

1 Honorable Gerald S. Rosenberg (Ret.)
ADR SERVICES, INC.
2 1900 Avenue of the Stars, Suite 200
Los Angeles, California 90067
3 (310)201-0010 PH
Arbitrator
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7 **ADR SERVICES, INC.**

8 **IN THE MATTER OF THE ARBITRATION BETWEEN**

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vs. Claimant,) ADRS Case No. 19-4999-GSR
) Case No. 16166
) **RULING RE RESPONDENT**
) **MOTION FOR SUMMARY JUDGMENT**
)
) Hearing: June 10, 2020
Respondent.) Time: 8:00 a.m.
) Location: Telephonic
)
)

18 The motion of Respondent (“ ” or
19 “Respondent”) for summary judgment came on for a telephonic hearing before the Arbitrator,
20 Hon. Gerald S. Rosenberg (Ret.) at 8:00 a.m. on June 10, 2020.

21 seeks summary judgment on the professional negligence claim asserted against it
22 on the grounds that: (1) the action is barred by the applicable statute of limitations (CCP
23 §340.5); and (2) there is no triable issue of material fact.

24 Having read and considered the brief and evidence submitted in support of and in
25 opposition to the motion, the Arbitrator now issues the following ruling:

26
27 **BACKGROUND**

28 This medical negligence action arises out of Claimant’s assertion that his colon cancer
29 was not timely or properly treated by

1 This action follows several notices and complaints sent by Claimant to numerous entities
2 relating to his claims against , including the Department of Managed Health Care,
3 and the Medical Board of California. In a letter dated March 19, 2018,
4 to , Senior Counsel, , Mr.
5 detailed his struggle with cancer after his repeated requests for a colonoscopy were denied in
6 2012 when he was having a problem with rectal bleeding and rectal pain.

7 Claimant ultimately submitted a Demand for Arbitration in July 2019. Respondent moved
8 for Judgment on the Pleadings arguing that the action was untimely. The unopposed motion was
9 denied on November 6, 2019, because Respondent failed to meet its initial burden of proof of
10 establishing the right to the relief sought. The timeliness arguments were based on non-judicially
11 noticeable documents.

12 On November 8, 2019, served Claimant with Request for Admissions, Set One,
13 Nos. 1-2, as well as form Request for Admissions, Set Two, seeking admissions regarding the
14 genuineness of 22 attached documents. (Moving Papers, Exhibits A & B.) On November 12,
15 2019, served a third set of Requests for Admission containing Nos. 23-32. (Moving
16 Papers, Exhibit C.) Having received no responses, Respondent's counsel set a meet and confer
17 letter unilaterally extending the response date to December 23, 2019. (Moving Papers, Exhibit
18 D.) On December 23, 2019, Mr. sent an email to Respondent's counsel acknowledging
19 the verbal agreement to extend the response date again to January 17, 2020.

20 Not having received any responses, Respondent moved to deem the truth of the matters
21 and genuineness of the documents set forth in the Requests for Admissions admitted. The
22 motion was granted by the Arbitrator on March 9, 2020.

23 DISCUSSION

24 **A. Principles Applicable to Summary Judgment**

25 Ruling on a summary judgment motion involves a three-step analysis. First, identify the
26 issues framed by the pleadings since it is these allegations to which the motion must respond by
27 establishing a complete defense or otherwise showing there is no factual basis for relief. Second,
28 determine whether the moving party's showing establishes facts that negate the opponent's claim
29

1 and justifies a judgment in the favor of the moving party. Third, if it does, determine whether the
2 opposition demonstrates the existence of a triable, material factual issue.

3 A defendant moving for summary judgment has the burden of presenting facts to negate an
4 essential element of each cause of action or to show there is a complete defense to each cause of
5 action. (CCP §437c(p)(2).) Where, as here, the plaintiff would have the burden of proof at trial by a
6 preponderance of the evidence, the defendant must present evidence that would preclude a
7 reasonable trier of fact from finding it was more likely than not that the material fact was true.
8 (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.)

9 Consideration must be given to all evidence set forth in both the moving and opposing
10 parties' papers. (CCP § 437c(c); *Committee to Save Beverly Highlands Homes Assn. v. Beverly*
11 *Highlands Homes Assn.* (2001) 92 Cal.App.4th 1247, 1261.) Consequently, evidence submitted by
12 the opposing party may remedy evidentiary omissions in the moving party's papers. (*Villa v.*
13 *McFerren* (1995) 35 Cal.App.4th 733, 750-751 [fill an evidentiary gap]; *Laabs v. City of Victorville*
14 (2008) 163 Cal.App.4th 1242, 1267-1268 [evidence supplied by the plaintiff that supports the
15 defendant's motion].)

