

**HARRY KNOWLES, Petitioner, v. THE SUPERIOR COURT OF SAN
DIEGO COUNTY, Respondent; SERAFINA LABO et al., Real Parties in
Interest.**

D043323

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DIS-
TRICT, DIVISION ONE**

*118 Cal. App. 4th 1290; 13 Cal. Rptr. 3d 700; 2004 Cal. App. LEXIS 793; 2004
Cal. Daily Op. Service 4495; 2004 Daily Journal DAR 6217*

May 25, 2004, Filed

SUBSEQUENT HISTORY: Review denied by Knowles v. San Diego County Superior Court, 2004 Cal. LEXIS 7506 (Cal., Aug. 11, 2004)

PRIOR HISTORY: [***1] Superior Court of San Diego County, No. GIC 756501, Patricia Yim Co-
wett, Judge.

DISPOSITION: Petition for writ of mandate granted in part; denied in part.

CASE SUMMARY:

PROCEDURAL POSTURE: Real parties in interest survivors, the decedent's four children, brought a wrongful death suit against petitioner physician, alleging medical malpractice. The respondent superior court denied the physician's motion for summary judgment. The physician petitioned for relief in proceedings in mandate.

OVERVIEW: The decedent died while hospitalized. The physician alleged that the wrongful death claims were barred pursuant to *Cal. Code Civ. Proc. § 340.5*. The physician also alleged that the fourth survivor's claims were barred, as this survivor believed, due to a head injury, that his father was still alive. The appellate court did agree that the claims were time-barred, but it did not agree that the fourth survivor's beliefs prevented him from establishing damages. A plaintiff need not know the precise manner in which a wrongdoer was negligent in order to discover his or her injury within the meaning of *§ 340.5*. In this case, the statute of limitations began when the three survivors suspected malpractice shortly after decedent's death, not when they learned of the alleged malpractice of this particular physician after they contacted a second consultant. As to the fourth survivor, the appellate court had previously rejected the argument that mental retardation rendered a person less able to suffer loss of companionship. The physician failed to present any evidence about the extent of the fourth survivor's injuries; therefore, the physician failed to meet his burden of proof.

OUTCOME: The physician's petition was granted with respect to the argument that the claims were time-barred; however, the petition was denied with respect to the fourth survivor's claims.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A physician filed a petition for writ of mandate, claiming the trial court improperly denied his motion for summary judgment filed in a wrongful death action brought by a family of a deceased patient. The family alleged that the physician was professionally negligent in performing a renal stenting, which resulted in the patient's death. The family suspected medical negligence shortly after the patient's death. They filed a wrongful death action against parties other than the physician that performed the renal stenting. When an expert suggested that the physician that performed the renal stenting might be negligent, the family filed a wrongful death action against the physician almost two years after their initial suspicions of medical negligence. One family member, a son of the decedent, was mentally disabled. The physician filed a motion for summary judgment as to the wrongful death claims of the family, other than the mentally disabled son, claiming the actions were barred by *Code Civ. Proc.*, § 340.5. With respect to the mentally disabled son, in the same motion, the physician claimed the son could not establish damages for loss of companionship because he thought his father was alive. The court denied the motion. (Superior Court of San Diego County, No. GIC 756501, Patricia Yim Cowett, Judge.)

The Court of Appeal granted the writ of mandate in part and denied it in part. The court held that the limitations period was triggered when the family suspected medical negligence of some form immediately after the death, rather than when their investigation premised upon that suspicion led them to suspect that the physician performing the renal stenting had been negligent. It is the discovery of the injury rather than the discovery of a particular defendant's negligence that triggers the limitations period in *Code Civ. Proc.*, § 340.5. It is the suspicion of negligence rather than an expert's opinion that [*1291] triggers the limitations period. The family had a year from their initial suspicion to investigate and bring suit. The court held that since the family filed suit nearly two years after they first suspected medical negligence, it was barred by the one-year statute of limitations contained in *Code Civ. Proc.*, § 340.5. The court issued a writ of mandate ordering the court to vacate that portion of the order denying the motion for summary judgment on the wrongful death claims made by the family except for the mentally disabled son. When a wrongful death action is successful, the children of the decedent are entitled to reasonable compensation for the loss of companionship, love, comfort, affection, society, solace or moral support suffered as a result of the death. Mental retardation does not necessarily render a person less able to suffer loss of companionship damages in a wrongful death action. Courts will not simply presume that persons with mental defects are unable to suffer wrongful death damages. The Court of Appeal held that, since the physician made no prima facie showing that the mentally disabled son could not establish wrongful death damages, the trial court properly denied the motion for summary judgment with respect to the mentally disabled son. (Opinion by Aaron, J., with Huffman, Acting P. J., and McDonald, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1) Limitation of Actions § 31--Accrual of Cause of Action--Professional Medical Negligence.--A person need not know of the actual negligent cause of an injury; mere suspicion of negligence suffices to trigger the limitation period in *Code Civ. Proc.*, § 340.5.

