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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GILBERTO CORRALES, etc., Plaintiff and Appellant, v. COUNTY OF LOS ANGELES, Defendant and Respondent.	B207469 (Los Angeles County Super. Ct. No. BC315260)

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

Howard A. Kapp for Plaintiff and Appellant.

Peterson and Bradford, Thomas R. Bradford; Greines, Martin, Stein & Richland, Martin Stein and Carolyn Oill for Defendant and Respondent.

Gilberto Corrales, an Incompetent, by and through his Guardian Ad Litem, Gretchen Corrales, appeals a judgment entered in favor of the County of Los Angeles on his claim for personal injury suffered while being treated at County-USC Medical Center. He contends the trial court erred in denying his motion in limine, in denying his motions for judgment notwithstanding the verdict and for a new trial, in instructing the jury, and finding that there was no attorney misconduct at trial. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Corrales is a professional boxer.[1] A native of Mexico, he does not speak English. In September 2002, he had been staying on Mount Baldy and noticed a cut or a bug bite on his hand. After several days, it progressed to a pus-filled lesion and his wife, who had acted for a time as his manager and had a degree in Fine Arts, drove him to County-USC Medical Center. A doctor at County-USC operated on his hand. Corrales spent three or four days in the hospital, was discharged, and given antibiotics and told to soak the wound and apply fresh bandages every day.[2] He did not know what was wrong with his hand, although it was "open" from below the knuckle to above the knuckle.

About two weeks after his discharge from the hospital, Corrales noticed that his finger was stiff, and the tendon in his finger, which had been exposed by the wound, was thin and frayed. At this time, his wife began to take pictures of the wound and continued to do so for about six weeks. Mrs. Corrales contended she did not take the pictures to document anything, but because she takes pictures of "everything." They also showed the pictures to plaintiff's friends so they could see the injury to his hand.

On September 27, 2002, Dr. Daly examined Corrales's hand and asked him who performed the surgery. Dr. Daly gave Corrales two notes: one stated that the wound was

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[1] At the opening of trial, plaintiff's counsel informed the court he was mentally ill and was "delusional." During trial, Mrs. Corrales was appointed his guardian ad litem, and Corrales's testimony was presented through his deposition testimony.

[2] Including his surgery, Corrales visited County-USC a total of 14 times from the period September 9, 2002 through January 2003.

too wide, and the other that Corrales should see an orthopedist or a plastic surgeon. Mrs. Corrales discussed the notes with Corrales, and on a subsequent visit, she gave the notes to the doctor Corrales went to see at County-USC, but he threw them away.

About a week later, Corrales returned to County-USC. The doctor examining his hand cut the tendon. This surprised Mrs. Corrales, but she believed the doctor cut off the tendon because "it was already broken." Sometime after the doctor cut the tendon, plaintiff's hand became "claw" like.

In December 2002, Corrales saw Dr. Steven Schnall (who had seen Corrales during his initial admission to the hospital) at County-USC for an evaluation. Dr. Schnall understood that Corrales wanted to be able to put his hand in a glove so he could resume his boxing career. Mrs. Corrales believed the surgery would permit plaintiff to make a fist. Dr. Schnall told Corrales that he could not bend his right index finger because one of the doctors at County-USC had cut the tendon, and informed Corrales he would need additional surgery in order to make a fist so he could resume his boxing career.

In January 2003, Corrales had another surgery on his hand, but he was still unable to make a fist. However, he went back to the gym and did some training. In April or May 2003, doctors at County-USC told Corrales he did not need anything further and that his treatment was done. After the surgery, Corrales resumed his training, but felt he was not ready to box yet. During the time he was treated at County-USC, Corrales did not have any idea there had been malpractice.

Corrales, who did not have an appointment, came to Dr. Schnall's office on August 20, 2003, but Dr. Schnall did not consider Corrales to be a patient at that time. Corrales asked him whether he could box again. Dr. Schnall billed Corrales for the visit.

Corrales saw Dr. Karns in Beverly Hills in October 2003. Dr. Karns believed something was wrong with Corrales's hand and suggested he see a lawyer. Prior to that time, no one had suggested to Corrales that County-USC had made a mistake.

Corrales trusted his doctors and believed them when they told him that his hand would get better with time.

