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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TERRI KOZANO etc.,

Plaintiff and Appellant,

v.

SCRIPPS CLINIC MEDICAL GROUP,
INC., et al.,

Defendants and Respondents.

D045887

(Super. Ct. No. GIC786005)

APPEAL from a judgment of the Superior Court of San Diego County, Kevin A. Enright, Judge. Reversed with directions.

The plaintiff in this personal injury action was severely injured in a head-on collision. According to plaintiff the driver of the other car was a chronic alcoholic, prescription medication abuser and suffered from withdrawal seizures and severe depression. In addition, according to plaintiff, at the time of the collision the driver of the car which struck her was under the influence of Valium and Serax.

Initially, plaintiff filed a complaint against the other driver. Later, plaintiff added as defendants the manufacturer of the car plaintiff was driving. Still later, by way of amendment plaintiff attempted to add as defendants the other driver's medical care providers. Plaintiff contends the medical care providers should have advised the other driver not to drive and should have notified the Department of Motor Vehicles about the other driver's disabilities. The medical care providers moved for a judgment on the pleadings on the grounds the plaintiff's claims against the medical care providers were untimely. The trial court granted the motion and dismissed the claims against the medical care providers. We reverse.

The claims against the medical care providers arise out of the same general set of facts set forth in the original complaint and therefore relate back to the date the original complaint was filed. Because the original complaint was timely, the claims against the medical care providers are also timely.

SUMMARY

On August 14, 2001, plaintiff and appellant Terri Kozano was severely injured in a head-on collision. On March 29, 2002, Kozano filed a complaint against the driver of the other car, Diane James. The complaint also alleged the existence of 100 Doe defendants. Eventually, a guardian ad litem was appointed to prosecute the action on Kozano's behalf.

On August 9, 2002, Kozano filed a first amended complaint which alleged products liability claims against Hyundai Motor Company and Hyundai Motor America

(collectively Hyundai), the manufacturer and distributor of the car Kozano was driving. In 2003 Kozano settled her claims against Hyundai.

On August 21, 2003, Kozano added the Department of Motor Vehicles (the DMV) as a defendant. In response to the DMV's demurrer, Kozano filed a motion for relief from the time limits otherwise applicable under Government Code section 945.4. The trial court denied relief from the time limits and sustained the DMV's demurrer without leave to amend.

On October 20, 2003, Kozano filed amendments to the complaint which attempted to substitute as Doe defendants Richard Richley, M. D., Peter D. Aldrich, M.D., Ph.D., Robert Wolfe, M.D., and Norma Schlanger, Ph.D. The clerk of the trial court cancelled the amendments to the complaint and returned them to Kozano's counsel because Local Court Rules required that counsel appear ex parte in the trial court and receive leave of court to file the Doe amendments.

On February 24, 2004, Kozano filed a second amended complaint. The second amended complaint alleged that Drs. Richley, Aldrich, Wolfe and Schlager, as well as Scripps Clinic Medical Group, Inc., and Scripps Mercy Medical Group, Inc., knew that James suffered from alcoholism, depression, prescription drug abuse and that her medical condition was characterized by lapses of consciousness and episodes of marked confusion. The complaint alleged that the medical care providers were liable because although they were aware that James suffered from a number of conditions which made it dangerous for James to drive, they failed to advise her not to drive and failed to advise the DMV of her incapacity.

On July 30, 2004, Kozano filed a third amended complaint. The third amended complaint alleged that in response to an inquiry from the DMV, the medical care providers stated that James's driving ability was not impaired. According to the complaint the medical care provider's acts and omissions were the "direct and proximate cause of plaintiff's injuries and damages."

