being administered," "the Anesthesia Technician and Physician's Assistant left the operation," "[f]ailure to resolve the drop in blood pressure for too long a period of time," and "[p]roceeding with the elective surgery after the drop in Ms. Shannon-Yeganhe's blood pressure."

Dr. Novak stated in his declaration that, based on his review of the medical records of the surgery, the Cedars-Sinai doctors and staff took two actions during the procedure that fell below the standard of care. The first was "for Dr. Ternian not to have administered epinephrine to Ms. Shannon-Yeganhe" once he realized she had had an anaphylactic allergic reaction to Ancef. The second was proceeding with the surgery after Shannon-Yeganhe had the allergic reaction, instead of first waking her to assess her neurological, cardiac, and respiratory condition. Dr. Novak further stated that "all the members of the operative team are equally culpable for that [second] act of malpractice."

Finally, in his declaration, Dr. Bentley observed that "Dr. Ternian administered ephedrine as a first-line agent to treat anaphylaxis despite the fact that clinical guidelines universally mandate the use of epinephrine. . . . As a direct and proximate result of the failure to administer epinephrine, Ms. Yeganhe-Shannon suffered a protracted duration of intraoperative hypotension that her treating neurologist, Dr. [Tran], believes

resulted in an anoxic brain injury with resultant cognitive dysfunction." Dr. Bentley also opined that Ternian and Baron failed "[t]o comply with the applicable standard of care" by not documenting and disclosing to Shannon-Yeganhe the "gravity" and "sever[ity]" of the events that occurred in connection with her allergic reaction.

On September 3, 2015 Judge Lyons granted Cedars-Sinai's motion for summary judgment. Judge Lyons concluded that Shannon-Yeganhe was "on sufficient inquiry notice" of her injury beginning April 12, 2011, the day after her surgery, when doctors informed her she had experienced anaphylactic shock as a result of an allergic reaction to Ancef, and that therefore the applicable one-year statute of limitations barred her action. Judge Lyons also ruled that, "assuming Dr. Baron and Dr. Ternian are the ostensible agents of Cedars-Sinai, as Dr. Baron and Dr. Ternian were found to not be liable and had their summary judgment motions granted by orders entered on September 23, 2014, Cedars-Sinai cannot be liable if its agents are not liable." Shannon-Yeganhe timely appealed, and we consolidated her two appeals.

## DISCUSSION

### A. *The Trial Court Did Not Abuse Its Discretion in Denying Shannon-Yeganhe's Motion to Set Aside the Orders Granting the Doctors' Motions for Summary Judgment*

Shannon-Yeganhe argues the trial court erred in denying her motion to set aside the orders granting the motions by Ternian and Baron for summary judgment based on attorney

abandonment. She argues Mr. Nordskog's "extrinsic mistake" and "positive misconduct" required the trial court to set aside the orders as an exercise of its inherent equitable power and under section 473.

1. *Applicable Law*

A trial court has inherent equitable power to set aside a default judgment "for extrinsic fraud or mistake." (*Rodriguez v. Nam Min Cho* (2015) 236 Cal.App.4th 742, 750 (*Rodriguez*); accord, *Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 737 (*Aldrich*).) "'Extrinsic mistake' refers to circumstances outside of the litigation that have prevented a party from obtaining a hearing on the merits." (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 502.) "Extrinsic mistake exists when the ground for relief is not so much the fraud or other misconduct of one of the parties as it is the excusable neglect of the defaulting party to appear and present his claim or defense." (*Ibid.*)

A trial court also has discretion under section 473, subdivision (b), to "relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."[8] (See *Zamora v.*

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[8] "[S]ection 473, subdivision (b) 'contains two distinct provisions for relief from default' [citation]—one makes relief discretionary with the court; the other makes it mandatory. [Citation].] The two provisions differ in several other respects," including that "the mandatory relief provision is narrower in scope insofar as it is only available for defaults, default judgments, and dismissals, while discretionary relief is available for a broader array of orders." (*Martin Potts and Associates, Inc.*

*Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 254 (*Zamora*).) "Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." (§ 473, subd. (b).)

