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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

ANTONIO MANDUJANO et al.,

Plaintiffs and Appellants,

v.

MINNESOTA MINING &
MANUFACTURING CO. et al.,

Defendants and Respondents.

B152259

(Los Angeles County
Super. Ct. No. BC233587)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Wendell J. Mortimer, Jr., Judge. Reversed and remanded.

Law Offices of Raphael Metzger, Raphael Metzger, and Gregory Coolidge for
Plaintiffs and Appellants Antonio Mandujano and Minerva Villegas.

Ammirato & Palumbo, Bruce Palumbo, and Vincent A. Ammirato for Respondent
Summit Steel, Inc.

Wilson, Elser, Moskowitz, Edelman & Dicker, Jody Reynald Togonon and Donald
P. Eichhorn for Respondent MS Abrasive Cleaning Equipment, Inc.

Law Offices of George H. Ellis and George H. Ellis for Respondent Milwaukee
Electric Tool Corporation.

Wait & Childs, Michael B. TeBeau and Thomas Wait for Respondent Bondo Corporation.

Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, Douglas L. Day and Jeffrey Swedo for Respondent Makita U.S.A., Inc.

Friedenthal, Cox & Herskovitz, Daniel R. Friedenthal and Mark Herskovitz for Respondent Cameron Welding Supply, Inc.

Law Offices of Vivian L. Schwartz, Deborah M. Fletcher and Vivian L. Schwartz for Respondent Senik Paint Co.

Clinton & Clinton, David A. Clinton and Holly Kalechstein for Respondents Norton Company, Praxair, Inc. and Laagco.

Plaintiffs Antonio Mandujano and his wife Minerva Villegas appeal from a partial judgment in a personal injury action entered after the trial court granted a motion for summary judgment, initially filed by defendant Minnesota Mining & Manufacturing Company (3M) and joined by nine other defendants. The trial court held the personal injury claims arising from Mandujano's inhalation of dust at work were barred by Code of Civil Procedure section 340, subdivision (3) because Mandujano was aware more than one year before the filing of the complaint of his injury and its wrongful cause. Because the evidence before the trial court on summary judgment permits more than one reasonable inference as to when Mandujano first suspected wrongdoing, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Mandujano worked as a welder for Dana Creath Designs, Inc. (Creath) in Costa Mesa, California from 1987 until 1999 when he was placed on medical disability. In March 2000 Mandujano was diagnosed with interstitial pulmonary fibrosis.

1. *The complaint for personal injuries.*

Alleging that he had been exposed to numerous toxic and abrasive chemicals, including substances containing aluminum and silica, during the course of his

employment at Creath, Mandujano and his wife filed this lawsuit on July 18, 2000. The complaint, which ultimately named 15 defendants, alleged seven causes of action: negligence, strict liability (failure to warn), strict liability (design defect), fraudulent concealment, breach of implied warranties, battery and loss of consortium.¹

2. *3M's motion for summary judgment.*

3M moved for summary judgment on the ground that Mandujano knew the dust he had been inhaling at Creath for more than a decade was harming him and that he was aware by March 1999, 15 months before the filing of the complaint, that his illness was the result of someone's wrongdoing.² 3M argued that under the well-settled principles of *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103 (*Jolly*), Mandujano's claims were barred by the one-year statute of limitations applicable to personal injury actions. (Code Civ. Proc., § 340, subd. (3).)

3. *The evidence concerning Mandujano's knowledge of his injury and its cause.*

The parties presented evidence on summary judgment that from 1987 to 1994 Mandujano worked in the welding department at Creath making lamps. While in that position, Mandujano also cut wrought iron tubing with a power saw, which created a substantial amount of dust with a strong odor. Mandujano often felt a burning in his throat. When he cleared his throat and spit up the dust, it was black. He also had a metallic taste in his mouth, and his facemask would turn black from dust that got inside the mask. For the first several years he was at Creath, Mandujano did not pay attention to

¹

The defendants named in the complaint were Campbell Hausfeld/Scott Fetzer Company; CTI Abrasives & Tools, Inc.; Fisher Tool Company, Inc.; Hermes Abrasives, Inc.; 3M; MS Abrasive Cleaning Equipment, Inc.; Norton Company and Pearl Abrasive Company. Cameron Welding Supply; Praxair, Inc.; Los Angeles Art and Glass Company; Makita U.S.A., Inc.; Milwaukee Electric Tool Corp.; Senik Paint Co. and Summit Steel Co. were subsequently added to the case by Doe amendments.