Scripps Medical Group, Inc., Scripps Mercy Medical Group, Inc., and Drs. Aldrich and Wolfe (collectively the Scripps defendants) moved for a judgment on the pleadings.¹ They argued that Kozano either discovered or should have discovered their role in her injuries more than a year before the second amended complaint was filed and that the claims against them were therefore untimely. In response Kozano argued that although she had not successfully moved to substitute the Scripps defendants as Does, her claims against them should relate back to the time of her original complaint. In this regard she asked the court for leave to substitute the Scripps defendants as Doe defendants. In the alternative Kozano argued that, as alleged in the third amended complaint, she did not discover the role of the Scripps defendants until June 2003 and could not have discovered their role any earlier.

The trial court granted the motion for judgment on the pleadings without leave to amend. The trial court reasoned that the claims against the Scripps defendants did not relate back to the time of the original complaint because the allegations against them did

¹ Defendant Norma Schlager, Ph.D., filed a demurrer to the third amended complaint and her demurrer was sustained without leave to amend.

not arise out of the same general set of facts alleged in the original complaint. A judgment in their favor was entered and Kozano filed a timely notice of appeal.

DISCUSSION

I

"The standard of review in a motion for judgment on the pleadings is well settled. The motion is confined to the face of the pleading under attack, and all facts alleged in the complaint must be accepted as true." (*Rangel v. Interinsurance Exchange* (1992) 4 Cal.4th 1, 7.) "Furthermore, it is an abuse of discretion to grant a motion for judgment on the pleadings without leave to amend ' "if there is any reasonable possibility that the plaintiff can state a good cause of action." ' ' " (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 260.)

II

Although Kozano concedes her amended complaint against the Scripps defendants was filed more than a year after the collision, she argues that she is entitled to the benefit of the delayed discovery rule. Kozano contends that she did not and could not discover her claims against the Scripps defendants until June 2003 when she was able to review James's DMV records. Like the trial court, we do not think the delayed discovery rule assists Kozano.

Our Supreme Court recently examined the delayed discovery rule. In *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807-809 (*Fox*) the court held: "The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. The discovery rule does not encourage dilatory tactics because

plaintiffs are charged with presumptive knowledge of an injury if they have ' " 'information of circumstances to put [them] *on inquiry* ' " ' or if they have ' " '*the opportunity to obtain knowledge* from sources open to [their] investigation.' " ' "

[Citation.] In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation. [¶] . . . [¶]

"In order to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.' [Citation.] In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not withstand demurrer.' (*Ibid.*)

"Simply put, in order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light. In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts

supporting the cause of action within the applicable statute of limitations period." (*Fox, supra*, 35 Cal.4th at pp. 807-809, fn. omitted.)

In *Fox* the plaintiff had undergone gastric bypass surgery and following surgery experienced leakage from her intestine. The leakage was repaired in a second surgical procedure. The plaintiff filed a timely medical malpractice action against her surgeon and the hospital where the procedure was performed. At the surgeon's deposition, he stated that in repairing the leakage he discovered that it had been caused by a surgical stapler supplied by the hospital. He further stated that on previous occasions the surgical stapler had caused post-surgery leaks. Following the surgeon's deposition, the plaintiff filed a complaint against the manufacturer of the surgical stapler. The manufacturer filed a demurrer which alleged the complaint was untimely. In response to the demurrer, the plaintiff argued she was entitled to the benefit of the discovery rule and offered to file an amended complaint which would allege she had no reason to suspect the existence of a products liability claim against the manufacturer until she took the surgeon's deposition. The court held that the proffered amended complaint was sufficient to meet the requirements of the delayed discovery rule. (*Fox, supra*, 35 Cal.4th at p. 811.)

Here, in her third amended complaint, Kozano made the following allegation: "Plaintiff did not learn until June 2003 that said defendants examined, evaluated, and/or treated defendant James prior to the subject accident. Prior to that time, plaintiff did not know and had no reason to know that said defendants were defendant James' healthcare providers and that said defendants might bear some responsibility for the injuries and damages sustained by plaintiff." In response to the motion for judgment on the

pleadings, Kozano stated that she could not have discovered the role of the Scripps defendants until she obtained James's DMV records in June 2003. However, Kozano did not proffer to the trial court any further facts to support her claim that she acted with diligence in investigating her claim.