(2) Limitation of Actions § 31--Accrual of Cause of Action--Professional Medical Negligence--Unknown Causal Mechanism.--A plaintiff need not know the precise manner in which a wrongdoer was negligent in order to discover his or her injury, within the meaning of *Code Civ. Proc.*, § 340.5. The limitations period can begin to run before a plaintiff learns the specific causal mechanism by which he or she has been injured.

(3) Limitation of Actions § 31--Accrual of Cause of Action--Professional Medical Negligence--Discovery of the Injury.--Pursuant to the plain language of *Code Civ. Proc.*, § 340.5, it is the discovery of "the injury," rather than the discovery of a particular defendant's negligence, that triggers the limitations period. The use of the term "such person's alleged professional negligence" in *Code Civ. Proc.*, § 340.5, merely defines the type of action subject to the statute; it does not define the limitations period contained therein. [*1292]

(4) Limitation of Actions § 31--Accrual of Cause of Action--Professional Medical Negligence--Suspicion of Negligence.--It is a plaintiff's suspicion of negligence, rather than an expert's opinion, that triggers the limitation period in *Code Civ. Proc.*, § 340.5. The limitations period began when the decedent's family's suspicions were aroused that medical negligence had occurred. The period is not affected by the family's diligence in finding facts to support their lawsuit.

(5) Limitation of Actions § 31--Accrual of Cause of Action--Professional Medical Negligence--Suspicion of Negligence.--Under *Code Civ. Proc.*, § 340.5, a plaintiff has a year from his or her initial suspicion to investigate and bring suit alleging professional negligence against a health care provider. In many cases, this one-year period may be extended by the proper filing and amendment of a Doe complaint. The limitations period was triggered when the family of a patient who died after two surgeries in two days suspected medical negligence rather than when their investigation led them to suspect a particular health care provider, and the lawsuit filed almost two years after they suspected negligence was barred by *Code Civ. Proc.*, § 340.5.

[3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 535; 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1427.]

(6) Wrongful Death § 14--Damages--Loss of Services, Comfort, and Society--Decedent's Children.--The children of a decedent in a successful wrongful death action are entitled to reasonable compensation for the loss of love, companionship, comfort, affection, society, solace, or moral support suffered as a result of the death.

(7) Wrongful Death § 14--Damages--Loss of Services, Comfort, and Society--Mental Retardation.--Mental retardation does not render a person less able to suffer loss of companionship damages in a wrongful death action. The child with a head injury and resulting disability, who does not know his father is dead, was capable of suffering wrongful death damages resulting from the death of his father.

COUNSEL: Barton H. Hegeler, Eugene A. Patrizio and Storm P. Anderson for Petitioner.

No appearance by Respondent.

Mitchel J. Olson for Real Parties in Interest.

JUDGES: Aaron, J., with Huffman, Acting P. J., and McDonald, J., concurring.

OPINION BY: AARON [*1293]

OPINION

[**701] AARON, J.--

I.

INTRODUCTION

Real parties in interest Serafina Labo (Serafina), Florence Crick (Florence), and John Labo (John), are the wife, daughter, and son, respectively, of the decedent Anatalio Labo (Anatalio).¹ Real party in interest Nard Labo (Nard) is also a son of Anatalio and is mentally disabled. Serafina, Florence, John and Nard each brought a wrongful death claim against defendant Harry Knowles, alleging that Anatalio died as a result of Knowles's professional medical negligence. Knowles filed this petition for writ relief after the trial court denied his motion for summary judgment and/or adjudication as to the wrongful death claims.