2. Corrales's Claim; Complaint; Bifurcated Trial on Claims Statute.

On December 18, 2003, Corrales filed a claim for damages with the County, alleging malpractice in the treatment of his hand. The claim stated that the date of the incident was "September 1 to 9, 2002 and continuing."

The County rejected the claim as untimely on January 14, 2004. Corrales filed his complaint in this action on May 7, 2004.

Trial was bifurcated and the issue of compliance with the claims statute tried first. The parties stipulated that Corrales's claim had been filed on December 18, 2003; in order to be timely, his cause of action must have accrued after June 18, 2003.

3. Verdict; Post-Trial Motions.

The jury found that Corrales's claim was untimely as it was presented more than six months after Corrales discovered, or through the use of reasonable diligence should have discovered, that defendant's conduct had caused him harm. Corrales moved for judgment notwithstanding the verdict and for a new trial, arguing there was insufficient evidence of his discovery of defendant's negligence more than six months prior to the filing of his claim. The trial court denied both motions.

DISCUSSION

I. THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND MOTION FOR NEW TRIAL.

Corrales contends that there was no evidence that he discovered or suspected his injury prior to October 8, 2003, and the trial court erred in denying his motion for judgment notwithstanding the verdict and motion for new trial.

We accord a trial court's broad discretion in ruling on a motion for new trial great deference on appeal. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1160.) However, particularly when reviewing an order denying a new trial, we must review the entire record to determine independently whether the claimed error on which the new trial motion is based was prejudicial. (*Id.* at pp. 1160, 1161.) On the other hand,

a motion for judgment notwithstanding the verdict is properly granted only where, viewed in the light most favorable to the party securing the verdict, there is no substantial evidence to support the verdict. (*Trujillo v. North County Transit District* (1998) 63 Cal.App.4th 280, 284.) "'If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied.' [Citation.]" (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 878.) We review the trial court's denial of such a motion to determine if any substantial evidence exists to support the jury's verdict as to any questions of fact. (*Laico v. Chevron U.S.A., Inc.* (2004) 123 Cal.App.4th 649, 659.)

In actions for damages against local public entities, the claims statutes require timely filing of a proper claim as condition precedent to the maintenance of the action. (Gov. Code, §§ 905, 945.4.) The date of accrual of a claim for purposes of claim presentation is the same date the claim accrues for purposes of the relevant statute of limitations. (*Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 63.)

Code of Civil Procedure section 340.5 sets forth the statute of limitations applicable to plaintiff's claim for damages based upon professional negligence, and provides that a plaintiff must commence his or her action "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." Under the statute's discovery provision, the statute begins to run when the plaintiff suspects the injury was caused by wrongdoing. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398.) The rule sets forth two alternate tests for triggering the statute: (1) a subjective test that requires actual suspicion by the plaintiff that the injury was caused by wrongdoing, and (2) an objective test that requires a showing a reasonable person would have suspected the injury was caused by wrongdoing. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110-1111; *Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1391.)

A physician's fraud or concealment of wrongdoing tolls the statute of limitations, but only for the period during which the plaintiff has not discovered the claim, or by the exercise of reasonable diligence, should have discovered the claim. (*Sanchez v. South*

Hoover Hospital (1976) 18 Cal.3d 93, 99.) However, "[t]he mere fact that an operation does not produce the hoped-for results does not signify negligence and will not cause commencement of the statutory period." (*Bristol-Myers Squibb Co. v. Superior Court* (1995) 32 Cal.App.4th 959, 964, disapproved on other grounds in *Norgart v. Upjohn Co., supra,* 21 Cal.4th at p. 410, fn. 8.)

Here, the trial court did not err in denying plaintiff's motions. Plaintiff claims that nothing in the evidence supports his discovery of his injury until October 8, 2003, within the claims filing period. He contends that at no time during his treatment at County-USC or during his visit with Dr. Schnall in August 2003 did he express dissatisfaction with his treatment; even after his tendon was snipped, nothing changed his relationship with County-USC; during his treatment, plaintiff's doctors reassured him; and his duty of inquiry was reduced during the time of his treatment.