Although the *Fox* opinion was filed after the trial court granted the motion in this case, as the Scripps defendants point out the bare allegations of the third amended complaint do not meet the requirements of *Fox*. The third amended complaint merely states that Kozano discovered the Scripps defendants' role in June 2003; the complaint does not allege under what circumstances their role was discovered or what investigation Kozano engaged in prior to discovering their role. Even supplemented by the statement in her opposition papers that she could not have discovered the role of the defendants until she had received James's DMV records, Kozano did not allege in the trial court *facts* which would tend to show that there was no other means by which she could have discovered the role of the Scripps defendants.

Kozano's allegations are markedly different from the ones considered in *Fox*. On its face the allegation by a patient that she could not have discovered the role a surgical stapler played in her injury until advised about that role by her surgeon satisfies the requirements of the delayed discovery rule because outside such a statement from her treating physician, it is not likely a patient or her attorney would suspect that intestinal leakage was the result of such a mechanical defect as opposed to an error on the part of her physician. Unlike the largely hidden role of a surgical stapler, unfortunately substance abuse plays such a well recognized and ubiquitous role in automobile deaths

and injuries that victims in automobile accident cases cannot credibly contend that they had no suspicion substance abuse was involved in their injuries. Indeed, in her reply brief Kozano sets forth a number of steps she took which demonstrate that months before the DMV report was released to her, she suspected both the substance abuse she later alleged *and* the identity of the Scripps defendants. In particular, we note the allegation in her reply brief that as early as October 2002 she had subpoenaed records from Scripps Clinic and Scripps Memorial Hospital and that in November 2002 she had received a police report which showed that at the time of the accident James had a number of prescription medications in her bloodstream. These facts illustrate in a fairly convincing fashion that victims of automobile accidents will in fact recognize and investigate the possible role of substance abuse in their injuries. They also illustrate that contrary to the allegations of her third complaint, Kozano *did* suspect the role of the Scripps defendants long before the DMV records were disclosed to her.

In sum then the trial court did not abuse its discretion in declining to give Kozano the benefit of the delayed discovery rule.²

III

Kozano's alternative argument is her contention that her claims against the Scripps defendants should relate back to her original complaint. We agree.

² In light of our disposition of Kozano's delayed discovery argument, we do not reach the Scripps defendants' alternative argument that under principles of collateral estoppel the trial court's disposition of Kozano's motion for relief from Government Code section 945.4 barred Kozano from arguing that she had acted with reasonable diligence.

The relation-back doctrine was fully discussed by the court in *Barrington v. A. H. Robins Co.* (1985) 39 Cal.3d 146, 150-151 (*Barrington.*). "The relation-back doctrine has been used to determine the time of commencement of an action for the purpose of the statute of limitations. Normally, the statute of limitations commences to run regardless of the injured party's ignorance of his or her cause of action. [Citation.] In *Austin v. Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596, we held that an amended complaint is not barred by the statute of limitations, even though it substitutes a named party for a fictitious defendant, if the amended complaint relates back to a timely original complaint. Reasoning that the defendant was not prejudiced by the filing of an amendment after the statutory period had elapsed, we observed that 'a defendant unaware of the suit against him by a fictitious name is in no worse position if, in addition to substituting his true name, the amendment makes other changes in the allegations on the basis of the same general set of facts. . . .' (*Id.*, at p. 602.) Conversely, 'a plaintiff who did not know of the true name at the time the original complaint was filed . . . has at least as great a need for the liberality of amendment . . . as a plaintiff who knew the defendant's name throughout, and he should not be penalized merely because he was compelled to resort to his statutory right of using a fictitious name.' (*Id.*, at p. 603.)