Thus, to obtain relief under either the court's inherent equitable power or section 473 based on attorney misconduct, a party "[g]enerally . . . must plead that the neglect or omission of his [or her] attorney was excusable, because inexcusable neglect is ordinarily imputed to the client, and his [or her] redress is an action for malpractice." (*Aldrich*, *supra*, 170 Cal.App.3d. at p. 738; see *Zamora*, *supra*, 28 Cal.4th at p. 258 ["'[a] party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable because the negligence of the attorney is imputed to his [or her] client and may not be offered by the latter as a basis for relief'"]; *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 898 (*Carroll*) ["[t]he client's redress for inexcusable neglect by counsel is, of course, an action for malpractice"].)

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*v. Corsair, LLC* (2016) 244 Cal.App.4th 432, 438.) Shannon-Yeganhe does not argue she is entitled to relief under the mandatory relief provision of section 473, subdivision (b), which, in any case, "does not apply to summary judgments." (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1425; see *Henderson v. Pacific Gas and Elec. Co.* (2010) 187 Cal.App.4th 215, 228 ["the mandatory relief provision of section 473(b) does not include relief for mistakes an attorney makes in opposing, or not opposing, a summary judgment motion"].)

"However, in a case where the client is relatively free from negligence, and the attorney's neglect is of an extreme degree amounting to positive misconduct, the attorney's conduct is said to obliterate the existence of the attorney-client relationship. [Citations.] The client in such a case has representation only in a nominal and technical sense." (*Aldrich*, *supra*, 170 Cal.App.3d. at pp. 738-739.) In such situations, "the client will not be charged with responsibility for [the attorney's] misconduct if the client acts with due diligence in moving for relief after discovering the attorney's neglect and if the other side will not be prejudiced by the delay." (*Id.* at p. 739; see *Seacall Development, Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 Cal.App.4th 201, 205 (*Seacall*) ["[t]his exception is premised on the concept . . . the client has no attorney from whom negligence can be imputed"].)

We review for abuse of discretion an order denying a motion to set aside under either the court's inherent equitable power or section 473. (*Aldrich*, *supra*, 170 Cal.App.3d at pp. 736-737; see *Carroll*, *supra*, 32 Cal.3d at pp. 897-898 [an order denying a motion under section 473 will not be disturbed on appeal absent a clear showing of abuse of discretion]; cf. *Rodriguez*, *supra*, 236 Cal.App.4th at p. 749 ["[w]e review for abuse of discretion the trial court's decision whether to grant relief from default judgment under its inherent equity jurisdiction"].)

2. *The Trial Court Did Not Abuse Its Discretion in Ruling Counsel for Shannon-Yeganhe's Neglect Did Not Amount to Positive Misconduct*

Shannon-Yeganhe does not cite any excusable neglect or omission by her counsel as a basis for relief. (See *Zamora*, *supra*,

28 Cal.4th at p. 258 ["'[c]onduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not . . . excusable,'" and "'[t]o hold otherwise would be to . . . effectively eviscerate the concept of attorney malpractice'"].) Rather, she argues her attorney's failure to file written oppositions to the doctors' motions for summary judgment, refusal to communicate with her, and lack of effort to have the orders granting the motions set aside amounted to "positive misconduct."

