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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

DARIN McLEMORE, Plaintiff and Appellant, v. ALEJANDRO HURTADO et al., Defendants and Respondents.	B281846 (Los Angeles County Super. Ct. No. BC589313)

APPEAL from judgment of the Superior Court of Los Angeles County, Randolph M. Hammock, Judge. Affirmed.

Dorenfeld Law, David K. Dorenfeld, Michael W. Brown, Matthew N. Selmer, for Plaintiff and Appellant.

Taylor DeMarco, N. Denise Taylor and Julianne M. DeMarco, for Defendant and Respondent Alejandro Hurtado.

Peterson Bradford Burkwitz, George Peterson and Craig Marinho, for Defendant and Respondent Jung Joo Park.

Plaintiff and appellant Darin McLemore brought an action for dental malpractice against several defendants, including respondents Alejandro Hurtado, D.D.S., and Jung Joo Park, D.D.S.[1] Respondents filed separate motions for summary judgment, arguing that McLemore's action was barred by the applicable one-year statute of limitations in Code of Civil Procedure section 340.5.[2] The trial court ruled that the limitations period commenced when McLemore sent a March 27, 2014 email (the March 27 email), in which McLemore explained the injuries he had suffered as a result of respondents' treatment and discussed the possibility of litigation. The trial court granted summary judgment, finding that McLemore's notice of intent to sue, and his complaint, were filed after the expiration of the one-year limitations period. We affirm.

The Complaint and Respondents' Answers

McLemore's complaint was filed on July 28, 2015, alleging a single cause of action for dental malpractice. The complaint alleged that McLemore retained the services of respondents, who worked at Century Dental, to perform

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[1] Other named defendants who are not a party to this appeal are David Campbell, D.D.S. and Century Dental, a business organization of unknown form.

[2] Statutory references are to the Code of Civil Procedure unless otherwise stated.

services consisting of one or more crowns and/or root canals. Respondents provided dental care, treatment, and advice to McLemore between approximately January 2014 and March 2015. Respondents caused injury to McLemore's mouth and teeth, including damage to his teeth, tissue, nerves, gums and jaw. Respondents failed to properly diagnose, treat, monitor, and render proper care to McLemore, resulting in irreparable personal injuries and damages.

Respondents filed answers asserting a variety of defenses, including that the action was barred by the statute of limitations in section 340.5.

Motions for Summary Judgment

Respondents' motions for summary judgment were based on the same theory—McLemore's email to Century Dental dated March 27, 2014, in which he acknowledged the multiple injuries he suffered in the treatment by respondents and mentioned possible litigation—triggered the commencement of the limitations period in section 340.5. McLemore did not serve a notice of intent to sue letter under section 364 until April 29, 2015, and the complaint was filed on July 28, 2015, after the expiration of section 340.5's one-year statute of limitations. The trial court agreed and granted summary judgment. Judgment was entered in favor of respondents. McLemore filed a timely notice of appeal.

DISCUSSION

McLemore argues the trial court erred in finding that the March 27 email triggered the one-year statute of limitations under section 340.5 McLemore contends that whether he "had knowledge of his injury on March 27, 2014 or on April 29, 2014" is a disputed issue of material fact, because he continued to investigate the cause of his symptoms beyond the date of the email. He further contends the limitations period did not commence on the date of his email because he continued to be treated by respondents, and relied on their "soothing disclaimers" that he was not injured by their negligence after the email's date.

A. Undisputed Facts Relating to Treatment

McLemore went to Century Dental on January 30, 2014, complaining of tooth pain. He was examined by Dr. Minchul Suk, who recommended a crown on the upper left rear tooth and a root canal on the lower left rear molar. Dr. Suk prepared the upper left tooth for a crown. After the treatment, McLemore suffered pain in the area and required pain medication.

McLemore returned to Century Dental on March 3, 2014, where he was treated by Park, who said she was going to perform the root canal. Park started the root canal but did not complete the procedure. She referred McLemore to Hurtado.

On March 5, 2014, Hurtado completed the root canal and placed the crown on the upper left tooth. Park also provided care for McLemore on that date. According to McLemore, Park thought McLemore should see an endodontist before Hurtado put the crown in place. Following the treatment, McLemore was in pain, his face was swollen, and the Novocaine had not worn off after 40 minutes.

McLemore returned to Century Dental on March 12, 2014. He was examined by Hurtado. McLemore was examined by Dr. Stephen T.T. Goei on March 19, 2104. McLemore sent the March 27 email to Alma at Century Dental. On April 29, 2015, McLemore served respondents with a notice of intent to sue.

B. The March 27 Email

McLemore sent the March 27 email to "Alma" at Century Dental. He described the email as "a fair and complete documentation of my dental experience" with Century Dental. He stated that "[i]t has been an awful experience and I am suffering because of it. I wanted Dr. Hurtado, Dr. Park, and the first [] dentist who treated me . . . to know what I am going through." McLemore described his dental care as "a life changing experience" which caused a major depression and an alteration in his daily quality of life.