"We later traced the evolution of the relation back doctrine in *Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932, and formulated a general rule: An amended complaint relates back to the original complaint, and thus avoids the statute of limitations as a bar against named parties substituted for fictitious defendants, if it: (1) rests on the

same general set of facts as the original complaint; and (2) refers to the same accident and same injuries as the original complaint. (*Id.*, at pp. 936-937.)

"Plaintiff's contention [in this case] that [her products liability] cause of action does not relate back is supported by *Coronet Manufacturing Co. v. Superior Court* (1979) 90 Cal.App.3d 342. In *Coronet*, the original complaint in an action for wrongful death alleged that plaintiffs' daughter was electrocuted while using a dangerous instrumentality -- a defective hair dryer. The defendants were the corporation that manufactured the hair dryer and a number of Doe component suppliers. The amended complaint, which identified Coronet for the first time as one of the Doe component suppliers, was filed after the statute of limitation had run as to the original complaint. The amended complaint, however, alleged that the dangerous instrumentality was a lamp socket and switch manufactured by Coronet rather than a hair dryer.

"The court held that the amended complaint did *not* relate back to the original complaint, and was thus barred by the statute of limitations. The court announced that an amended complaint relates back only if it is based on the same operative facts, and refers to the same 'offending instrumentality' and 'accident.' The amended complaint before the court did not relate back because '[t]he difference between being electrocuted by a hair dryer and being electrocuted by a table lamp is as great as being electrocuted by the hair dryer and being poisoned by some improperly processed food found on the kitchen shelf. Although they relate to a single death at a single location, they are different "accidents" and involve different instrumentalities.' (*Id.*, at p. 347.)" (*Barrington, supra*, 39 Cal.3d at pp. 150-151.)

In *Barrington* the plaintiff's original complaint alleged that she was injured as a result of a physician's medical malpractice and the failure of a drug company to warn her about the dangers of taking the prescription drug Darvon. Seven months after she filed her original complaint, the plaintiff filed an amended complaint which alleged that the manufacturer of an intrauterine device was responsible for other injuries. More than three years after the original complaint was filed, but less than three years after the amended complaint was filed, the plaintiff served the manufacturer with the amended complaint. The manufacturer moved to dismiss on the grounds that the complaint against it related back to the original complaint and service was therefore untimely under Code of Civil Procedure section 581a. The plaintiff argued that her claims against the manufacturer were not based on the same set of operative facts and did not relate back. The court agreed with the plaintiff. The court stated: "[W]hen a complaint is amended to allege a new cause of action based on different operative facts, the new cause of action is different in nature from any cause of action contained in the earlier complaint, and hence does not relate back." (*Barrington, supra*, 39 Cal.3d at p. 154.)

In *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408-409 (*Norgart*) the court discussed the relation-back doctrine in circumstances somewhat analogous to the ones presented here. The plaintiffs in *Norgart* were the parents of a woman who had committed suicide. According to the victim's father, shortly after her death he immediately suspected that someone, either his daughter's husband, who he believed had been abusing her, or physicians who had been treating her, were in some manner responsible for his daughter's death. Some years later he and his wife attributed the death

to the drug Halcion which his daughter was taking at the time of her death and sued its manufacturer, the Upjohn Company. In the course of determining that the parents' claim against the manufacturer of Halcion were untimely, the court determined that given the information which the father had gathered after his daughter's death, the parents could have and should have filed a complaint against those they had identified and later added Upjohn as a Doe defendant. Although the victim's husband and medical care providers had acted in ways which were different from Upjohn's alleged impact on the victim, the court found that the causes of action against Upjohn would have related back to the time of a timely complaint against the husband and medical care providers. In reaching this conclusion, the Supreme Court disagreed with the reasoning of the Court of Appeal, which had found that relation back would not have been available. The court stated: "The relation-back doctrine requires that the amended complaint must (1) rest on the *same general set of facts*, (2) involve the *same injury*, and (3) refer to the *same instrumentality*, as the original one. [Citations.]