²

3M's motion for summary judgment was joined by defendants Senik Paint Co.; Summit Steel Co.; Cameron Welding Supply; Los Angeles Art And Glass Company; Makita U.S.A., Inc.; MS Abrasive Cleaning Equipment, Inc.; Norton Company; Praxair, Inc. and Milwaukee Electric Tool Corp.

the dust and did not believe it was unhealthy to breathe it. However, Mandujano told several different physicians that, beginning sometime in 1990, he had begun to develop chest pains, shortness of breath, cough and phlegm production.

In 1994 Mandujano moved to a new department where he fixed lamps. At this time he also worked for an hour or so each morning cleaning the plates where bulbs were placed, which required use of a sandblasting machine. Mandujano was responsible for filling the machine with sand. Based on the instructions on the sandbags, Mandujano believed the sand was metallic. The instructions also told him to wear a mask when using it, which he did. He could see dust inside the machine while he worked; and although the machine was closed, it was “ancient” and had a leak. After using the sandblasting machine, Mandujano’s face and body would be covered with dust.

In 1994 Mandujano went to a clinic where he was diagnosed with allergies. He was given shots to treat the allergies, which typically made him feel better for a week or so, and then he would start feeling worse again. This pattern continued for a number of years.

On March 8, 1999 Mandujano visited an emergency room at the University of California at Irvine (UCI), where he was given a chest x-ray. The medical record from that visit states Mandujano was diagnosed with “chronic interstitial lung disease.” The record also indicates Mandujano had complained of “exposure to ground glass at work.” At his deposition, Mandujano, who does not speak English, testified he was not informed of the results of the X-ray or the diagnosis.

On March 15, 1999 a physician at UCI diagnosed Mandujano as having a “cough” with “allergic rhinitis” (more commonly, a runny nose).

In April 1999 Mandujano “started to feel really bad” and “was noticing that [he] was coughing constantly” and was “having to spit constantly.” During this time Mandujano repeatedly asked his employer to pay half of his medical expenses because he thought his respiratory problems were caused by his exposure to dust at work.

Mandujano testified he thought his illness should be classified as a “workplace accident.”

On May 28, 1999 another UCI physician examined Mandujano and, suspecting that he might have tuberculosis, ordered a tuberculosis test. On June 1, 1999 the physician noted in Mandujano's chart that the test was negative.

On July 9, 1999 Mandujano reported to a physician that he had experienced "cough, phlegm, wheezing for 7 months," and stated he experienced back pain every time he coughed. Mandujano's physician diagnosed his condition as allergies. Mandujano testified he was again informed by his physician during fall 1999 that he had allergies. Mandujano believed his doctor when he was given this information.

In October 1999 additional chest X-rays were performed. The physician showed the X-rays to Mandujano and told him he had dust in his lungs. On December 3, 1999 Mandujano saw yet another physician, who treated him "for persistent cough secondary to allergies which was further aggravated by excess of dust at work." During December 1999 he was placed on medical disability. In early 2000 an open lung biopsy was performed confirming the diagnosis of pulmonary fibrosis.