1 We use first names for purposes of clarity and intend no disrespect.

[***2] Knowles contends that Serafina, Florence and John's wrongful death claims are barred by the statute of limitations contained in *Code of Civil Procedure section 340.5*² because they each discovered their claims more than one year before filing suit. We agree with this contention. Knowles also claims that Nard cannot establish any loss of companionship damages associated with his father's death because it is undisputed that due to a head injury and the resulting disability, Nard believes his father is alive. We disagree that Nard's belief that his father is alive necessarily prevents him from establishing such damages. Accordingly, we grant the petition in part and deny it in part.

2 All subsequent statutory references are to the Code of Civil Procedure unless otherwise specified.

II.

FACTUAL AND PROCEDURAL BACKGROUND

On November 20, 2000, Anatalio was admitted to Green Hospital for the endovascular treatment of renal artery stenosis and the repair of an abdominal aortic [***3] aneurysm. On that same day, Knowles performed renal arterial stenting to treat the renal stenosis. The next day, surgeons Ralph Dilley and Alana Chock performed a repair of the abdominal aortic aneurysm. Anatalio died on November 24, 2000, while hospitalized.

[*1294] Serafina authorized an autopsy to be performed that same day and, within two weeks of Anatalio's death, requested copies of his medical records. Real parties in interest retained Forrest Adams, a medical consultant, to review Anatalio's medical records. Serafina, Florence, and John each suspected medical negligence shortly after Anatalio's death. On November 7, 2001, Serafina, Florence, John and Nard each brought wrongful death claims against Green Hospital of Scripps Clinic, [**702] Scripps Health, Dilley, and Chock, as well as 100 Doe defendants. (*Labo v. Green Hospital of Scripps Clinic et al.* (Super Ct. San Diego County, 2001, No. GIC777900) (*Green Hospital* action)).

While that case was pending, Serafina, Florence, John and Nard's attorney consulted with another doctor regarding Anatalio's death. In October 2002, this doctor informed Serafina, Florence, John and Nard's attorney that Knowles may have done something during the [***4] renal stenting procedure that caused internal bleeding. On November 6, 2002, Serafina, Florence, John and Nard filed this wrongful death action against Knowles. They each alleged that Anatalio's death was the result of Knowles's professional negligence in performing the renal stenting.

Nard appears in this action through his guardian ad litem, Robert Crick. As a result of a mental disability, Nard is unaware his father has died. Nard is not seeking economic damages in this action.

On December 19, 2002, real parties in interest dismissed the *Green Hospital* action with prejudice. Thereafter, Knowles moved for summary judgment as to the wrongful death claims of Serafina, Florence and John in this case, on the ground that their actions were barred by the statute of limitations in *section 340.5*. In the same motion, Knowles moved for summary adjudication of Nard's claim on the ground that Nard could

not establish damages, as a matter of law. The trial court denied Knowles's motion for summary judgment and/or summary adjudication in its entirety.

Knowles filed a writ petition in this court in which he claimed that the trial court improperly denied his motion for summary judgment and/or [***5] adjudication. We issued an order to show cause why the relief should not be granted and stayed further proceedings in the trial court.

III.

DISCUSSION

A. Appropriateness of Writ Relief and Standard of Review

Our review of Knowles's petition is governed by the following well-established principles. "An order denying a motion for summary judgment [*1295] may be reviewed by way of a petition for a writ of mandate. [Citation.] Where the trial court's denial of a motion for summary judgment will result in a trial on nonactionable claims, a writ of mandate will issue. [Citation.] Since a motion for summary judgment 'involves pure matters of law,' we review a ruling on the motion independently. [Citation.] Summary judgment is proper when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. [Citation.]" (*Prudential Ins. Co. of America, Inc. v. Superior Court* (2002) 98 Cal.App.4th 585, 594-595 [119 Cal. Rptr. 2d 823].)

B. The Wrongful Death Claims of Serafina, Florence and John Are Barred by the Statute of Limitations in Section 340.5 Because They Discovered Their Claims More Than One Year Before Filing Suit [***6]

Knowles claims that Serafina, Florence, and John's wrongful death claims are barred by the statute of limitations contained in section 340.5 because they each discovered their claims more than one year before filing suit. We agree.³

3 Knowles did not move for summary judgment of Nard's cause of action on this ground.

Section 340.5 provides in relevant part: [**703] "In an action for injury or death against a health care provider based upon such person's alleged professional 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." (Italics added.)