"Positive misconduct is found where there is a total failure on the part of counsel to represent his client." (*Aldrich*, *supra*, 170 Cal.App.3d at p. 739; see *Carroll*, *supra*, 32 Cal.3d at p. 900 [what cases falling within the "positive misconduct" exception "have in common is a total failure on the part of counsel to represent the client"]; *Seacall*, *supra*, 73 Cal.App.4th at p. 205 ["[i]mputation of the attorney's neglect to the client ceases at the point where 'abandonment of the client appears,'" and "[w]hat constitutes 'abandonment' of the client depends on the facts in the particular action"]; cf. *Lopez v. Superior Court* (1986) 178 Cal.App.3d 925, 935 ["[i]f the attorney has not totally failed to represent the client, but has been guilty of inexcusable neglect, relief will not be granted"].) While there is no question Nordskog inexcusably neglected Shannon-Yeganhe, the trial court did not abuse its discretion in concluding Nordskog had not totally failed to represent her. Nordskog appeared on her behalf at the May 23, 2014 hearing on her ex parte application to continue Ternian's initial motion for summary judgment (which the minute order notes was "argued at length"), appeared on her behalf at a June 20, 2014 trial setting conference, and appeared again on her behalf on August 12, 2014—while the doctors'

motions for summary judgment were pending—to argue in opposition to multiple discovery motions filed by the defendants. In the meantime Nordskog solicited and obtained an opinion letter from Dr. Schlesinger, dated August 15, 2014.

Nordskog's legal work and court appearances for Shannon-Yeganhe, which included working and making appearances while the doctors' motions for summary judgment were pending, readily distinguish this case from the two cases Shannon-Yeganhe cites where the trial court abused its discretion in denying relief based on a claim of positive misconduct. In the first case, *Daley v. Butte County* (1964) 227 Cal.App.2d 380 (*Daley*), the trial court acknowledged the attorney "'never once personally appeared on any motion or pretrial conference throughout the entire history of the case [a period of nearly three years]. . . . Nor, for that matter, did [the attorney or his associates] ever communicate with the Court, . . . either by letter, telephone call, telegram, or in person concerning any of the matters which pertain to this case, or any of the scheduled calendar hearings or pre-trial conferences.'" (*Id.* at pp. 387-388; see *id.* at p. 396 [reversing an order denying the plaintiff's motion to vacate a dismissal of the complaint for lack of prosecution].) In the second case, *Orange Empire Nat. Bank v. Kirk* (1968) 259 Cal.App.2d 347 (*Orange Empire*), the court emphasized the attorney's "utter failure to represent his client": After assuring the client he would represent him in the case, the attorney never filed a notice of appearance, did not appear for trial after assuring the client he would "take care of the trial," and did nothing to obtain relief from the resulting default judgment despite assuring the client he would. (*Id.* at pp. 350-352; see *id.* at p. 356 [reversing an order denying the cross-

defendant's motion to vacate a default and set aside default judgment].)

The courts in the other two cases on which Shannon-Yeganhe relies, *Aldrich*, *supra*, 170 Cal.App.3d 725 and *Buckert v. Briggs* (1971) 15 Cal.App.3d 296 (*Buckert*), affirmed orders granting relief based on claims of positive misconduct; they merely illustrate the scope of a trial court's discretion to grant such relief. (See *Aldrich*, at p. 741 [affirming an order granting the plaintiff's motion to vacate a dismissal for failure to answer interrogatories]; *Buckert*, at pp. 299, 303 [affirming an order granting the cross-defendant's motion to vacate a default judgment entered after neither she nor her counsel appeared for trial].) And they are factually distinguishable because Nordskog provided significantly more representation than the attorneys in those cases provided. In *Aldrich*, the court observed that "the record discloses no activity by, and no presence whatever of the attorney," after he filed an amended complaint and that "his client was not even nominally represented." (*Aldrich*, at p. 739.) The few facts recited in the *Buckert* opinion similarly disclose no activity, involvement, or appearance by the attorney, beyond telling his clients he would notify them of their trial date, which he never did. (See *Buckert*, at p. 299.)