4. *The trial court's decision granting the summary judgment motion.*

The trial court granted the defendants' motion for summary judgment, finding that the undisputed facts established Mandujano's knowledge of his injury and its cause, as well as a suspicion of wrongdoing, more than one year before the filing of the complaint. Although the court's ruling discusses pre-1999 events, its conclusion that the one-year limitations period bars the complaint under *Jolly, supra*, 44 Cal.3d 1103 relies on the March 8, 1999 emergency room diagnosis that Mandujano was suffering from an "interstitial lung disease" (reflected in the emergency room report); Mandujano's complaint to the emergency room personnel (also as reflected in the report) that he had been exposed to "ground glass at work" (restated by the trial court as "exposure to toxic materials"); and, most importantly, Mandujano's request in April 1999 that his employer "pay his medical expenses because he believed that his injuries had been caused by working in the dust."

The trial court also dismissed the fraud claim, holding the one-year limitations period for personal injury claims was also applicable to this cause of action. The trial court reasoned that the gravamen of the claim was a personal injury, and fraud had not been pleaded with particularity.

CONTENTIONS

Mandujano and Villegas contend that a cause of action for personal injuries based on an occupational disease does not accrue until the plaintiff is able to satisfy each of the pleading requirements identified in *Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 80, including an awareness that he or she is suffering from a specific illness. They assert that under this standard their claims did not accrue and the statute of limitations did not begin to run until early 2000, when Mandujano first received a definitive diagnosis of interstitial pulmonary fibrosis.

Mandujano and Villegas also contend that the trial court misapplied the discovery rule of *Jolly* and that a triable issue of fact exists as to when Mandujano first reasonably suspected his illness was the result of wrongdoing. Because we agree with the second contention, we need not decide in this case whether the pleading rules defined in *Bockrath* affect the accrual of a cause of action for personal injury based on occupational disease.

DISCUSSION

1. *The legal standard for discovery of a personal injury cause of action.*

A cause of action generally accrues when, under the substantive law, the wrongful act is done or the wrongful result occurs. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.) “In other words, . . . the time when the cause of action is complete with all of its elements [citations]--the elements being generically referred to by sets of terms such as ‘wrongdoing’ or ‘wrongful conduct,’ ‘cause’ or ‘causation,’ and ‘harm’ or ‘injury’ [citations].” (*Ibid.*)

In *Jolly*, *supra*, 44 Cal.3d 1103 the Supreme Court held the common law rule that an action accrues on the date of injury applies “only as modified by the ‘discovery rule.’”

The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause. [Citation.] A plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her. [Citation.]” (*Id.* at p. 1109, fn. omitted.)

Under *Jolly* knowledge of an injury and its factual or physical cause is not enough to commence the running of the limitations period because that information does not necessarily imply that any wrongdoing has occurred. The plaintiff must also be aware of sufficient facts to put her on inquiry notice of a negligent case. (*Jolly, supra*, 44 Cal.3d at pp. 1109-1114; *Clark v. Baxter Healthcare Corp.* (2000) 83 Cal.App.4th 1048, 1057.)

“The question is what did the plaintiff know and when did he know it. When did he know or when should he have discovered that he was suffering from a disease that had caused or was likely to cause him injury for which relief could be sought at law.”

(*Velasquez v. Fibreboard Paper Products Corp.* (1979) 97 Cal.App.3d 881, 887-888.)

Actual knowledge of each of these three elements--injury, cause and wrongdoing--is not required: “[A] plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof” (*Norgart v. Upjohn Co, supra*, 21 Cal.4th at p. 397.) “Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. . . . [Citation.] A plaintiff need not be aware of the specific ‘facts’ necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.” (*Jolly, supra*, 44 Cal.3d at pp. 1110-1111, fn. omitted.)

Although a plaintiff who is experiencing symptoms and is aware of their cause has a duty to reasonably investigate possible wrongdoing, the type of diligence required “in ferreting out and learning of the negligent causes” of his or her condition may be

diminished if the plaintiff has been given medical advice that allays initial indications of wrongdoing. (*Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 102; see *Kitzig v Nordquist* (2000) 81 Cal.App.4th 1384, 1393-1394; *Unjian v. Berman* (1989) 208 Cal.App.3d 881, 885-888.)