However, the jury could have inferred from plaintiff's wife's photographic series of his injuries that the photographs were taken to document wrongdoing, and thus that plaintiff suspected as early as late September 2002 he might have been the victim of medical malpractice and the result of his hand surgery was more than just a non-negligent bad outcome. Further, plaintiff knew in January 2003 that his second surgery had not been successful in restoring function to his hand, and from this the jury could infer that by that time plaintiff suspected that the result of the surgery was more than just a bad outcome. In addition, in spite of the fact plaintiff was under a doctor's care after June 2003 (assuming for the sake of argument he was in fact a patient of Dr. Schnall in August 2003), the doctor-patient relationship does not absolve him of a responsibility to make an inquiry when facts would put a reasonable person on inquiry notice, or where facts indicate that he was suspicious of wrongdoing. Here, plaintiff admits that his tendon was not healing properly in October 2002, when it looked "thin and frayed." The condition of his hand at the very least put him on inquiry notice, and could support an inference by the jury that plaintiff suspected the doctors caring for his hand had breached the standard of care. As explained in *Jolly, supra,* 44 Cal.3d 1103, the plaintiff need not know the precise manner in which a wrongdoer was negligent to discover his or her injury within

the meaning of Code of Civil Procedure section 340.5 (*Id.* at p. 1111.) "In the aftermath of *Jolly,* courts have rejected the argument that the limitations period does not begin to run until a plaintiff learns the specific causal mechanism by which he or she has been injured." (*Knowles v. Superior Court* (2004) 118 Cal.App.4th 1290, 1298.)

II. NO INSTRUCTIONAL ERROR.

Corrales contends the trial court erred in refusing his proffered instruction on the statute of limitations, refusing to give a "suspicion" instruction, and that the use of the phrase "claimed harm" was not defined in the instruction prepared by the defense that was given by the court. He asserts that these errors, coupled with defense counsel's question to the jury -- "did [plaintiff's] claimed harm occur before June 18, 2003? I submit to you, there's no doubt about that" -- mislead the jury.

A. Factual Background.

Plaintiff's proffered instruction stated, "This lawsuit is barred by the applicable statute of limitations if you find the defendant County of Los Angeles proves that [plaintiff] discovered before June 18, 2003 facts that would have [] caused a reasonable person in his situation, including his personal background, to reasonably suspect that his injury was caused by the negligence of the County of Los Angeles. [¶] The mere fact that [plaintiff] sustained an unsatisfactory outcome is not itself evidence that a reasonable person would suspect that his injury was caused by the negligence of the County of Los Angeles."

The court refused to give plaintiff's instruction.

At the conclusion of the evidence, the defense argued that a "suspicion" instruction should be given, and proposed language that "[u]nder the one year discovery rule, the statute of limitations begin[s] to run when the plaintiff suspects or should suspect that h[is] injury was caused by wrongdoing. . . ." Over defense counsel's objections, the trial court stated it would not give the suspicion instruction, reasoning that the claim statute provided that "'[t]he deadline for filing the claim shall be six months after the plaintiff discovers or through the use of reasonable diligence should have

discovered,' and you can certainly argue that they had suspicion based on the facts presented. . . . The instruction certainly doesn't preclude that. . . ."

Ultimately, the trial court gave a defense instruction, which stated: "In an action for injury against a health care provider, based upon such person's alleged professional negligence, the deadline for the filing of the government claim shall be six months after the plaintiff discovers, or through the use of reasonable diligence, should have discovered the injury. For all purposes, the word 'injury' signifies both the negligent cause and the damaging effect of the alleged wrongful act and not the act itself. The County of Los Angeles contends that plaintiff's government claim was not filed within the time set by law. To succeed on this defense, the County of Los Angeles must prove that plaintiff's claimed harm occurred before June 18, 2003."

Plaintiff has the burden of showing that instructional error has resulted in a miscarriage of justice requiring reversal. (Cal. Const., art. VI, § 13; *Boeken v. Philip Morris, Inc*. (2005) 127 Cal.App.4th 1640, 1678.)

Here, plaintiff contends the court erred in not giving his proffered instruction, which would have advised the jury in particular that he had discovered facts that would have "caused a reasonable person in his situation, including his personal background" to have a suspicion he had been injured by County-USC's negligence. This instruction misstates the law. The objective prong of Code of Civil Procedure section 340.5 requires a showing that a reasonable person would have suspected the injury was caused by wrongdoing. (*Jolly v. Eli Lilly, supra,* 44 Cal.3d at p. 1110.) The objective standard of reasonableness does not properly include plaintiff's particular situation, or his personal background.