(1) It is well established that, "[t]he term 'injury,' as used in section 340.5, means both a person's physical condition and its negligent cause." (*Davis v. Marin* (2000) 80 Cal.App.4th 380, 385 [94 Cal. Rptr. 2d 896].) However, a person need not know of the actual negligent [***7] cause of an injury; mere suspicion of negligence suffices to trigger the limitation period. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398 [87 Cal. Rptr. 2d 453, 981 P.2d 79] (*Norgart*); *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110-1111 [245 Cal. Rptr. 658, 751 P.2d 923] (*Jolly*).)

In *Jolly*, the plaintiff knew that her mother had taken the synthetic drug estrogen diethylstilbestrol (DES). (*Jolly, supra*, 44 Cal.3d at p. 1107.) The plaintiff also suspected, by 1978, that DES was a defective product and that it was a cause of the plaintiff's cancer. (*Id. at p. 1108.*) However, the plaintiff delayed legal action because she did not know the identity of the DES manufacturer. (*Ibid.*) In 1980, the Supreme Court decided *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588 [163 Cal. Rptr. 132, 607 P.2d 924], which [*1296] held that a plaintiff could state a claim without knowing the actual manufacturer of the DES at issue in the plaintiff's particular case. The plaintiff in *Jolly* sued in 1981. The trial court granted a defense summary judgment motion based on the statute of limitations. On review, the *Jolly* court rejected the notion that [***8] a plaintiff must have knowledge of specific facts establishing misconduct in order to discover a cause of action. (*Jolly, supra*, 44 Cal.3d at pp. 1110-1111.) Instead, the *Jolly* court held that a plaintiff discovers her

cause of action when she suspects negligence: "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. ... 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." (*Ibid.*, fn. omitted.)

In *Norgart*, *supra*, 21 Cal.4th 383, the Supreme Court applied the discovery rule as defined by *Jolly*, *supra*, 44 Cal.3d 1103, to bar a wrongful death cause of action brought in 1991 by a parent against a pharmaceutical company that had [***9] manufactured a drug the parent alleged contributed to his daughter's suicide in 1985. The *Norgart* court explained that the parent was suspicious of the cause of his daughter's death shortly after she died: "Leo admitted that, '[a]t or around the time of Kristi's death,' he suspected that 'something wrong' had happened to her to cause her death: he 'thought' that 'there had to be some reason, other than just herself, that would cause her to [**704] commit suicide,' that 'there had to be some other force or action upon her that caused her to commit suicide ... ' He thereby impliedly admitted--to quote *Jolly*--that he 'suspect[ed] ... that someone ha[d] done something wrong' to cause her death. (*Jolly v. Eli Lilly & Co.*, *supra*, 44 Cal.3d at p. 1110.) He also admitted that, prior to mid-1986, he had formed a belief that an 'individual or individuals ... did something wrong to [her] that caused her to take her own life,' and had begun to contemplate bringing an action for wrongful death. He further admitted that the 'individual or individuals' in question were her husband Steven, for what he suspected was physical abuse, and her psychiatrist Dr. [***10] Apostle, for what he suspected was professional negligence. He thereby expressly admitted--to quote *Jolly* again--that he 'suspect[ed] ... that someone,' indeed two specific persons, 'ha[d] done something wrong' to cause her death. (*Jolly v. Eli Lilly & Co.*, *supra*, 44 Cal.3d at p. 1110.)" (*Norgart*, *supra*, 21 Cal.4th at pp. 405-406.)

Thus, in *Norgart*, *supra*, 21 Cal.4th 383, the court held that the plaintiff's suspicions of negligence as a contributing factor in his daughter's suicide triggered the statute of limitations, even though the plaintiff did not suspect [**1297] the precise manner by which the wrongdoing occurred. (*Id.* at p. 406.) The court did not focus on when the plaintiff became suspicious that the pharmaceutical company had been negligent.⁴

4 The *Norgart* court also noted that even if the plaintiff had not actually suspected the pharmaceutical company of wrongdoing, he had reason for such suspicion because of a warning label associating the drug with suicide in patients who took the drug while suffering from symptoms of depression. (*Norgart*, *supra*, 21 Cal.4th at p. 407.)