2. *Summary judgment based on date of discovery.*

Summary judgment is proper where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's grant of summary judgment "de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

"The court may not 'grant[]' the defendants' motion for summary judgment 'based on inferences . . . if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.' (Code Civ. Proc., § 437c, subd. (c).) Neither, apparently, may the court grant their motion based on any evidence from which such inferences are drawn, if so contradicted. That means that, if the court concludes that the plaintiff's evidence or inferences raise a triable issue of material fact, it must conclude its consideration and deny the defendants' motion." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856.)

Resolution of the statute of limitations issue is generally a question of fact. (*Jolly, supra*, 44 Cal.3d at p. 1112; *Unjian v. Berman, supra*, 208 Cal.App.3d 881.) Summary judgment is proper, however, if "the uncontradicted facts established through discovery are susceptible of only one legitimate inference" (*Jolly, supra*, 44 Cal.3d at p. 1112.)

3. *A triable issue of fact exists as to when Mandujano suspected wrongdoing.*

None of the three evidentiary points relied upon by the trial court, whether considered separately or taken together, establishes beyond dispute that Mandujano suspected wrongdoing more than one year before filing his lawsuit in July 2000.

As to the first item, the March 1999 diagnosis of interstitial lung disease, Mandujano testified that he was not told of the diagnosis at the time and that thereafter he was once again told that his condition was due to allergies. Whether that testimony is ultimately accepted by the trier of fact, it is sufficient to eliminate this evidence as a basis for summary judgment.

As to the second and third items, Mandujano's complaint to the emergency room physician about dust or glass particles at the workplace and his request that his employer contribute to his on-going medical expenses, it cannot be disputed that Mandujano was aware by April 1999 that exposure to dust at work was at the very least aggravating his condition. But at his deposition Mandujano testified he thought his illness should be classified as a "workplace accident." He was never asked if he thought his illness was the result of someone's wrongdoing. Thus, summary judgment was improper unless the only reasonable inference that can be drawn from Mandujano's complaints about dust and glass particles and his request to his employer is that he necessarily suspected not only that workplace dust was the factual cause of his medical problem but also that his problems were the result of "someone doing something wrong" to him. (*Jolly, supra*, 44 Cal.3d at pp. 1110-1111.)

While it is no doubt a reasonable inference that Mandujano suspected wrongdoing by April 1999, it is not the only reasonable inference that can be drawn from the evidence. In this regard, the case at bar and particularly the manner in which defense counsel chose to develop their evidence are strikingly similar to *Unjian v. Berman, supra*, 208 Cal.App.3d 881, which involved a medical malpractice action following an unsuccessful face-lift operation.

The critical fact in *Unjian* was that three weeks after the operation the plaintiff revoked an arbitration agreement with his plastic surgeon because, as he later testified, he believed his face looked worse after the surgery. In support of a motion for summary judgment on limitations grounds, the defendant-surgeon argued the only reasonable inference that could be drawn from cancellation of the agreement under these

circumstances was that the plaintiff was planning to sue the surgeon and therefore the plaintiff suspected negligence by the date he mailed the revocation letter. (*Unjian v. Berman, supra*, 208 Cal.App.3d at p. 888.) This division disagreed, and reversed the judgment in favor of defendant:

“It is also noteworthy Mr. Unjian [the plaintiff] did not testify at his deposition he cancelled the arbitration agreement because he believed or suspected Dr. Berman had performed negligently. He testified he cancelled the agreement because ‘my face looked worse.’ Counsel for Dr. Berman could have nailed the matter down at that point by asking a question such as ‘Did you think, at that point, Dr. Berman did something wrong?’ or ‘Did you have a suspicion at that time there was malpractice?’ Mr. Unjian was never asked any such question. Instead, counsel chose to leave the matter with Mr. Unjian’s testimony he revoked the agreement because his face looked worse and rely on an inference from that testimony Mr. Unjian believed or suspected negligence. [¶] A trier of fact may draw the inference urged by Dr. Berman. The problem, as far as summary judgment is concerned, is that other inferences could be drawn by the trier of fact. Mr. Unjian could have simply wished to keep his options open or he may have believed it was a mistake to sign the agreement Recalling Dr Berman’s ‘guarantee’ his face would look better after surgery, Mr. Unjian may have believed the fact his face looked worse would entitle him to a refund of all or part of the cost of surgery regardless of how competently Dr. Berman performed it. [¶] It was not in the province of the trial court to choose among the several reasonable inferences that could be drawn from Mr. Unjian’s action and his explanation for the action. This was a question to be resolved at trial.” (*Unjian v. Berman, supra*, 208 Cal.App.3d at pp. 888-889.)