The statement in plaintiff's proffered instruction that "the mere fact that [plaintiff] sustained an unsatisfactory outcome is not itself evidence that a reasonable person would suspect that his injury was caused by the negligence of the County of Los Angeles" is a misstatement of the law. The correct rule is that "[t]he mere fact that an operation does not produce the hoped-for results does not signify negligence and will not cause commencement of the statutory period." (*Bristol-Myers Squibb Co. v. Superior Court,*

supra, 32 Cal.App.4th at p. 964.) Nothing in this rule implies that a plaintiff can ignore injury; rather, to commence the statute the injury must suggest, as it did here, that negligence was behind the injury.

Further, under *Sanchez v. Hoover, supra,* 18 Cal.3d at p. 99, the fact that the plaintiff remains under a physician's care does not toll the statute absent fraud or concealment. The plaintiff who suspects wrongdoing must act. Here, plaintiff suspected wrongdoing in his treatment at County-USC while under his doctors' care; this suspicion triggered the running of the statute.

Nor can the use of the phrase "claimed harm" in place of "injury" form the basis of prejudicial error in spite of the fact "injury" was separately defined in the instruction. It is not reasonably likely the jury was misled by the terminology "harm" in place of "injury."

Finally, the trial court did not err in refusing a separate or more elaborate instruction on "suspicion." As the court noted, the concept of "suspicion" is subsumed within the notion of the plaintiff's discovery of wrongdoing.

III. NO ERROR IN DENIAL OF MOTION IN LIMINE NO. 1.

Corrales contends the trial court erred in refusing to grant his motion in limine to limit the defense to its answers given to response to Form Interrogatory No. 15.1 served in September 2007. He contends in those answers the defense limited itself to the position that the statute of limitations had accrued because he had "actual knowledge" of his injury, and such answers do not support the defense of suspicion. County-USC argues that the burden was on plaintiff to establish compliance with the claims statute as an element of his cause of action and therefore the statute of limitations was not an affirmative defense; furthermore, even if it were, nothing in County-USC's response could have misled plaintiff to his detriment in preparing his case because the discovery of his injury, which triggers the cause of action, was always in issue.

The trial court's ruling on a motion in limine is reviewed for abuse of discretion. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1493.) The trial court is "vested with broad discretion in ruling on the admissibility of evidence." (*Smith v. Brown-Forman*

Distillers Corp. (1987) 196 Cal.App.3d 503, 519.) Generally, a trial court's ruling on a motion in limine will not be reversed on appeal absent a clear showing of abuse of discretion. (*People v. Mincey* (1992) 2 Cal.4th 408, 439.) "'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.'" (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.) A court does not abuse its discretion as to factual findings if they are supported by substantial evidence. (*Borissoff v. Taylor & Faust* (2004) 33 Cal.4th 523, 531.)

Here, the County answered Form Interrogatory No. 15.1 regarding affirmative defenses, and asserted that plaintiff had "actual knowledge of his injury in September of 2002" and that plaintiff alleged "negligent treatment of his hand injury" in September 2002. The trial court denied the motion without comment.

We can find no abuse of discretion. County-USC is correct that the statute of limitations was not an affirmative defense. "The timely filing of a claim is an essential element of a cause of action against a public entity and failure to allege compliance with the claims statute renders the complaint subject to general demurrer." (*Wood v. Riverside General Hospital* (1994) 25 Cal.App.4th 1113, 1119.) Nonetheless, the statute of limitations is relevant because it measures the claim period. (*Ovando v. County of Los Angeles, supra,* 159 Cal.App.4th at p. 63.)

However, nothing in the County's discovery response can be read to limit its theory of its defense in terms of accrual of the time period within which plaintiff was required to file his claim. Civil discovery statutes are intended to narrow the issues for trial and to prevent surprise. (See, e.g., *Campain v. Safeway Stores, Inc.* (1972) 29 Cal.App.3d 362, 366.) Plaintiff was aware that his discovery of his injury under Code of Civil Procedure section 340.5 was at issue and can claim no unfair surprise resulting from defendant's response.