16 Further, in addition to the direct evidence, reasonable inferences that may be drawn by the
17 ultimate trier of fact from the submitted evidence must be considered. (*Aguilar v. Atlantic Richfield*
18 *Co.* (2001) 25 Cal.4th 826, 856 [judge has no power to weigh inferences]; *Kids' Universe v.*
19 *In2Labs* (2002) 95 Cal.App.4th 870, 879-880.) The reasonable inferences must be viewed in the
20 light most favorable to the opposing party. (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72,
21 81.) Nevertheless, inferences may not be derived from speculation, conjecture, imagination, or
22 guesswork. (*Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1298-1299.)
23 Furthermore, the motion may not be granted when reasonable inferences are contradicted by other
24 reasonable inferences. The submission of evidence which is equivocal or from which conflicting
25 inferences may be drawn is insufficient to meet the movant's burden (*Anderson v. Metalclad*
26 *Insulation Corp.* (1999) 72 Cal.App.4th 284, 297.)

27 Creating a triable issue of fact requires both "admissible" and "substantial" evidence.
28 Claims and theories not supported by admissible evidence do not create a triable issue. (See *Rochlis*
29 *v. Walt Disney Co.* (1993) 19 Cal.App.4th 201, 217 [disapproved on other grounds]; but see CCP §

1 437c(c) [objections not made deemed waived].) Furthermore, to create a triable issue the evidence
2 must be substantial, not merely speculative. (See *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151,
3 163; *Travelers Casualty & Surety Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1462
4 [speculative expert declaration insufficient].)

5 To preserve the constitutionality of the summary judgment process, the moving party's
6 evidence must be strictly construed while the opposing party's evidence must be liberally construed.
7 (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *McDonald v. Antelope Valley*
8 *Community College Dist.* (2008) 45 Cal.4th 88, 96-97; *Garrett v. Howmedica Osteonics*
9 *Corporation* (2013) 214 Cal.App.4th 173, 189.) Considering the rule of liberal construction, a
10 reasoned explanation required in an expert declaration filed in opposition to a summary judgment
11 motion need not be as detailed or extensive as that required in expert testimony presented in support
12 of a summary judgment motion or at trial. (*Jennifer C. v. Los Angeles Unified School Dist.* (2008)
13 168 Cal.App.4th 1320, 1332-1333; *Garrett v. Howmedica Osteonics Corporation*, *supra*, 214
14 Cal.App.4th at p. 189.)

15 The court may not weigh the evidence to determine whose version is more likely true; nor
16 may a summary judgment or summary adjudication be based on the court's evaluation of
17 credibility. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840.) Consequently, if
18 evidence is equally in conflict as to a material fact, the motion should be denied. (See *Kids'*
19 *Universe v. In2Labs*, *supra*, 95 Cal.App.4th at pp. 880, 882.)

20
21 **B. Statute of Limitations**

22 The relevant statute of limitations for medical malpractice actions, CCP §340.5, sets forth
23 two limitations periods. It reads in relevant part: "In an action for injury or death against a health
24 care provider based upon such person's alleged professional negligence, the time for the
25 commencement of the action shall be three years after the date of injury or one year after the
26 plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury,
27 whichever occurs first. In no event shall the time for commencement of legal action exceed three
28 years unless tolled by any of the following: (1) upon proof of fraud; (2) intentional concealment; or
29 (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the

1 person of the injured person....”

2 The one-year period commences when the plaintiff is aware of both the physical
3 manifestation of the injury and its negligent cause. The three-year period begins to run when the
4 plaintiff discovers that he or she has been injured, i.e., suffered a physical manifestation of the
5 alleged wrongful act. Both limitations periods must be met, or a plaintiff’s claim will be deemed
6 untimely. (*Rose v. Fife* (1989) 207 Cal.App.3d 760, 768.) The one-year limitations period does not
7 begin to run until the plaintiff discovers both his or her injury and its negligent cause. (*Drexler v.*
8 *Petersen* (2016) 4 Cal.App.5th 1181, 1189.) Therefore, “[t]he date of injury could be much later
9 than the date of the wrongful act where the plaintiff suffers no physical harm until months or years
10 after the wrongful act.” (*Steketee v. Lintz, Williams & Rothberg* (1985) 38 Cal.3d 46, 54.) The
11 injury, however, is not necessarily the ultimate harm suffered, but instead occurs at “the point at
12 which ‘appreciable harm’ is first manifested.” (*Brown v. Bleiberg* (1982) 32 Cal.3d 426, 437, fn. 8;
13 see *Hills v. Aronsohn* (1984) 152 Cal.App.3d 753, 762) [“appreciable harm” may become apparent
14 before the ultimate harm or diagnosis.] “Each case necessarily will turn on its own particular
15 circumstance. It could well be that an injury or pathology will not manifest itself for some period
16 after the last treatment by a physician. On the other hand, that injury or pathology may manifest
17 itself and the patient will suffer known appreciable harm at a time prior to the ‘ultimate’ result.”
18 (*Bispo v. Burton* (1978) 82 Cal.App.3d 824, 831; see *Warren v. Schechter* (1997) 57 Cal.App.4th
19 1189, 1203 [manifestation of appreciable harm is that point at which the damage has become
20 evidenced in some significant fashion; when the damage has clearly surfaced and is noticeable].)

