Filed 2/20/02

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JASON GRAY et al., Plaintiffs and Appellants, v. TRI-CITY MEDICAL CENTER, Defendant and Respondent.	D037480 (Super. Ct. No. GIN008666)

APPEAL from an order of the Superior Court of San Diego County, Richard E. Mills, Judge. Affirmed.

In this action for relief from an order denying a petition to file a late claim, Jason Gray and Christine Gray (Gray) sought to file a late claim for medical malpractice against Tri-City Medical Center (Tri-City). (Gov. Code,[1] § 946.6, subd. (c).) In August 1995, plaintiff and appellant Jason Gray had an appendectomy at Tri-City, a government entity. Almost three years later, he felt back pain and went to Scripps Hospital where an x-ray revealed a metallic ring in his abdomen. He had further tests at that time (August-

1 All further statutory references are to the Government Code unless otherwise indicated.

September 1998), but the location of the ring was still uncertain. Fifteen months later he underwent a colonoscopy, which showed the ring was in the surgical site.

In January 2000, Gray presented a government tort claim to Tri-City, which was denied as untimely. He applied for leave to file a late claim, which Tri-City also denied. (§§ 911.2, 911.4.)

Gray then brought this petition for an order seeking relief from the claim presentation requirement. The superior court denied the petition and he appeals. As we will explain, we agree that under the discovery rule, the claim was not timely and the order was properly denied. (Code Civ. Proc., § 340.5)

DISCUSSION

I

FACTUAL AND PROCEDURAL BACKGROUND

Dr. Andrew Deemer of Tri-City performed an appendectomy on Gray on August 7, 1995. On August 3, 1998, Gray went to Scripps Clinic because of lower back pain, and Dr. Michele Carpenter treated him. An x-ray revealed the presence of an oval-shaped metal ring in his right lower abdomen, but was indeterminate as to whether it was within the small intestine or in the surgical site of the appendectomy. Carpenter told him the ring might be something he swallowed as a child and that doctors did not normally make such mistakes. Carpenter spoke to Deemer, the surgeon, and he denied using rings attached to laparotomy pads.

In September of 1998, Gray had a barium study CT scan which was also inconclusive as to the precise location of the ring. Gray was told that a colonoscopy

would determine the exact location.[2] Further, he was told that if the ring was in the small intestine, then the consequences would have to be discussed, but that if it was not, it could be left alone.

In December of 1999, more than a year later, Gray had a colonoscopy that confirmed the ring was in the surgical site.

Gray filed a claim pursuant to section 911.2 against Tri-City for medical negligence and negligence on January 5, 2000. Christine Gray sought loss of consortium damages. It was denied for being untimely on February 16, 2000. Gray then applied under section 911.4 for leave to file a late claim on March 15, 2000. His application was denied on April 28, 2000. Next, on October 23, 2000, Gray petitioned the trial court pursuant to section 946.6 for relief from the provisions of section 945.4. The petition was denied and Gray appeals the order.

II

APPLICABLE STANDARD

We review the trial court's denial of the order under an abuse of discretion standard. "The determination of the trial court in granting or denying a petition for relief under section 946.6 will not be disturbed on appeal except for an abuse of discretion. [Citation.] Abuse of discretion is shown where uncontradicted evidence or affidavits of the petitioner establish adequate cause for relief." (*Ebersol v. Cowan* (1983) 35 Cal.3d 427, 435.)

---

2 Colonoscopy is a "visual examination of the inner surface of the colon by means of a colonoscope." (PDR Medical Dictionary (2d ed. 2000) p. 381.)

III

ANALYSIS

Three issues are presented on appeal: (1) was the tort claim timely; (2) what was the impact of Gray's reliance on his treating doctor's statements about the ring; and (3) did Gray take all reasonable steps necessary to protect his health? We have reviewed the record before us, and conclude that the trial court was within its discretion to find no adequate cause for relief. Accordingly, we will affirm the order.

A

Timeliness of the Claim

Claims against government entities require adherence to statutory rules. The claim presentation requirement of section 911.2 necessitates that a claim for "injury to [a] person . . . shall be presented . . . not later than six months after the accrual of the cause of action." As will be explained, accrual of the cause of action is governed here by Code of Civil Procedure section 340.5, applicable to medical negligence.

Under section 945.4, presentation and action on the claim are prerequisites for bringing a suit against a public entity. If a claim is not timely presented, section 911.4 allows a potential claimant to apply to the public entity for leave to present a late claim. The application must be presented within one year of the accrual of the cause of action. Pursuant to section 911.6, subdivision (1) the entity must grant or deny the application within 45 days of its presentation, and may grant the leave if "the failure to present the claim was through mistake, inadvertence, surprise or excusable neglect and the public entity was not prejudiced in its defense of the claim by the failure to present the claim

within the time specified . . . ." If a potential claimant is denied leave to make the claim under section 911.6, section 946.6, subdivision (a) allows the potential claimant to petition the court for relief from section 945.4. Accordingly, under section 946.6, subdivision (b), the petitioner must file the petition within six months after the denial, state the reason for the late claim, and meet the same requirement as in section 911.6 of mistake, inadvertence, etc.