Defense counsel here, like the lawyers in *Unjian v. Berman, supra*, 208 Cal.App.3d 881, elected not to ask Mandujano whether he suspected wrongdoing at the critical time, instead choosing to rely on an inference from the testimony that Mandujano complained about dust and asked his employer to pay his medical costs. Yet just as Mr. Unjian may have revoked the arbitration agreement to seek a refund regardless of

how competently Dr. Berman performed, so too Mandujano may have complained and sought assistance with his medical bills from his employer without suspecting that the presence of dust at the workplace was in any way wrongful (rather than simply harmful). As was true in *Unjian*, which inference is accepted must be resolved at trial.

DISPOSITION

The judgment is reversed. The case is remanded for further proceedings not inconsistent with this opinion. Mandujano and Villegas are to recover costs on appeal.

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PERLUSS, J.

I concur:

JOHNSON, J.

LILLIE, P. J., Dissenting.

I respectfully dissent. I find this case to be squarely within the *Jolly* rule, and Mandujano's action is barred because it was filed too late. While the results in this case may be harsh, the majority's attempts to save a sympathetic plaintiff from the consequences of his own inaction does disservice to the policies promoted by statutes of limitations and Code of Civil Procedure section 437c.

I. THE JOLLY RULE BARS MANDUJANO'S ACTION BECAUSE HE HAD A SUSPICION OF WRONGDOING MORE THAN ONE YEAR BEFORE THE FILING OF THE COMPLAINT.

The undisputed facts show Mandujano suspected wrongdoing when he asked his employer to pay for his medical expenses more than one year prior to filing his complaint. The one-year statute of limitations of Code of Civil Procedure section 340, subdivision (3), applicable in personal injury and product liability cases, normally begins to run when the wrongful act takes place. (*G. D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 25.) This rule is subject to the "rule of discovery," which tolls accrual until the plaintiff knows, or should know, all material facts essential to show the elements of the cause of action. (*Pereira v. Dow Chemical Co.* (1982) 129 Cal.App.3d 865, 873.)

In the case of latent occupational disease, the application of the discovery rule posits that the statute of limitations begins to run from the time the plaintiff "suspects or should suspect that her injury was caused by wrongdoing." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110.) A plaintiff is held to his or her actual knowledge as well as imputed knowledge of that which could reasonably be discovered through investigation of sources available to plaintiff. (*Id.* at p. 1109.) Once the plaintiff "has notice or information of circumstances to put a reasonable person on inquiry [, the plaintiff must] decide whether to

file suit or sit on [his] rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; [he] cannot wait for the facts to find [him].” (*Id.* at pp. 1110-1111, internal quotation marks omitted.)

The knowledge threshold for triggering the running of the statute is low. *Jolly* does not require that the plaintiff has already discovered or could discover the underlying negligence with an exercise of reasonable diligence. “Since the investigation is not for the purpose of establishing sure knowledge of another’s fault, but only a suspicion, the rendition of summary judgment in favor of defendants based on the one-year statute is more common than might initially be supposed.” (*Bristol-Myers Squibb Co. v. Superior Court* (1995) 32 Cal.App.4th 959, 964.) Indeed, the “wrongdoing” contemplated by *Jolly* is not “wrongdoing” in a technical or legal sense but wrongdoing in conformity with lay understanding. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398.) Thus, knowledge of a legal theory supporting the filing of a lawsuit is irrelevant; it is the *facts* underlying a potential action that the plaintiff must discover.