"I am having a major problem as a result of my dental work. I do not believe in frivolous lawsuits, and hope we can come to some medical and financial resolution [to] deal with my immediate reality. I thought it best to reach out to your office before contacting an attorney, or Dr. Campbell, or the press." McLemore missed over three weeks of work and might have to file for disability. His symptoms included numbness on the left side of his face, jaw, tongue, lips, nasal cavity, under eye area, neck area and left chin, which is spreading to the right side of the chin. His face was starting to distort, he could not control the left side of his mouth, and there was pain in opening his mouth all the way. He suffered from a "tingling, burning feeling" on the left side of the face, "as if a million tiny needle[s] were poking me." He is enduring TMJ therapy, he cannot sing or articulate certain words, the teeth where crowns were placed are sore, tight, and temperature sensitive, he is suffering stress and cannot sleep well. McLemore would like answers to why this is happening. He is "dealing with some form of depression."

McLemore described himself as "a very happy and upbeat person, but this thing is really doing a number on me." He wanted answers to why he came to the office for a typical root canal, but ended up "with the left side of my face partially paralyzed."

McLemore next explained his treatment. He saw a dentist, whose name he could not recall, on January 30, 2014. The dentist said McLemore needed two upper crowns and root canal on a lower molar. He agreed to the procedure

and made financial arrangements for the service. McLemore was injected with Novocaine. The procedure was taking a long time, and at some point he began to bleed profusely after the dentist drilled too deeply or, as the dentist joked, he "[n]icked an artery." After bleeding for about 35 minutes they were able to take an impression for the crown. He was prescribed an antibiotic, pain medication, and was sent home.

While waiting for the crowns to be completed, McLemore began to experience pain. He returned to the office on March 3, 2014, where he was treated by Park. She said he should see an endodontist rather than have the crown put on while in pain, but they should proceed with the root canal. Park seemed inexperienced. She was unsure if McLemore had two or three canals. Park stopped the procedure, temporarily filled the partial root canal, and arranged for McLemore to return to see Hurtado.

On March 5, 2014, McLemore was treated by Hurtado at the dental center. There was a problem with the dental set-up and difficulty between Hurtado and his assistant in finding instruments. Hurtado accidentally jabbed McLemore in the inner cheek with an instrument, and then apologized. The drill went in too deep and McLemore winced in pain. He was given additional Novocaine. Hurtado suggested he put on the crowns, even though Park had wanted McLemore to first see an endodontist. Hurtado insisted that the temporary filing should be removed and the crowns placed, and if McLemore still needed further root

canal work it could be done later. At some point Park took over to complete the root canal, but she stopped and let Hurtado finish. An attempt was made to adjust the bite on the crowns. McLemore was given another pain medication prescription and told to return in a few weeks.

McLemore went to the dental office "[last] Wednesday" and was examined by Hurtado. Hurtado examined his face, said he had no nerve damage, and the swelling and numbness should go away in a week. If it did not go away Hurtado said he would refer McLemore to Dr. Steven Goei.

McLemore went to Goei, who performed various tests and said the damage is probably not permanent. Goei identified an abscess and infection, and concluded McLemore's jaw was locked perhaps due to being open too long during the root canals. Goei explained that the nerves had been agitated but he could not point to the exact cause. Goei said possibly an instrument or drill may have gone in too deep, the Novocaine was injected directly into the sensory nerve, or some of the filling material may have leaked into the nerves.

McLemore stated that his treatment summary "is how everything more or less chronologically transpired, and is all completely true." He expressed the hope that "you will have the integrity and compassion to help me medically and fanancally [*sic*] as I maneuver through this very difficult time in my life. [¶] I realized that medicine is not an exact science, but I also believe some unnecessary mistakes occurred, and I am suffering from it."

McLemore concluded the email by asking why Park performed his root canal when she lacked the necessary experience. He stated that the entire root canal procedure should have been done in one rather than two sessions. He asked why Park said not to have the crowns placed over his upper teeth after looking at the x-rays, but Hurtado said it was okay.

Standard of Review

"A trial court properly grants a motion for summary judgment where '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).) 'Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] '"We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained."' [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.' (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)" (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286.)

The Statute of Limitations in Medical Malpractice Actions

"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.) "No action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action." (§ 364, subd. (a).)

"The one-year provision begins when the 'plaintiff suspects or should suspect that [his or] her injury was caused by wrongdoing . . . .' (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110 [(*Jolly*)].) With 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. (Cf. *Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1391.)" (*Garabet v. Superior Court* (2007) 151 Cal.App.4th 1538, 1545.) "The term 'injury' means both the plaintiff's physical condition and its negligent cause; thus, once a plaintiff knows, or by reasonable diligence should have known, he or she has been harmed through professional negligence, the one-year limitations period begins to run. (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 896.)" (*Jefferson v. County of Kern* (2002) 98 Cal.App.4th

606, 610 (*Jefferson*); *Steingart v. White* (1988) 198 Cal.App.3d 406, 415.)