Here, Gray adhered procedurally to the statutory requirements. He presented a claim under section 911.2 on January 5, 2000, which was denied for being filed more than six months after the accrual of the cause of action. Next, he applied on March 15, 2000, for leave to present a late claim under section 911.4, alleging excusable neglect because he did not know the ring was in the surgical site until the December 1999 colonoscopy. Such leave was denied for being filed more than one year after the accrual of the cause of action. Pursuant to section 946.6, Gray petitioned the trial court for an order relieving him of the section 945.4 requirements, which was denied. Although Gray properly followed all of the procedural steps, Tri-City and the trial court denied the claim as untimely.

Timeliness is governed by statutory requirements. The date of the accrual of the cause of action is defined by section 901. The action would "be deemed to have accrued within the meaning of the statute of limitations which would be applicable [but for the] requirement that a claim be presented . . . ." Since the underlying action was for medical negligence, Code of Civil Procedure section 340.5 governs. For a claim against a medical provider for 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*." (Code Civ. Proc., § 340.5, italics added.) The one-year limit is the statutory embodiment of the discovery rule, and it applies to these facts.

In *Jolly v. Eli Lilly & Co.* (1988) 44 Cal. 3d 1103 (*Jolly*), the court elucidated the discovery rule.

> "[T]he statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing . . . once the plaintiff has ""notice or information of circumstances to put a reasonable person on inquiry"" . . . . [Citations.] A plaintiff need not be aware of the specific 'facts' necessary to establish the claim . . . . Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts." (*Id.* at pp. 1110-1111.) (Italics omitted.)

The *Jolly* court also stated in a footnote that the wrong the plaintiff needs to be aware of is not the legal sense of wrong, but the lay understanding of wrong. (See *Jolly, supra,* 44 Cal. 3d. at p. 1110, fn. 7.) Knowledge of presumptive and actual facts will start the statutory period running and the plaintiff comes under a duty to investigate. (*Sanchez v. South Hoover Hospital* (1976) 18 Cal. 3d 93, 101.) "[W]hen 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. [Citations.]" (*Ibid.*)

We must examine the discovery rule of Code of Civil Procedure section 340.5 as it relates to Gray's situation. On August 3, 1998, he had an x-ray that revealed a metal ring in his abdomen, which was not a naturally occurring phenomenon in the body. The x-ray

was inconclusive as to whether it was in the small intestine or the surgical site. Dr. Carpenter told him he might have swallowed the ring as a child and that doctors do not usually make such mistakes. Objectively, it was not an abuse of discretion for the trial court to find this information was sufficient to put a reasonable person on inquiry that the injury might possibly be caused by wrongdoing. A ring in the body is not a natural occurrence and it might be found in the location of the surgery. In fact, Gray admits that he had such a suspicion.

Even if we were to conclude that Gray need not have had a reasonable suspicion at this point, his course of action the following month in September of 1998 should have generated such a reasonable suspicion. Gray had a barium study CT scan, which was inconclusive as to the location of the ring. However, he was told that he could definitely find out the ring's location by having a colonoscopy. Further, he was told of a conversation between Drs. Carpenter and Deemer, wherein Deemer denied using such a ring during surgery. In 1998, Gray now knew there was a metal ring in his body that either the surgeon left or that he swallowed as a child; his surgeon denied leaving it; such mistakes were not usually made; and a colonoscopy would be determinative. These circumstances were sufficient to put a reasonable person on notice. The *Jolly* test is not concerned with the statistical probability of which explanation is more likely. Rather, the paramount concern is whether there is enough information to put a reasonable person on inquiry. We agree with the trial court that here, there was.

Gray was aware of circumstances that put him under a duty of inquiry when he had the x-ray in 1998, and he had a duty to investigate. In fact, he partially fulfilled this

duty by having the barium study CT scan a month later. Unfortunately, the scan was inconclusive, but Gray was told that a colonoscopy would tell him with certainty where the ring was and consequently, how it got there. However, Gray waited 15 months before having the colonoscopy. This period of waiting is exactly the type of sitting "on his rights" that *Jolly* stated was a way of losing those rights. (*Jolly, supra,* 44 Cal.3d at p. 1111.) Accordingly, Gray's delay in having the colonoscopy foreclosed his possibility of recovery. The date of discovery and thus the accrual date for the cause of action was August 1998, or at least September 1998. Therefore his claim filing on January 5, 2000 was properly found by the trial court to be untimely.