While the level of awareness necessary to trigger the statute is generally a question of fact, it becomes a question of law where the facts are susceptible of only one legitimate inference, and reasonable minds can draw only one conclusion from the evidence--that the plaintiff knew or should have known of facts indicating wrongdoing had occurred. (*Pereira v. Dow Chemical Co., supra*, 129 Cal.App.3d at p. 874.) In the instant case, the fact that Mandujano asked his employer to pay his medical expenses more than one year before filing the complaint supports only one conclusion: Mandujano suspected his injury was caused by wrongdoing, and it was up to Mandujano to go and find the facts.¹ This case is squarely within the *Jolly* rule.

Nonetheless, the majority concludes that Mandujano could have requested his employer to pay his medical bills “without suspecting that the presence of dust at the

¹ Indeed, it is clear the plaintiff suspected wrongdoing at least as far back as 1994, when he refused to use the sandblasting equipment because he did not like the dust -- a fact ignored by the majority opinion.

workplace was in any way wrongful (rather than simply harmful).” I do not see how drawing a distinction between “wrongful” and “harmful” is proper under *Jolly*, which requires the trial court to focus on what a reasonable person would or should have done under the circumstances. Indeed, under the majority’s fractured reasoning, the trial court will now have to consider what Mandujano was *actually thinking* when he asked his employer to pay his medical bills--was it harmful? Or was it wrongful? This sort of subjective inquiry is neither contemplated nor sanctioned by the *Jolly* rule, which is intended to spur plaintiffs to file lawsuits and ask questions later.

II. MEDICAL MALPRACTICE “DELAYED DISCOVERY” CASES ARE INAPPLICABLE.

The majority recognizes that “[w]hile it is no doubt a reasonable inference that Mandujano suspected wrongdoing by April 1999, it is not the only reasonable inference that can be drawn from this evidence.” (Majority opinion at p. 9.) For the proposition that Mandujano could have been thinking the dust was merely harmful, rather than wrongful, the majority relies on *Unjian v. Berman* (1989) 208 Cal.App.3d 881, one of a line of medical malpractice cases² applying the discovery rule to Code of Civil Procedure section 340.5.³

In *Unjian*, the plaintiff had an unsuccessful facelift in November 1982. About three weeks after the operation, the plaintiff mailed a letter to the doctor performing the operation,

² (See, e.g., *Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1392 [plaintiff reasonably relied on the dentist’s judgment that “everything was fine,” and therefore statute did not begin running until an implant came out during surgery and plaintiff began to suspect her implants were failing and that the failure was attributable to wrongdoing]; *Wozniak v. Peninsula Hospital* (1969) 1 Cal.App.3d 716, 725 [summary judgment improper where “trier of fact could be justified in concluding that [plaintiffs] placed reliance on their physicians and surgeon who had the duty of keeping them informed”].)

³ Code of Civil Procedure section 340.5 provides that in an action against a healthcare provider, an action for professional negligence must be filed within three years of 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.”

revoking an agreement to arbitrate. When asked at deposition why he mailed the letter, the plaintiff responded “I could see there was no improvement in my face. Actually, I felt even a little more gaunt; . . . little . . . worse. . . . My face looked worse.” (*Unjian v. Berman, supra*, 208 Cal.App.3d at p. 883.) The plaintiff remained in the doctor’s care until October 1983, during which time the doctor told plaintiff an infection on his face was probably caused by an old acne cyst. Plaintiff did not file suit until September 1984, more than one year after the surgery. (*Id.* at pp. 883-884.)