21 Two alternative tests govern whether the one-year statute of limitations has been triggered:
22 (1) a subjective test requiring actual suspicion by the plaintiff that the injury was caused by
23 wrongdoing; and (2) an objective test requiring a showing that a reasonable person would have
24 suspected the injury was caused by wrongdoing. The first to occur under these two tests begins the
25 limitations period. (*Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1391.) Reasonableness of a
26 delayed discovery is ordinarily a question of fact, but the issue presents a question of law when the
27 evidence establishes beyond dispute that the plaintiff has failed to bring the action within one year
28 after notice of its existence. (*Graham v. Hansen* (1982) 128 Cal.App.3d 965, 972.) The well-settled
29 principle is that ignorance of a legal theory of recovery is irrelevant. The statute of limitations is not

1 tolled by belated discovery of legal theories, as distinguished from belated discovery of facts. It is
2 the knowledge of facts rather than the discovery of a legal theory of recovery that is the test. The
3 test is whether the plaintiff has information of circumstances sufficient to put a reasonable person on
4 inquiry or has the opportunity to obtain knowledge from sources open to his or her investigation.
5 (*Ibid.*) If a plaintiff believes that because of injuries he or she has suffered that someone has done
6 something wrong, such a fact is sufficient to alert that plaintiff to the necessity for investigation and
7 pursuit of legal remedies. (*Id.*, at pp. 972-973.)

8 In this case, although Claimant does not state in either of his arbitration demands when he
9 first learned about the cancer diagnosis, prior correspondence by Claimant to and various
10 government entities about the alleged malpractice show that Claimant knew of the cancer diagnosis
11 more than one year prior to submitting his first Demand for Arbitration on February 6, 2019. This
12 includes correspondence from Mr. to in March 2018, stating that previous diagnoses
13 of hemorrhoids were incorrect as he was told he had cancer. (Decl., Exhibit A.) Mr.
14 also received multiple written communications from the Department of Managed Health Care and
15 Medical Board of California Central Complaint Unit from March 2017 to August 2017. (*Ibid.*)

16 In his opposition to this motion, Mr. states that he was informed of his diagnosis of
17 adenocarcinoma in February 2015 and was told that he needed aggressive and immediate chemo-
18 radiation therapy due to advanced Stage III-B colorectal cancer. (Opposition, at pp. 10-11, Exhibits
19 Z and AA.)

20 Additionally, by failing to respond to 's Requests for Admission, Claimant admitted
21 as a matter of law that, not only was he on inquiry notice of his claim against prior to
22 February 6, 2018. On March 9, 2020, the Arbitrator issued a ruling granting 's unopposed
23 Motion to Deem Admitted the Genuineness of Documents and Truth of the Matters set forth in
24 Requests for Admission, Sets One, Two, and Three pursuant to CCP §2033.280.¹ (See Exhibit "B"
25 to Decl.)

26
27 ¹ A party's failure to respond to requests for admissions results in a waiver of the right to object
28 and gives the propounding party the right to move an order that the genuineness of any
29 documents and the truth of any matters specified in the requests be deemed admitted. (CCP
§2033.280.)

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2 CONCLUSION

3 The motion of Respondent for summary judgment is
4 GRANTED.

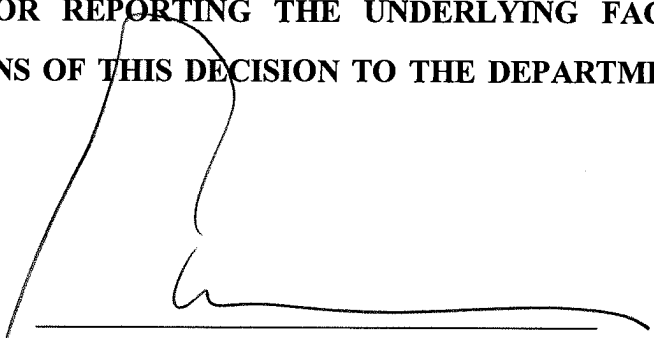
5 The undersigned Arbitrator independently reviewed the moving and opposing papers,
6 evidence and other supporting briefs, which show no triable issue of material fact to show that Mr.
7 's malpractice claim was timely made. As such, this dispositive motion is granted in
8 Respondent's favor without costs. It is so ordered.

9
10 *FINAL AWARD

11 The Arbitrator hereby enters a final arbitration award in favor of Respondent
12 . Claimant shall take nothing by way of his claims.

13
14 **NOTHING IN THIS ARBITRATION DECISION PROHIBITS OR RESTRICTS THE**
15 **ENROLLEE FROM DISCUSSING OR REPORTING THE UNDERLYING FACTS,**
16 **RESULTS, TERMS AND CONDITIONS OF THIS DECISION TO THE DEPARTMENT**
17 **OF MANAGED HEALTH CARE.**

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20 DATED: June 10, 2020

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22 _____
23 Hon. Gerald S. Rosenberg (Ret.)
24 Arbitrator