B

The Impact of Gray's Reliance on His Doctor

To excuse his delay, Gray claims that his reliance on Dr. Carpenter's explanations that (1) he might have swallowed the ring as a child and (2) doctors do not usually make such mistakes, justifiably allayed his suspicions. In *Unjian v. Berman* (1989) 208 Cal.App.3d. 881, the court acknowledged the existence of a "lesser standard of 'diminished' diligence in the discovery of wrongful treatment by the physician *while the physician-patient relationship continues* . . . ." (*Id.* at p. 887, italics added.) However, Gray's claim of reliance is misplaced, because the delayed discovery exception only applies when the physician-patient relationship continues, and here Dr. Deemer was no longer treating Gray.

The recently decided case *Duncan v. Spivak* (2001) 94 Cal.App.4th 245 (*Duncan*), which allowed a diminished duty of diligence because of the advice of a different treating

physician, does not apply here. The facts of *Duncan* are illustrative. Duncan had surgery for a hernia in October of 1996, and many staples were used to help it heal, including a staple on a nerve. (*Id.* at p. 249.) Duncan felt worse after the surgery and consulted a lawyer four months later. The lawyer sent a preliminary notice of intention to commence an action against Dr. Spivak. (Code Civ. Proc., § 364.) However, no court action was filed at that time.

Duncan then consulted several other doctors, and in March of 1997 had exploratory surgery, which did not find the staple, but found scar tissue, which was removed as the apparent source of his pain. (*Duncan, supra,* 94 Cal.App.4th at p. 251.) Duncan's lawyer then withdrew from the case. (*Ibid.*) However, Duncan was still in pain and continued to see other doctors and had surgery in April of 1998, which revealed the staple. (*Ibid.*) He filed a notice of intention to commence action and then a medical negligence complaint was filed in October 1998. His claim was denied for being untimely. (Code Civ. Proc., § 340.5.) On appeal, the court held that the action "is not necessarily time-barred under the one-year period set forth in section 340.5 immediately upon a suspicion of wrongdoing where he subsequently receives objective medical advice to allay those suspicions." (*Duncan, supra,* 94 Cal.App.4th at p. 263.)

Gray's situation is distinguishable. In *Duncan, supra,* 94 Cal.App.4th 245, the patient relied on an objective medical fact (surgery revealing that scar tissue was the alleged cause of his pain) to justify his delayed discovery. Here, Gray was told he might have swallowed the ring as a child and that doctors did not usually make such mistakes. This falls short of objective medical advice, as it is only an opinion about two possible

sources of his injury. Further, in *Duncan*, the patient continued to seek medical assistance after being told about the scar tissue. Here, Gray did nothing for 15 months after he was told of the two scenarios and how to determine which was correct. Also, the patient in *Duncan* consulted a lawyer four months after he had surgery because he suspected something was wrong. Gray waited 15 months after finding out that the ring might be in the surgical site to consult a lawyer. The rules applied in *Duncan* do not assist Gray's cause.

C

Reasonable Steps to Protect Gray's Health

Gray asserts that he was justified in delaying the colonoscopy, an invasive procedure, because all that he was reasonably required to do was protect his health. Under the discovery rule stated in *Jolly, supra*, 44 Cal.3d 1103 a patient does not have to undergo exploratory surgery to find out whether a foreign object is the cause of his injuries. (*Ashworth v. Memorial Hospital* (1988) 206 Cal.App.3d 1046, 1062 (*Ashworth*).)[3] "A plaintiff is not required to discover the negligent cause of her injuries at all costs to her own health and welfare. Rather, the plaintiff is only required to take all reasonable steps to protect her health." (*Ibid.*)

---

3 *Ashworth* deals with the portion of Code of Civil Procedure section 340.5 that allows an exception to the three-year statute of limitations for the presence of a foreign body in a plaintiff. (*Ashworth, supra*, 206 Cal.3d. at p. 1058.) Here, we are dealing with the one-year discovery rule, not the three-year statute of limitations. However, the rule stated in *Ashworth* concerning the need to take reasonable steps to protect one's health, also applies to this fact situation.

Here, the issue is whether the trial court abused its discretion in concluding Gray did not take all reasonably timely steps to protect his health. Although a colonoscopy is an uncomfortable and invasive exam, it has limited risk, and does not amount to surgery. Further, Carpenter told Gray that the colonoscopy would show whether the ring was in the small intestine, and that if it was, they would have to discuss whether or not to remove it. Determining via a colonoscopy whether or not a foreign object should be left in one's body can properly be evaluated as a reasonable step to protect one's health. We conclude that there was no abuse of discretion on this record.

DISPOSITION

The order is affirmed.

HUFFMAN, J.

WE CONCUR:

KREMER, P. J.

McCONNELL, J.