The doctor argued a reasonable person in plaintiff’s position would have known something was wrong based on the plaintiff’s statement in December 1982 that his face looked “worse.” (*Unjian v. Berman, supra*, 208 Cal.App.3d at p. 883.) This court reversed the trial court’s grant of summary judgment, noting “[t]he fact that an operation did not produce the expected result would not necessarily suggest to the ordinary person the operation had been performed negligently.” (*Id.* at p. 885.) Therefore, where “the injury is obvious but there is nothing to connect that injury to the defendant’s negligence it cannot be said as a matter of law the plaintiff’s failure to make an earlier discovery of fault was unreasonable.” (*Ibid.*) The rationale for this rule is that “[t]he facts and circumstances of the medical treatment rendered a patient are within the exclusive knowledge of the hospital and the attending physicians. It is difficult to understand how an injured person could discover the cause of the injury until he has obtained that information.” (*Wozniak v. Peninsula Hospital* (1969) 1 Cal.App.3d 716, 725.)

This rationale, based upon principles of duty, superior knowledge and estoppel, does not apply in the instant case. There was nothing Mandujano’s employer knew that he did not, and his employer (as opposed to his doctor) was not assuring him everything was “fine.” On the contrary, Mandujano was on notice there were dangerous dust particles in the work place; he was on notice they were causing him harm; he knew it was wrongful because the machine was “ancient” and had a leak. As a simple factual issue, there is nothing in the record below which even remotely suggests that Mandujano’s “injury [was] obvious but there [was] nothing to connect that injury to the defendant’s negligence [and] it cannot be said as a matter of law [Mandujano’s] failure to make an earlier discovery of fault

was unreasonable.” (*Unjian v. Berman, supra*, 208 Cal.App.3d at p. 885.) Rather, the facts demonstrate Mandujano made that causal link between his injury (coughing, spitting up black material) and the defendant’s negligence (an “ancient” machine, dust flying around the workplace); such link is conclusively demonstrated where an employee asks his employer to pay his medical bills. Recognition of wrongdoing is implicit in the request.⁴

III. THE MAJORITY MISAPPLIES THE RULE THAT SUMMARY JUDGMENT MUST BE DENIED IF THE FACTS SUPPORT CONFLICTING INFERENCES.

Finally, the majority’s methodology in using the summary judgment statute to split hairs in order to save a sympathetic plaintiff does harm to the *Jolly* rule. The summary judgment statute prohibits the granting of summary judgment where there are conflicting inferences, as the matter must be resolved by a factfinder. “[S]ummary judgment shall not be granted by the court based on inferences *reasonably deducible* from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.” (Code of Civ. Proc., § 437c, subd. (c) [emphasis added].) The majority errs in applying Code of Civil Procedure section 437c and concluding there is more than one reasonable inference that can be drawn from Mandujano’s request. Instead, as discussed

⁴ Indeed, the majority’s reasoning appears to be based more on a case cited by plaintiff, *Clark v. Baxter Healthcare Corp.* (2000) 83 Cal.App.4th 1048, than the medical malpractice case it cites. In *Clark*, the plaintiff, a nurse, used latex gloves beginning in 1990. She first noticed that her hands were itching and cracking in early 1993, and went to an allergist in early 1994 who told her not to use latex gloves because she might be allergic to them. After she suffered a severe reaction during a gynecological examination in 1995, she joined a support group for latex allergy sufferers. She then discovered in late 1995 that her allergy to latex gloves was caused by *defective* manufacture of the gloves. (*Id.* at pp. 1052-1053.) Her action, filed in January 1996, was held to be timely even though plaintiff was aware of her injury and its cause in early 1994. *Clark* concluded the distinction was that she did not know of any wrongdoing, i.e., defective manufacture, until late 1995. Even if we were to apply *Clark*’s analysis to the instant case, Mandujano’s situation is factually different. First, if Mandujano subjectively believed his condition was still due to allergies (i.e., a result of merely “harmful” substances) in April 1999, then why ask his employer to pay his medical bills? Second, in *Clark*, there was *no* evidence of wrongdoing during the statutory period; in the instant case, the air was thick with it.

above, the majority's conclusion is not "reasonably deducible" from the evidence because it conflicts with the *Jolly* rule and improperly injects a subjective component into an otherwise objective test.

By returning this case to the trial court for an excursion into the subjective, the majority wastes scarce resources and encourages tardy litigation. I dissent.

LILLIE, P. J.