"The Court of Appeal did not make any assertion that the same-injury requirement would not have been met. Nor could it. Both the original and amended complaints would have involved Kristi's *wrongful death* by means of an intentional overdose of prescription drugs, including Halcion, arising out of depression. [Citation.]

"Neither did the Court of Appeal make any assertion that the same-instrumentality requirement would not have been met. Nor could it. Both the original and amended complaints would have referred to Kristi's wrongful death *by means of an intentional overdose of prescription drugs, including Halcion*, arising out of depression. [Citation.]

"But the Court of Appeal did indeed make an assertion the same-general-set-of-facts requirement would not have been met. It did so, however, entirely without basis. Both the original and amended complaints would have referred to *Kristi's wrongful death by means of an intentional overdose of prescription drugs, including Halcion, arising out of depression.* [Citation.]" (*Norgart, supra*, 21 Cal.4th at pp. 408-409; see also *Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932, 934-940.)

Here Kozano's amended complaint against the Scripps defendants relates back to the original complaint for the same reasons a complaint in *Norgart* would have related back. The amended complaint rests on the same general set of facts set forth in the original complaint, to wit: the head-on collision between Kozano's car and Diane James's car. The amended complaint, like the original complaint, allege as damages the severe injuries Kozano suffered in the collision. Most importantly, both complaints allege that Kozano's injuries were caused by the same two instrumentalities: James and her car.

The facts here are also similar to earlier cases which found that complaints against Doe defendants related back to original complaints against named defendants. In *Garrett v. Crown Coach Corp.* (1968) 259 Cal.App.2d 647, 651, the plaintiff was struck by a school bus. His original complaint alleged the named defendants and the Does negligently owned and operated the school bus. The court found the plaintiff's later complaint against the manufacturer of the bus related back to the original complaint, even though the manufacturer was neither an owner nor operator of the bus. (*Ibid.*) Relying on *Garrett v. Crown Coach Corp.*, the court in *Smeltzley v. Nicholson Mfg. Co.*, *supra*, 18 Cal.3d at page 937, found that a cause of action against the manufacturer of a debarking

machine related back to an injured lumber mill worker's earlier claim against the operator of the mill for maintenance of a dangerous work place. Like the plaintiffs in these cases, Kozano has alleged a different theory of liability against new defendants. Like the defendants in the earlier cases, her new causes of action relate back to her original complaint because they grow out of the same accident, the same injuries and the same instrumentalities.

The amended complaint here is in marked contrast to the one considered in *Barrington*, which did not involve the same incident, the same injury or the same instrumentality. Kozano's amended complaint is also in contrast to the holding in *Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 217 (*Lee*), upon which the Scripps defendants also rely. In *Lee* the plaintiff was demoted and filed suit based on her demotion. Following the commencement of her lawsuit, her employment was terminated. More than two years after the termination, she attempted to amend her complaint to add a cause of action based on her termination. Because the termination occurred long after the demotion, the court quite correctly found that the termination cause of action could not relate back to the original complaint which was based solely on the demotion. Here of course, all of Kozano's claims are based on her collision with James.

Although Kozano's amended claims meet the substantive requirements of the relation-back doctrine, as the Scripps defendants point out, Kozano has not yet successfully substituted them as Doe defendants under the provisions of section 474. However, as we have noted: "[T]he courts of this state have considered noncompliance

with the party substitution requirements of section 474 as a procedural defect that could be cured and have been lenient in permitting rectification of the defect." (*Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 177, citing *Streicher v. Tommy's Electric Co.*, (1985) 164 Cal.App.3d 876, 884-885.) In light of Kozano's request for leave to substitute the Scripps defendants as Doe defendants, on remand she should be given the opportunity to do so.

Judgment reversed with directions to give Kozano leave to substitute the Scripps defendants as Does.

BENKE, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.