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DIVISION TWO ADDRESSES ACCRUAL,
EQUITABLE ESTOPPEL FOR NOTICE OF
CLAIM PURPOSES

Little v. State of Arizona (Ct. Appeals, Div. Two, September 30, 2010)

Plaintiff Little sued the state for the wrongful death of her daughter, Shawntinice Polk, a star player on the University of Arizona women's basketball team. Polk died after collapsing in a training room on September 26, 2005. The cause of her death was a pulmonary thromboembolism. A local television reporter approached Plaintiff about making a documentary about Polk's death. Little authorized the reporter to obtain her daughter's medical records and investigate the circumstances surrounding her death. On July 1, 2007, the reporter filed a complaint on Plaintiff's behalf with the Arizona Medical Board against Polk's treating physician. On February 7, 2008, the board ruled that the physician's treatment of Polk fell below the standard of care. Polk's treating physician was an employee of the state at the U of A's Campus Health Services. Plaintiff Little filed a notice of claim with the state on May 15, 2008.

The State moved for summary judgment based on Plaintiff's failure to file the notice of claim within the 180 day statutory time limit. The trial court granted the State's motion and the Plaintiff appealed, arguing that her notice

of claim was timely because her cause of action did not accrue until the Board issued its decision finding negligence. Alternatively, Plaintiff argued that any untimeliness should be excused under the doctrines of equitable estoppel and tolling.

The court of appeals affirmed, ruling that Plaintiff's cause of action accrued when the reporter filed a complaint with the board on Little's behalf, because she was then on notice to investigate whether negligent conduct may have caused her injury. The reporter who filed the complaint on Plaintiff's behalf acted as her agent, and therefore Plaintiff effectively filed the board complaint herself. The court rejected Plaintiff's argument that equitable estoppel or equitable tolling applied. Plaintiff's claims regarding equitable estoppel were speculative, and she did not demonstrate the extraordinary circumstances warranting the application of equitable tolling.

JURY IS APPROPRIATE FACT FINDER
FOR QUESTION OF FACT ON NOTICE OF
CLAIM COMPLIANCE

Lee v. State (Ct. Appeals, Div. One, November 9, 2010)

A car accident killed Plaintiff's wife and the other two passengers in his car. Plaintiff sued the State claiming the State negligently designed, constructed, and maintained the road and guardrail involved. The State moved to dismiss on the ground that it had not received a notice of claim as A.R.S. § 12-821.01 requires. Plaintiff responded, providing a copy of his notice of claim and a declaration that Plaintiff had timely mailed the notice. The trial court granted the motion to dismiss, but the Supreme Court reversed, holding that when a claimant presents proof that a notice of claim was properly mailed to the proper authorities, it creates a rebuttable presumption that the notice was received, and whether the State received the notice of claim is an issue to be determined by the factfinder. On remand, the trial court ruled that it had broad discretion to resolve issues of fact pertaining to preliminary matters that do not go to the merits of the

case, and set the notice of claim issue for an evidentiary hearing. After the evidentiary hearing, the trial court again dismissed the case, finding that the state had not received the notice.

The court of appeals reversed, ruling that a jury should have decided the factual issue. The court disagreed that the notice of claim filing requirement was only an "administrative barrier" or a procedural matter for the court. Rather, it is an affirmative defense that must be resolved by a jury. The court suggested that the trial court could immediately set a date for what likely would be no more than a one or two day jury trial on this limited issue, deferring discovery on the merits until the notice of claim issue is resolved. The court indicated that the notice of claim issue should not await trial on the merits.

FEDERAL STATUTE DOES NOT TOLL
LIMITATIONS PERIOD ON STATE CLAIM
WHERE FEDERAL CASE IS DISMISSED
FOR LACK OF JURISDICTION

Morris v. Giovan (Ct. Appeals, Div. One, November 12, 2010)

28 U.S.C. § 1367(d) basically states that when a federal court declines supplemental jurisdiction over a state claim and remands it to state court, the statute of limitations on the state claim is tolled while the claim is pending in federal court. Here, Morris filed a medical malpractice action in state court against a Doe defendant, though he knew the identity of the doctor who was allegedly negligent. The action was dismissed for lack of service. Morris then filed a lawsuit in federal district court under the Federal Tort Claims Act, asking the court to assert supplemental jurisdiction over his state law claims. The federal action was eventually dismissed for lack of subject matter jurisdiction, because there was never any federal question jurisdiction. Just before the federal court's dismissal, Morris filed a second state court action naming Dr. Giovan as a defendant. The state court dismissed the action because more than two years had elapsed since Morris was on notice that he had a claim against Dr. Giovan. Morris filed a Rule 60(c)(6) motion for relief from final judgment, arguing that the statute of limitations for his state law claims was tolled while his action was pending in federal court. The trial court denied the motion, and Morris appealed.

The court of appeals affirmed, rejecting Morris's argument that the statute of limitations on his state law claim was tolled during his federal case, because the federal court never had any jurisdiction over the lawsuit. It reasoned that if the federal court lacks subject matter jurisdiction, its power to assert supplemental jurisdiction over state law claims is never triggered, and thus the tolling provision of § 1367(d) never comes into play. The court noted that its decision did not address the question of whether § 1367(d) applied to other dismissals not mentioned by the statute.

CLAIM ACCRUAL FOR NOTICE OF
CLAIM PURPOSES DOES NOT AWAIT
EXPERT OPINION ON FAULT

Thompson v. Pima County (Ct. Appeals, Div. Two, November 16, 2010)

On October 3, 2006, Taylor Thompson was injured when her car veered off a paved road. A deputy sheriff informed her family that potholes in the road might have contributed to the accident. The family enlisted an accident reconstruction expert who concluded, on February 7, 2007, that the condition of the road caused the accident. The family filed their notice of claim on July 30, 2007 - just under 180 days after receiving the expert's report, but nearly ten months after the accident. The trial court granted summary judgment in favor of Pima County, ruling that the notice of claim was untimely. Plaintiffs appealed.

On appeal, the family argued that under the notice of claim statute, their claim did not accrue until they had "facts sufficient" to file a valid notice of claim. They argued they did not have such facts until they received their expert's report. The court of appeals disagreed. The "facts sufficient" requirement in the claim statute is different from the "accrual" question. "Facts sufficient" refers to the "quantum of facts that the plaintiff must include in the notice of claim," whereas "accrual" refers to when a plaintiff first becomes aware that he or she has a cause of action against the defendant. Because the family was aware of a possible cause of action against Pima County within days of the accident, that is when their claim accrued. Their notice of claim was thus untimely, and summary judgment was affirmed.

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Law Alert

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