Finally, in all four cases the attorneys' abandonment of their clients was so complete the clients were not even aware that trial had occurred or that a motion to dismiss was pending until after the court had entered judgment against them. (See *Aldrich*, *supra*, 170 Cal.App.3d at p. 732 [the client "had never been informed or had any reason to believe that any action had been taken to dismiss his complaint"]; *Buckert*, *supra*, 15 Cal.App.3d at pp. 299-300 [the clients were unaware of the trial, at which no

one appeared on their behalf]; *Orange Empire*, *supra*, 259 Cal.App.2d at pp. 350, 354 [same]; *Daley*, *supra*, 227 Cal.App.2d at p. 389 [the attorney's "inexplicable immobility . . . blocked [the client's] actual knowledge of [the] motion to dismiss"].) In contrast, Shannon-Yeganhe was fully aware of the pending motions for summary judgment and attended the hearing on the motions, where she told the trial court she was representing herself (again) and made arguments in opposition to the motions, using documents her counsel had obtained from her doctor.[9]

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[9] The doctors also argue the trial court properly denied Shannon-Yeganhe's motion to set aside on the additional ground she was not diligent in seeking relief because she waited almost three months after Judge Lyons denied her motion to set aside without prejudice in February 2015 before refiling the motion before Judge Brazile in May 2015. (See *Zamora*, *supra*, 28 Cal.4th at p. 258 ["[t]he party seeking relief under section 473 must also be diligent"]; *Rodriguez*, *supra*, 236 Cal.App.4th at p. 750 ["the party seeking equitable relief on the grounds of extrinsic fraud or mistake must show," among other things, "diligence in seeking to set aside the default judgment once discovered"].) That ruling, however, rests on more tenuous grounds. Judge Lyons denied the motion to set aside without prejudice because, among other reasons, the motion "should be heard before Judge Brazile as the Motion is truly a Motion for Reconsideration." But it was "truly" not a motion for reconsideration. The motion to set aside involved entirely different law and facts than the motions for summary judgment. Because Judge Lyons should have heard that motion, the three-month period between February 2015 and May 2015 is not chargeable to Shannon-Yeganhe.

B. *The Trial Court Erred in Granting Cedars-Sinai's Motion for Summary Judgment*

Shannon-Yeganhe also contends the trial court erred in granting Cedars-Sinai's motion for summary judgment. Cedars-Sinai argues it was entitled to summary judgment because the undisputed facts showed (1) Cedars-Sinai did not breach the standard of care, (2) Cedars-Sinai did not cause Shannon-Yeganhe's injury, and (3) the statute of limitations barred her cause of action. Because triable issues of material fact remained on all three points, the trial court erred in granting Cedars-Sinai's motion.

1. *Standard of Review*

"Summary judgment is appropriate when there are no triable issues of material fact such that the moving party is entitled to judgment as a matter of law on all causes of action." (*Choi v. Sagemark Consulting* (2017) 18 Cal.App.5th 308, 318 (*Choi*); see Code of Civ. Proc., § 437c.) "We review an order granting summary judgment de novo, applying the same three-step analysis as the trial court. [Citations.] First, we identify the causes of action framed by the pleadings. Second, we determine whether the moving party has satisfied its burden of showing the causes of action have no merit because one or more elements cannot be established, or that there is a complete defense to that cause of action. Third, if the moving party has made a prima facie showing that it is entitled to judgment as a matter of law, the burden of production shifts and we review whether the party opposing summary judgment has provided evidence of a triable issue of material fact as to the cause of action or a defense."

(*Choi*, at p. 318; accord, *Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1449; see § 437c, subds. (o), (p)(2).)

"A party opposing summary judgment may not 'rely upon the mere allegations or denials of its pleadings' but must set forth 'specific facts' beyond the pleadings to show the existence of a triable issue of material fact. [Citation.] The evidence must be viewed in the light most favorable to the nonmoving party." (*Choi*, *supra*, 18 Cal.App.5th at p. 318, quoting § 437c, subd. (p)(2); see *Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347 [""[w]e liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party""]; *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467 (*Avivi*) [the court must consider all the evidence, "as well as all reasonable inferences that may be drawn from that evidence, in the light most favorable to the party opposing summary judgment"].)

2. *There Were Triable Issues of Material Fact on the Elements of Breach and Causation*

""[I]n any medical malpractice action, the plaintiff must establish: '(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.'"" (*Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 310 (*Borrayo*); accord, *Avivi*, *supra*, 159 Cal.App.4th at p. 468.)