"[I]t was commonly held that the statute did not run during the period the patient remained in the physician's care. (*Myers v. Stevenson* (1954) 125 Cal.App.2d 399, 401–402.) This corollary did not apply, however, in those cases in which there was evidence of the patient's actual discovery of the injury or a failure to discover through lack of due diligence under the circumstances. (*Mock v. Santa Monica Hospital* [(1960)] 187 Cal.App.2d 57, 64; *Hundley v. St. Francis Hospital* (1958) 161 Cal.App.2d 800, 806.)" (*Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 97 (*Sanchez*). In addition, "It has long been established that the defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations, but only for that period during which the claim is undiscovered by plaintiff or until such time as plaintiff, by the exercise of reasonable diligence, should have discovered it. (E.g., *Kimball v. Pacific Gas & Elec. Co*. (1934) 220 Cal. 203, 210; *Pashley* v. *Pacific Elec. Ry. Co*. (1944) 25 Cal.2d 226, 229 [(*Pashley*)].) Notwithstanding a defendant's continuing efforts to conceal, if plaintiff discovers the claim independently, the limitations period commences. (*Id*.) This rule has been applied even in those cases in which there was imposed on a defendant a fiduciary duty of disclosure. (See *Bowman v. McPheeters* (1947) 77 Cal.App.2d 795, 798, 800 [medical malpractice].) The rationale for the foregoing rule is that the culpable defendant should be estopped from profiting by his own

wrong *to the extent* that it hindered an 'otherwise diligent' plaintiff in discovering his cause of action. (*Pashley, supra*, at p. 231.)" (*Id.* at pp. 99–100.)

Summary Judgment Was Properly Granted

The trial court correctly ruled that the one-year limitations period of section 340.5 commenced with McLemore's March 27 email. On that date, McLemore affirmatively stated he was aware of his injuries, including "both the plaintiff's physical condition and its negligent cause," and he knew or should have known that he was harmed through professional negligence. (*Jefferson*, supra, 98 Cal.App.4th at p. 610.) Nothing more was required to commence the limitations period.

In his March 27 email, McLemore described his "awful experience" and "suffering" as a result of the care provided by Park and Hurtado. He identified a multitude of physical injuries (extensive numbness, pain, facial paralysis, and dental sensitivity) as well as resulting depression and loss of sleep, all the result of the dental care he received from respondents. McLemore indicated a lawsuit was possible, but he preferred "some medical and financial resolution [to] deal with my immediate reality," and he considered "it best to reach out . . . before contacting an attorney," conclusively demonstrating his awareness of harm caused by respondents. McLemore discussed what he believed were the deficiencies in his treatment, and attributed the cause of

those injuries to respondents' negligent treatment. The claim that the March 27 email did not commence the one-year statute of limitation is without merit.

McLemore is incorrect in arguing the limitations period did not commence with the March 27 email because he continued under the care of respondents. McLemore cites to no evidence that respondents treated him after the March 27 email. Even had treatment continued, the trial court properly found that the March 27 email triggered the one-year statute of limitations, because McLemore's email shows his "actual discovery of the injury." (*Sanchez*, *supra*, 18 Cal.3d at p. 97.)

McLemore relies on his own declaration to establish that he was still continuing to investigate the cause of the injury beyond the time he served the notice of intent to sue in April 2015. Setting aside the problem that none of the copies of McLemore's declaration in the record on appeal have a signature page showing that the declaration was executed under penalty of perjury, his conclusory statement that the investigation continues does not create a triable issue of material fact. McLemore's March 27 email conclusively establishes facts triggering the section 340.5 one-year statute of limitations—he identified the injuries suffered, the parties responsible, and expressed a desire for settlement before pursuing litigation. McLemore's subjective belief that he was continuing to investigate the cause of his injuries is of no moment, as his email demonstrates he had all the knowledge necessary to

commence the running of the statute of limitations. (*Jolly*, *supra*, 44 Cal.3d at p. 1112 [plaintiff is held to admission that she suspected that defendants' conduct was wrongful over a year before she filed suit].)

McLemore argues that Goei's purported inability to determine the cause of his symptoms demonstrates the existence of a triable issue of material fact. We disagree. McLemore's version of what Goei said does not suggest there is any other potential cause for his complaints other than his treatment by respondents, nor does it negate the explanation McLemore provided in the March 27 email of the details of the injuries, the responsible parties, and a desire settle the matter before contacting an attorney.

McLemore also argues that because his March 27 email is not under penalty of perjury, its true meaning is for a jury to decide. McLemore cites no authority for this novel proposition. "In light of appellants' failure to present any argument or legal authority to support this claim, we may summarily reject it. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [court is not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record].)" (*Muega v. Menocal* (1996) 50 Cal.App.4th 868, 877.)

DISPOSITION

The judgment is affirmed. Respondents Alejandro Hurtado, D.D.S. and Jung Joo Park, D.D.S are awarded their costs on appeal.

KRIEGLER, Acting P.J.

We concur:

BAKER J.

DUNNING, J.*

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