[***11] Similarly, in *Dolan v. Borelli* (1993) 13 Cal.App.4th 816 [16 Cal. Rptr. 2d 714] (*Dolan*), the Court of Appeal applied *Jolly*, *supra*, 44 Cal.3d 1103, in concluding that the statute of limitations set forth in section 340.5 barred a medical malpractice action brought by a patient against a doctor who had performed surgery to eliminate pain associated with carpal tunnel syndrome. (*Dolan*, *supra*, 13 Cal.App.4th at p. 819.) In *Dolan*, the doctor told the patient that she should be free from pain within 60 days after the surgery. (*Id.* at p. 820.) However, when the patient continued to experience pain more than 60 days after the surgery, she believed the doctor had performed the surgery improperly. (*Ibid.*) The patient consulted another physician who performed a second operation. The precise nature of the initial physician's negligence was revealed during the second surgery. (*Ibid.*) The Court of Appeal rejected the patient's argument that the statute of limitations began to run from the date of the second operation. The court reasoned, "As discussed in *Jolly*, the essential inquiry is when did [the patient] suspect [the first doctor] [***12] was negligent, not when did she learn precisely how he was negligent." (*Dolan*, *supra*, 13 Cal.App.4th at p. 824.)

In *Rivas v. Safety-Kleen Corp.* (2002) 98 Cal.App.4th 218, 226 [119 Cal. Rptr. 2d 503] (*Rivas*), the court noted that in 1991, the plaintiff was diagnosed with a malfunctioning kidney and was told by his doctor to avoid contact with a solvent, Safety-Kleen, which was used at his workplace. In 1996, the plaintiff submitted

a workers' compensation [**705] claim that attributed his disease to exposure to toxic fumes, gases, and liquids at work. (*Ibid.*) In 1998, the plaintiff filed a personal injury lawsuit against the manufacturer of Safety-Kleen. (*Ibid.*) The plaintiff claimed the statute of limitations did not bar his action because, pursuant to the discovery rule, the limitations period did not begin to run "until the injured party has been explicitly informed by his doctors that a certain substance or product caused the medical disorder or has had an opportunity to personally review medical records specifying the cause of the disorder." (*Id. at p. 228.*) The *Rivas* court rejected this claim and held that "the fact that [the plaintiff] filed a workers' compensation [***13] claim in September 1996 based on exposure to toxic chemicals at work is definitive proof that he had a suspicion that 'someone ha[d] done something wrong to [**1298] [him]' long before his civil complaint was filed in April 1998. (*Jolly v. Eli Lilly & Co., supra, 44 Cal.3d at p. 1110.*)" (*Rivas, supra, 98 Cal.App.4th at p. 229.*)

(2) We glean from *Jolly, supra, 44 Cal.3d 1103*, and its progeny that a plaintiff need not know the precise manner in which a wrongdoer was negligent in order to discover his or her injury, within the meaning of *section 340.5*. In the aftermath of *Jolly*, courts have rejected the argument that the limitations period does not begin to run until a plaintiff learns the specific causal mechanism by which he or she has been injured. (See *Rivas, supra, 98 Cal.App.4th at p. 229*; *Dolan, supra, 13 Cal.App.4th at p. 824.*)

In this case, Serafina, Florence, and John each suspected negligence associated with Anatolio's death shortly after he died on November 24, 2000. Serafina and Florence each admitted in their statement of undisputed facts in opposition to Knowles's motion for summary judgment that they [***14] suspected medical negligence immediately following Anatolio's death. John testified in his deposition that he had conversations with his mother shortly after his father died that caused him to suspect wrongdoing in connection with his father's death."Q. I'm trying to find out, when is the first time you personally suspected that something had been done inappropriately that led to your father's death?"A: I had suspicions based on my mom's statements, but I wanted to hear the results of the autopsy. I wanted to hear what [the family's attorney] had to say."

These admissions establish as a matter of law that shortly after Anatolio's death, Serafina, Florence, and John each "suspect[ed] ... that someone ha[d] done something wrong" to cause his death. (*Jolly, supra, 44 Cal.3d at p. 1110.*)⁵ Therefore, Serafina, Florence, and John all discovered their wrongful death claims shortly after November 24, 2000.

5 John argues that his deposition testimony indicates that "he waited to learn the facts before forming an opinion" regarding his father's death. Even assuming this is an accurate statement, the limitations period is not triggered when a plaintiff forms an *opinion* that wrongdoing has occurred. Rather, as discussed above, under *Jolly, supra, 44 Cal.3d 1103*, the plaintiff's mere *suspicion* of negligence triggers the statute. John's admission that he had such "suspicions based on [his] mom's statements," expressly meets the *Jolly* test.