"Opinion testimony from a properly qualified witness is generally necessary to demonstrate the elements for medical

malpractice claims." (*Borrayo*, *supra*, 2 Cal.App.5th at p. 310; accord, *Avivi*, *supra*, 159 Cal.App.4th at p. 467.) "When a defendant health care practitioner moves for summary judgment and supports his motion with an expert declaration that his conduct met the community standard of care, the defendant is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." (*Borrayo*, at p. 310; see *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 123.)

Cedars-Sinai argues the declaration of Morley, its nursing expert, established the hospital did not breach the standard of care in connection with Shannon-Yeganhe's surgery and did not cause or contribute to any injury she may have sustained. Morley stated that "hospital staff including, but not limited to hospital nurses, all acted within the standard of care. As such, nothing hospital staff did or failed to do caused or contributed to any injury sustained by the patient at any time. All pre-operative, intra-operative and post-operative care rendered by hospital staff inclusive of, and not limited to hospital nurses, was within the standard of care. . . . Based on the foregoing, to a reasonable degree of medical probability, nothing hospital staff did or failed to do caused or contributed to Ms. Shannon-Yeganhe's alleged injuries."

Cedars-Sinai contends Shannon-Yeganhe did not meet her burden to present conflicting evidence. It argues her experts' opinions that Ternian and Baron breached the standard of care and caused her injury do not create a triable issue of fact because Shannon-Yeganhe did not allege that Ternian and Baron were agents of Cedars-Sinai, the evidence does not support a finding they were, and, in any event, Cedars-Sinai cannot be vicariously liable for their conduct because the trial court had already ruled

they were not liable and entered judgment in their favor. Although Cedars-Sinai acknowledges Shannon-Yeganhe presented evidence that others, who were indisputably hospital staff members, also breached the standard of care, Cedars-Sinai contends the specific facts she cites to support that assertion relate only to a supposed failure to properly document what occurred during her surgery. Cedars-Sinai argues that neither Shannon-Yeganhe nor her experts explain how this "failure of documentation" caused her alleged injuries.

The record does not support Cedars-Sinai's argument. Shannon-Yeganhe submitted evidence of specific conduct by hospital staff members beyond mere failures in documentation. In particular, she cites Dr. Kroop's opinion that her brain injuries resulted from breaches in the standard of care by hospital staff who "worked to support the surgery," including their "[f]ailure to resolve the drop in blood pressure for too long a period of time" and their "proceeding with the elective surgery after the drop in [her] blood pressure." She also cites Dr. Novak's opinion that "all members of the operative team [were] equally culpable" in breaching the standard of care by proceeding with the surgery after her allergic reaction, rather than waking her to assess her condition. This testimony raises triable issues of material fact regarding whether breaches of the standard of care by Cedars-Sinai staff caused Shannon-Yeganhe's brain injury.

3. *There Were Triable Issues of Material Fact on the Statute of Limitations*

"Section 340.5 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.' A plaintiff in a medical malpractice action must satisfy the requirements of both the one-year and the three-year limitations periods. [Citations.] The injury commences both the three-year and the one-year limitations periods. [Citation.] The one-year limitations period, however, does not begin to run until the plaintiff discovers both his or her injury and its negligent cause." (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1189 (*Drexler*), fn. omitted; see *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 896 (*Gutierrez*) ["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"]; *Artal v. Allen* (2003) 111 Cal.App.4th 273, 279 [""the patient must bring . . . suit within one year after he discovers, or should have discovered, [the] "injury""]).

"Possession of 'presumptive' as well as 'actual' knowledge will commence the running of the statute. The applicable principle has been expressed as follows: 'when the plaintiff 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 . . . the statute commences to run.'" (*Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 101, italics omitted (*Sanchez*); accord, *Gutierrez*, *supra*, 39 Cal.3d at pp. 896-897.) "Thus, when the patient's 'reasonably founded suspicions [have been aroused],' and she has actually 'become alerted to the necessity for investigation and pursuit of her remedies,' the one-year period for suit begins." (*Gutierrez*, at p. 897; see *Sanchez*, at p. 102.)