IV. NO ATTORNEY MISCONDUCT.

Plaintiff contends that defense counsel committed attorney misconduct in closing argument to the jury. He points to counsel's statements focusing on the difference between the college-educated Mrs. Corrales and her husband's fourth or fifth grade education – a gap which was particularly stark due to plaintiff's mental incompetence;[3] counsel's argument that plaintiff must have known what Mrs. Corrales knew about his condition because they must have engaged in "pillow talk," thereby improperly imputing her knowledge to plaintiff;"[4] counsel's statement a reasonable person in Southern California would have filed a lawsuit given plaintiff's condition;[5] and counsel's statement that there was a lower threshold to filing a governmental claim than an ordinary lawsuit.[6]

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[3] Defense counsel elicited from Mrs. Corrales during trial that she had a master of fine-arts degree, and that plaintiff had a fifth or sixth grade education. Counsel argued in rebuttal, "You don't need to go to school at all in order to understand for a professional fighter the significance of a right hand that now looks like a claw. . . . [¶] Did [plaintiff] understand that? Yes. He did. He understood what it meant and he understood what its significance was."

[4] Defense counsel did not use this terminology, instead telling the jury, "You may infer it [as] a reasonable inference that the information Mrs. Corrales possessed, the information she claimed she saw, the information she claimed she heard was information that she, as [plaintiff's] former manager, conveyed to him as they talked as husband and wife. You can reasonabl[y] infer that that occurred."

[5] Defense counsel referred in closing argument to the propensity of people to file lawsuits at the first sign of injury, and stated, "I would suggest to you with the numbers of people in Southern California who would be in their cars going to a lawyer's office quick as a shot cannot be counted. There's so many of them."

[6] Defense counsel told the jury in rebuttal that "[a] government claim is not a lawsuit. It's simply a piece of paper that is filed saying somebody is making a claim, a lot less elaborate. All of those comments about frivolous lawsuits that you [heard from plaintiff's counsel] have not a thing to do with what we are about here. It has not a thing to do with the decisions that you must make in this case. [¶] We are not talking about lawsuits, frivolous or unfrivolous. We are only talking about whether somebody, when they have a certain amount of information, should be prompted to think about [whether they] should [] file a government claim" and whether they should ask about it and take the next step and gather more information.

We evaluate a claim of attorney misconduct under the *Watson*[7] standard, and will not reverse on the basis of attorney misconduct unless, after an examination of the entire cause, we conclude it is not reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the alleged error. (*Cassim v. Allstate Ins. Co*. (2004) 33 Cal.4th 780, 800 (*Cassim*).) We consider the entire record, taking into account such factors as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances. (*Sabella v. Southern Pacific Co*. (1969) 70 Cal.2d 311, 320-321.)

Attorneys are given wide latitude to discuss the case in their closing arguments. An attorney has the right to state his or her views on what the evidence shows, and the conclusions that may be drawn therefrom. Even if the reasoning is faulty and the deductions illogical, the adverse party cannot complain, as such matters are for the jury to consider. The attorney may not, however, assume facts not in evidence or invite the jury to speculate about unsupported inferences. (*Cassim, supra,* 33 Cal.4th at pp. 795-796.)

Defense counsel's closing argument statements do not constitute misconduct. Counsel was properly arguing the law when he stated that a government claim is a less formal proceeding than a lawsuit. (See, e.g., *Phillips v. Desert Hospital Dist.* (1989) 49 Cal.3d 699, 705-710 [describing contents of claim and Tort Claims Act].) Further, counsel's statements relating to plaintiff's lack of education and Mrs. Corrales's presumed communication with him regarding what the doctors had said are permissible comments on the witnesses's credibility and status as percipient witnesses. The jury could properly infer from the fact that Mrs. Corrales attended all the doctor appointments with plaintiff, that her higher level of education may have given her a better ability to understand the ramifications of plaintiff's treatment, and that she communicated this information to her husband. Counsel's reference to the number of lawsuits filed in Southern California could rationally be understood as an argument that a reasonable

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[7] *People v. Watson* (1956) 46 Cal.2d 818, 836.

person with plaintiff's injury would have recognized that it likely had a negligent cause, and that he should consult an attorney or take steps to recover from County-USC for his claim by, among other things, filing a claim.

DISPOSITION

The judgment of the superior court is affirmed. Respondent is to recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.