[***15] Serafina, Florence, and John contend that the statute of limitations in *section 340.5* did not begin to run when they suspected medical negligence, but, rather, [**706] when they specifically suspected *Knowles's* negligence. All of their arguments are premised upon this contention. First, they argue that *Jolly*, [**1299] *supra, 44 Cal.3d 1103*, and *Norgart, supra, 21 Cal.4th 383*, are not applicable because those cases discuss the statute of limitations formerly applicable to products liability actions (former § 340, subd. (3)), rather than *section 340.5*. However, it is well established that *Jolly's* discussion of the discovery rule applies to actions involving *section 340.5*. (See, e.g., *Kitzig v. Nordquist (2000) 81 Cal.App.4th 1384, 1391 [97 Cal. Rptr. 2d 762]* [applying *Jolly/Norgart* analysis to § 340.5 case]; *Dolan, supra, 13 Cal.App.4th at p. 824* ["the *Jolly* analysis applies to *section 340.5*"]; *Rose v. Fife (1989) 207 Cal. App. 3d 760, 769, fn. 9 [255 Cal. Rptr. 440]* [same].)

Second, Serafina, Florence, and John argue that the use of the phrase "*such person's* alleged professional negligence" in *section 340.5* requires [***16] that the limitations periods defined in the statute be analyzed

with respect to a particular defendant's negligence. (§ 340.5, *italics added*.) We disagree. As noted above, *section 340.5* provides in relevant part: "In an action for injury or death against a health care provider based upon such person's alleged professional 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."

(3) Pursuant to the plain language of *section 340.5*, it is the discovery of "the injury," rather than the discovery of a particular defendant's negligence, that triggers the limitations period. The use of the term "such person's alleged professional negligence" in *section 340.5* merely defines the type of action subject to the statute; it does not define the limitations period contained therein.

Third, Serafina, Florence, and John also rely on the Court of Appeal's recent decision in *Fox v. Ethicon Endo-Surgical, Inc.* (2003) 112 Cal.App.4th 1572 [6 Cal. Rptr. 3d 300], review granted February 18, 2004, S121173 (*Fox*), [***17] in arguing that the statute of limitations was not triggered in this case until they suspected Knowles's negligence. The *Fox* court disagreed with this court's conclusion in *Bristol-Myers Squibb Co. v. Superior Court* (1995) 32 Cal.App.4th 959 [**707] [38 Cal. Rptr. 2d 298] (*Bristol-Myers Squibb Co.*), disapproved on other grounds in *Norgart, supra*, 21 Cal.4th 383, 410, footnote 8, that the discovery of a professional negligence cause of action necessarily triggers the discovery of a products liability cause of action associated with the same medical procedure. (*Fox, supra*, 112 Cal.App.4th at p. 1589.) In *Bristol-Myers Squibb Co., supra*, 32 Cal.App.4th at pages 961-962, 966, this court considered whether a plaintiff's products liability cause of action against a breast implant manufacturer was triggered by her suspicion that the doctor who performed the implant surgery had committed medical malpractice. This court held, "When a plaintiff has cause to sue based on knowledge [*1300] or suspicion of negligence the statute starts to run as to *all* potential defendants." (*Id. at p. 966.*)

We reject Serafina, Florence, and John's argument [***18] for two reasons. First, because the Supreme Court has granted review in *Fox*, we may not rely on that decision. (See *Cal. Rules of Court*, rules 976, 977.) Second, we also need not rely on the imputed discovery doctrine developed in *Bristol-Myers Squibb Co., supra*, 32 Cal.App.4th 959, to resolve this case. In *Bristol-Myers Squibb Co.*, this court held that a plaintiff's suspicion of a surgeon's medical malpractice triggers the statute of limitations for a products liability claim against the manufacturer of materials used in the surgery. (*Id. at p. 966.*) Unlike the products liability claim at issue in *Bristol-Myers Squibb Co.*, Serafina, Florence, and John's wrongful death causes of action against Knowles were within the scope of their initial suspicion of medical negligence. They knew, or should have known, that Knowles had performed the initial surgery, and they suspected that some form of medical malpractice caused Anatolio's death four days later.