Cedars-Sinai argues Shannon-Yeganhe's action was untimely because the one-year limitations period began on April 12, 2011, the day after her surgery. Cedars-Sinai cites her deposition testimony that, as of that date, she understood she had suffered an allergic reaction to Ancef during the surgery and, as a result, experienced "possible cardiac arrest" and had to be "resuscitate[d]."[10] Cedars-Sinai also points to Dr. Tran's report to Dr. Kroop that Shannon-Yeganhe complained of having "cognitive problems . . . ever since she had" the surgery. Cedars-Sinai argues that, "[g]iven the information she received on April 12, 2011, and her cognitive deficits thereafter," Shannon-Yeganhe "suspected wrongdoing" on April 12, 2011. She was therefore on "inquiry notice," according to Cedars-Sinai, more than one year before she filed this action.

The relevant issue, however, is not so much when Shannon-Yeganhe suspected wrongdoing, but when she suspected, or should have suspected, her injury. (See *Drexler*, *supra*, 4 Cal.App.4th at p. 1190 ["[t]he word 'injury' in section 340.5 'refer[s] to the damaging effect of the alleged wrongful act and not to the act itself'"]; *Larcher v. Wanless* (1976) 18 Cal.3d 646, 650-651 ["as applied to wrongful death actions arising from alleged medical malpractice, 'injury' as used in section 340.5 refers to the death, with its allegedly wrongful cause, which gives rise to the lawsuit"].) As we explained in *Drexler*: "In most cases,

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[10] Cedars-Sinai also cites Shannon-Yeganhe's statement during her deposition that "an anaphylactic reaction . . . affects your heart, your blood, your brain because there's no oxygen that's going around or – or blood." It is unclear from her deposition testimony, however, when Shannon-Yeganhe came to this understanding of the effects of an anaphylactic reaction.

the plaintiff discovers his or her injury prior to, or contemporaneously with, learning its negligent cause. As a result, '[w]ith regard to the one-year limitation provision, 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.' [Citation.] The issue in this appeal, however, is not whether [the plaintiff] had actual or constructive knowledge of the doctors' alleged wrongdoing, but when [the plaintiff] discovered his injury." (*Id.* at p. 1190.)

The injury Shannon-Yeganhe alleged she suffered was brain damage. And she presented evidence that, from the time of her surgery until September 2012, her neurologist, Dr. Yoo, assured her "there was nothing wrong with [her] brain"; that MRIs taken during that period indicated she had no brain damage; that, until Dr. Tran saw her in August 2012, all of her doctors told her she had no brain damage; and that she did not suspect she had brain damage until Dr. Tran mentioned the possibility in his August 22, 2012 letter to Dr. Kroop. A "patient is fully entitled to rely upon the physician's professional skill and judgment while under his [or her] care, and has little choice but to do so." (*Sanchez*, *supra*, 18 Cal.3d 93, 102; accord, *Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1393.) By introducing evidence that, before she began treating with Dr. Tran, the unanimous assessment of her doctors was that she did not have any brain damage, Shannon-Yeganhe raised a triable issue of fact regarding whether it was reasonable for her to suspect she had brain damage only upon reading of that possibility in Dr. Tran's August 22, 2012 letter. The trial court therefore erred in granting Cedars-Sinai's motion for summary judgment.

## DISPOSITION

The judgments in favor Ternian and Baron are affirmed. The judgment in favor of Cedars-Sinai is reversed. Shannon-Yeganhe's motion to augment the record with the State Bar's order of involuntary inactive enrollment of Nordskog is denied as unnecessary. (See *In re M.M.* (2015) 235 Cal.App.4th 54, 59, fn. 4.) The parties are to bear their costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.