

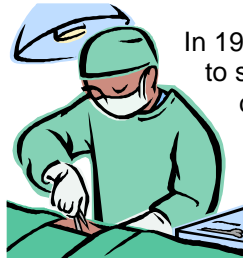
CASE ALERT

December 2001

**PATIENT DID NOT “DISCOVER” SURGEON’S NEGLIGENCE,
FOR PURPOSES OF STATUTE OF LIMITATIONS WHERE
CONSULTATIONS WITH OTHER PHYSICIANS AND
EXPLORATORY SURGERY FAILED TO CONFIRM PATIENT’S
SUSPICION OF MALPRACTICE*****Duncan v. Spivak***
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A California Court of Appeal reversed a trial court’s grant of summary judgment, holding that, for limitations purposes, a medical malpractice plaintiff did not “discover” the negligent cause of his injury when he experienced post-surgery pain, suspected professional negligence, consulted an attorney who filed a notice of ‘intent to sue, *but* was subsequently unable to support his lay suspicion of negligence with medical fact despite numerous consultations with doctors and even an additional surgery.

Russell Duncan sought treatment from Yemelyan Spivak, a physician, for surgical hernia repair in 1996. Despite numerous medical consultations, the cause of continued post-surgical pain was undiscovered.



In 1997, an attorney on behalf of plaintiff sent a notice of intent to sue to Spivak even though the cause of pain was not yet discovered. In 1998, plaintiff sought additional treatment and at that time the cause of the post-surgical pain was finally discovered - a surgical staple was attached directly to his femoral nerve.

Thereafter, Duncan obtained new counsel who served Spivak with another notice of intent to sue in June 1998. Duncan filed suit in October of that year.

Spivak moved for summary judgment on the ground that the complaint were barred by the one-year limitations period established in Code Civ. Proc. §340.5. The trial court granted the motion, concluding that limitations on Duncan’s claim accrued in February 1997 when Duncan consulted his first attorney about bringing a malpractice suit against Spivak and when that lawyer, on Duncan’s behalf, served Spivak with a notice of intent to sue.

Duncan appealed, noting that although he experienced post-surgery pain and suspected professional negligence, he was unable to prove his suspicion despite repeated consultations with doctors and an additional surgery. Thus, according to Duncan, he did not “discover” his injury for purposes of the statute of limitations until the final surgery in which the surgical staple in his femoral nerve was detected and removed. The court of appeal reversed, holding that Duncan’s retention of counsel and transmission of a notice of intent to sue did not reflect “discovery” of Spivak’s negligence as a matter of law.

Under Code Civ. Proc. §340.5, an action for professional health care negligence must be brought within three years of the date of injury or within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. The statute thus establishes two limitations periods, both of which must be satisfied. No such action may be brought after three years unless the limitations period is tolled by fraud, intentional concealment or the presence of a nontherapeutic, nondiagnostic foreign body in the injured person.

Duncan without question met the three-year absolute limitations period, as he was operated upon by Dr. Spivak in October 1996 and filed his complaint in October 1998.

Turning to Duncan's "discovery" of Spivak's alleged professional negligence, the court of appeal observed that a patient "discovers" professional negligence upon becoming aware of an injury's physical manifestation and its negligent cause. Duncan's awareness of his injury was not in dispute because Duncan's injury was manifest immediately after his first surgery.



Critically, Duncan did not learn facts essential to discerning the cause of his injury until exploratory surgery revealed the improperly positioned surgical staple. Before that time, Duncan had no objective basis for believing that malpractice had occurred.

The court acknowledged that Duncan certainly suspected malpractice when he consulted his first attorney in early 1997. Those suspicions were allayed, however, when other doctors indicated that there was no negligent cause of Duncan's pain.

The court of appeal therefore concluded that Duncan's one-year limitations period did not accrue as a matter of law based on his mere suspicion of wrongdoing, as Duncan received subsequent objective medical advice allaying his suspicions.

The court observed that a plaintiff's suspicion of wrongdoing will accrue the one-year limitations period of §340.5 if the plaintiff fails to diligently attempt to confirm the suspicion or if the suspicion is confirmed. Accordingly, Duncan's claim would have been barred by limitations as a matter of law if he had harbored his suspicions for over a year without seeking further

medical advice - in that case, Duncan would have failed to use reasonable diligence to discover Spivak's alleged medical malpractice.

However, because Duncan did seek advice from other physicians less than a year from his initial surgery, fact issues existed as to whether Duncan diligently attempted to determine whether Spivak had done something to cause his pain. The trial court therefore erred in entering summary judgment.



The court rejected the notion that Duncan's initial service of his notice of intent to sue definitively started his one-year limitations period. The statutory limitations period is designed to punish a dilatory plaintiff. It thus makes no sense to consider the filing of a notice of intent to sue determinative for purposes of limitations. Doing so could punish an otherwise-diligent plaintiff who sends a notice and later receives medical advice countering his suspicion of professional negligence.

Note: This opinion is not final. It may be withdrawn from publication, rehearing may be granted or the Supreme Court of California may grant a hearing. If any of these events take place, the opinion would be unavailable for use as authority.

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