(4) We also reject Serafina, Florence, and John's related contention that because their initial investigation did not lead them to suspect Knowles [***19] had been negligent, they did not discover their cause of action against him until October 2002, when a second consultant's opinion led them to suspect Knowles's negligence. It is a plaintiff's *suspicion* of negligence, rather than an expert's *opinion*, that triggers the limitation period. The limitations period begins when the plaintiff's suspicions are aroused. The period is not affected by the plaintiff's diligence in finding facts to support his lawsuit. For example, in *Kleefeld v. Superior Court* (1994) 25 Cal.App.4th 1680 [31 Cal. Rptr. 2d 12], the court rejected a plaintiff's argument that his diligence in pursuing his suspicions regarding a connection between his wife's death and the defendant's treatment was relevant to the running of the statute of limitations: "[A] plaintiff's diligence *after* he has become suspicious of wrongdoing is not relevant to the running of the statute of limitations. Diligence is only relevant to determine when he *should* have suspected wrongdoing. Once a plaintiff actually has the requisite suspicion, the statute of limitations commences to run. It is not tolled by efforts to learn more about the matter short of filing suit." (*Id. at p. 1684.*) [***20]

(5) Finally, Serafina, Florence, and John argue that public policy supports their interpretation of *section 340.5*. The gist of this argument is that starting the limitations period upon a generic suspicion of negligence rather than upon a suspicion that a particular defendant has been negligent will require the needless naming

of defendants as to whom no suspicion has yet arisen. The short answer to this concern is that plaintiffs have a year from their initial suspicion to investigate and bring suit. Moreover, in many cases, as [*1301] both *Jolly* and *Norgart* discuss, this one-year period may be extended by the proper filing and amendment of a Doe complaint. (See *Norgart*, *supra*, 21 Cal.4th at p. 408; *Jolly*, *supra*, 44 Cal.3d at p. 1118.)⁶

6 Real parties in interest included Doe defendants in the *Green Hospital* action. Those defendants were dismissed in April 2002 by the trial court. In noting that the Supreme Court has referred to the availability of the Doe procedure and the relation back doctrine, we do not express an opinion on the availability or proper use of that procedure in the *Green Hospital* action.

[***21] In summary, we conclude the limitations period in this case was triggered when Serafina, Florence, and John suspected medical negligence, rather than when their investigation premised upon that suspicion led them to suspect that Knowles had been negligent. Accordingly, their lawsuit against Knowles, which was filed nearly two years after they first suspected medical negligence, is barred by the one-year [**708] statute of limitations contained in section 340.5.

C. Knowles Has Not Made a Prima Facie Showing That Nard Cannot Establish Wrongful Death Damages

Knowles claims that the undisputed fact that Nard believes his father is alive creates a prima facie inference that Nard has suffered no damages associated with his father's death. Knowles claims that such inference shifted the burden to Nard to present evidence of his damages in opposing Knowles's motion for summary adjudication.

In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 [107 Cal. Rptr. 2d 841, 24 P.3d 493] (*Aguilar*), the Supreme Court outlined the relevant burdens in determining a defendant's motion for summary judgment or adjudication. "A defendant bears the burden of persuasion that 'one or more elements of the [***22] 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto. [Citation.] [¶] ... [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. ... A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.] No more is called for." (*Id.* at pp. 850-851.)

In this case, it is undisputed that "As a result of Nard Labo's head injury and the resulting disability he does not know that his father is deceased."⁷ It [*1302] is also undisputed that Nard is not claiming any economic damages. We conclude that these facts do not constitute a sufficient prima facie showing that Nard cannot, as a matter of law, establish wrongful death damages associated with the loss of his father.

7 We note that the undisputed fact that Nard does not know that his father is dead is different from Knowles's assertion in his brief that it is undisputed that Nard believes his father is alive. However, real parties in interest appear to acknowledge that Nard believes his father is alive in their opposition by positing that, "Nard may have chosen to believe his father is alive precisely because to admit he is dead is too painful for him." In any event, for the reasons described below, we conclude that Knowles is not entitled to summary adjudication of Nard's wrongful death claim under either circumstance.

[***23] (6) It is well established that the children of a decedent in a successful wrongful death action "are entitled to reasonable compensation for the loss of love, companionship, comfort, affection, society, solace, or moral support suffered as a result of the death." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 614 [103 Cal. Rptr. 2d 492].) In *Krouse v. Graham* (1977) 19 Cal.3d 59 [137 Cal. Rptr. 863, 562 P.2d 1022] (*Krouse*), in describing the long-standing precedent supporting the recoverability of such damages, the Supreme Court outlined the types of evidence relevant to establishing their existence in a particular case: "... California courts have uniformly allowed wrongful death recovery for loss of the society, comfort, care and

protection afforded by the decedent. ... [¶] ? [A]s early as 1911, we held that damages could be recovered for the loss of a decedent's 'society, comfort and protection' [citation]. ... Other cases have held admissible such evidence as the closeness of the family unit [citation], the warmth of feeling between family members [citation], and the character of the deceased as 'kind and attentive' [**709] or 'kind and loving' [citation]. Not only [***24] was wrongful death compensation awarded historically to heirs who had been financially dependent upon their deceased relatives, but adult children received substantial awards for the wrongful death of retired, elderly parents [citation] and parents received compensatory damages for the death of young children. [Citations.]" (*Krouse*, 19 Cal.3d at pp. 67-68.)

(7) This court has expressly rejected the argument that mental retardation necessarily renders a person less able to suffer loss of companionship damages in a wrongful death action. (See *Fagerquist v. Western Sun Aviation, Inc.* (1987) 191 Cal. App. 3d 709, 729 [236 Cal. Rptr. 633] (*Fagerquist*).) In *Fagerquist*, we upheld a \$ 1.5 million judgment in a wrongful death action in favor of a "severely mentally retarded" 10-year-old girl whose father was killed in a plane crash. (*Id.* at p. 727.) We noted that the girl's "mental development was approximately that of a three-year-old child and her communication skills were equivalent to those of a nine-month-old child." (*Ibid.*) We rejected the defendant's argument that the girl's "mental retardation must be deemed to preclude [***25] her from appreciating her father's love and companionship as fully as if she were a 'normal' child." (*Id.* at p. 729.) On the contrary, we held, "It would not have been unreasonable for [the jury] to have [*1303] found [the girl] would be *more* seriously damaged by loss of her father than a child who might be able to compensate for this deprivation through normal maturation, rather than less." (*Ibid.*, italics added.) In addition, we expressly rejected the notion that mental retardation necessarily results in a "limited capacity to appreciate parental comfort and support." (*Ibid.*) For example, we noted that "Persons suffering from mongolism (Down's Syndrome) are defined as 'unusually sociable and affectionate.'" (III The New Encyclopedia Britannica, Ready Reference and Index.) (15th ed. 1981) Micropaedia, 'Down's Syndrome,' p. 648.)" (*Fagerquist*, *supra*, 191 Cal. App. 3d at p. 729.) *Fagerquist* demonstrates that courts will not simply presume that persons with mental defects are unable to suffer wrongful death damages.

In this case, Knowles has not produced *any* evidence regarding the extent of Nard's injuries or the manner by which those injuries render [***26] Nard unable to suffer the loss of his father. There is nothing in the record to suggest that Nard's guardian would not be able to demonstrate that Nard has suffered from the loss of his father's love and companionship, despite Nard's lack of knowledge of his father's death. Therefore, we conclude Knowles has not met his "burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar*, *supra*, 35 Cal.4th at p. 850.) Accordingly, the trial court properly denied Knowles's motion for summary adjudication as to Nard's claim.

IV.

CONCLUSION

Serafina, Florence, and John each discovered their wrongful death claims against Knowles more than one year before filing their complaint in this case. Therefore, their wrongful death claims are barred by the statute of limitations in section 340.5. Accordingly, Knowles is entitled to summary judgment as to Serafina, Florence, and John's claims.

Knowles has not made a prima facie showing that Nard cannot establish wrongful [**710] death damages. Accordingly, the trial court properly denied Knowles's motion for summary adjudication as to Nard's claim.

[*1304] V.

DISPOSITION

[**27] Let a writ of mandate issue ordering the superior court to: (1) vacate that portion of its order denying Knowles's motion for summary judgment as to Serafina, John, and Florence's wrongful death claims, and (2) enter a new order granting Knowles's motion for summary judgment as to Serafina, John, and Florence's wrongful death claims. In all other respects the petition is denied. The stay issued by this court on December 23, 2003, is vacated. The parties shall bear their own costs in this writ proceeding.

Huffman, Acting P. J., and McDonald, J., concurred.

The petition of real parties for review by the Supreme Court was denied August 11, 2004.