No. S230510

In the Supreme Court of the State of California

J.M.

Plaintiff and Appellant,

vs.

Huntington Beach Union High School District, et al.,

Defendant and Respondent,

Court of Appeal, Fourth Appellate District, Division Three No. G049773
Superior Court, County Of Orange
Honorable Kirk Nakamura, Trial Court Case No. 30-2013-00684104

ANSWER BRIEF ON THE MERITS

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I. SUMMARY OF ARGUMENT AND PROCEDURAL HISTORY

The Petitioner alleges that on October 31, 2011, while under the supervision of the HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT ("District") he sustained personal injuries. Because the District is a public entity, if the plaintiff wanted to pursue a legal remedy against the District for its purported negligence, he was required to file a Claim for Damages ("Claim") with the District within six months of sustaining his injuries. *Cal. Gov. Code* §§ 911.2, 945.4. Appellant, however, failed to timely present the requisite Claim. If the appellant still desired to pursue a lawsuit against the District, he was thus required to file with the District an Application for leave to file a late claim ("Application"). *Cal. Gov. Code* § § 915 (a), 911.4 (b).

With the aid of counsel, the Appellant submitted an Application to the District on October 24, 2012, almost one year after the accident. The District, as is statutorily permissible, declined to act on the Application, and thus by operation of law, the Application was deemed denied on December 9, 2012.[1] Cal. Gov. Code § 911.6 (a), (c); Clerk's Tr. at 18-19.

If the Appellant still wished to pursue his claims against the District, the next step in the Government Claims process was to file with the Superior Court a Petition for leave for failure to file a timely Claim ("Petition"). Cal. Gov. Code § 946.6 (a). Such a Petition had to be filed within six months of the date that the Application was deemed denied, as in

1 Applications are deemed denied 45 days after submittal if no action is taken by the receiving public entity.

this case, by June 10, 2013. Cal. Gov. Code § 946.6 (b); Clerk's Tr. at 19.

With the aid of the same counsel that submitted the Application, the appellant chose to file a Petition, but did not file and/or serve the Petition until October 28, 2013, almost one year after the denial, and well past the June 10, 2013 deadline. Because the Petition was not filed within the mandatory six months after denial, on December 19, 2013 Judge Nakamura of the Orange County Superior Court denied the Petition.

The plaintiff appealed the trial court's denial. The Fourth Appellate Court sided with the District and did not overturn the trial court. In its decision, previously published, the appellate court held that the plaintiff missed the statute of limitations by which to file a Petition.

This court granted review on one question – is a Petition necessary when a public entity fails to grant and timely filed Application of a minor. As will be seen, the answer is yes. The almost 60 year history of the Government Claims Act, stare decisis, and practical considerations dictate in favor of upholding the necessity of a Petition, and further evidence a reasoned acknowledgement by the Legislature that public entities are not required to grant Applications, a discretionary process. The District therefore requests that this court uphold the necessity of a Petition when a public entity exercises its Legislature provide right to ignore an Application.

II. GUIDING PRINCIPLES OF STATUTORY INTERPRETATION

The question posed by the Supreme Court is one of statutory interpretation. Accordingly, the standard of review is de novo. *Imperial Merchant Services, Inc. v. Hunt* 47 Cal.4th 381, 387 (2009).

California Teachers Assn. v. Governing Bd. of Rialto Unified Sch. Dist., 14 Cal.4th 627, 632-33 (1997) provides guidance on statutory interpretation:

> We begin with the touchstone of statutory interpretation, namely, the probable intent of the Legislature. To interpret statutory language, we must "ascertain the intent of the Legislature so as to effectuate the purpose of the law." In undertaking this determination, we are mindful of this court's limited role in the process of interpreting enactments from the political branches of our state government. In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law, " ' "whatever may be thought of the wisdom, expediency, or policy of the act." ' "
>
> "[A]s this court has often recognized, the judicial role in a democratic society is fundamentally to interpret laws, not to write them. The latter power belongs primarily to the people and the political branches of government ...." It cannot be too often repeated that due respect for the political branches of our government requires us to interpret the laws in accordance with the expressed intention of the Legislature. "This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*internal citations omitted*).

In applying or interpreting a statute, the courts must presume that the legislature intended to enact a valid statute. *In re Kay*, 1 Cal.3d 930 (1970); *Franklin v. Municipal Ct.*, 26 Cal.App.3d 884 (1972); *Charles S. v. Board of Education*, 20 Cal.App.3d 83 (1971). Courts assume that the legislature intended the statute to have some effect and do not presume that the lawmakers indulged in an idle act. *Stafford v. Realty Bond Service Corp.*, 39 Cal.2d 797 (1952); *Tesco Controls, Inc. v. Monterey Mechanical Co.*, 124 Cal.App.4th 780 (2004); *Sondeno v. Union Commerce Bank*, 71 Cal.App.3d 391 (1977). Every word, phrase, or provision is presumed to have been intended to have a meaning and perform a useful function, for the legislature is presumed to know what it was saying and to mean what it

said in enacting and amending legislation. *Krupnick v. Duke Energy Morro Bay, L.L.C.*, 115 Cal.App.4th 1026 (2004); *Hutchins v. Waters*, 51 Cal.App.3d 69 (1975).

The courts do not sit as super-legislatures to determine the desirability or propriety of statutes. *Page v. Mira Costa Community College Dist.*, 180 Cal.App.4th 471 (2009), review denied, (Mar. 24, 2010). When the wisdom, necessity, or propriety of an enactment is a question upon which reasonable minds might differ, the court will defer to the legislative determination. *Miller v. Board of Public Works of City of Los Angeles*, 195 Cal. 477 (1925). Therefore, this court has held that an interpretation that renders related provisions nugatory must be avoided. *Metropolitan Water Dist. v. Adams*, 32 Cal.2d 620, 630-631 (1948); *People v. Craft*, 41 Cal.3d 554, 561 (1986); *In re Catalano* 29 Cal.3d 1, 10-11 (1981); *Lungren v. Deukmejian*, 45 Cal. d 727, 735 (1988).

III. THE HISTORY OF THE GOVERNMENT CLAIMS ACT LEADS TO THE CONCLUSION THAT A PETITION IS, AND HAS ALWAYS BEEN, REQUIRED

A. HISTORICAL DERIVATION OF THE PETITION

In 1959, Government Code § 710 was enacted to mandate that no suit could be filed against a public entity unless a timely claim was first presented. Section 710[2] read:

> "No suit for money or damages may be brought against a local public entity on a cause of action for which this chapter

2 All statutory references are to the Government Code unless otherwise specified.

> requires a claim to be presented until a written claim therefor has been presented to the entity in conformity with the provisions of this article. No suit for money or damages may be brought against a local public entity on a cause of action for which this chapter requires a claim to be presented until a written claim therefor has been presented to the entity in conformity with the provisions of this article.

The "provisions of this article" also included section 715 which provided a 100-day statute of limitations by which to file the claim.

Section 717 mandated that the public entity act on the claim in one of three ways:

> "If the governing body finds the claim is not a proper charge against the local public entity, it shall reject the claim.
>
> If the governing body finds the claim is a proper charge against the local public entity and is for an amount justly due, it shall allow the claim.
>
> If the governing body finds the claim is a proper charge against the local public entity but is for an amount greater than is justly due, it shall either reject the claim or allow it in the amount justly due and reject it as to the balance. If the governing body allows the claim in part and rejects it in part it may require the claimant, if he accepts the amount allowed, to accept it in settlement of the entire claim.
>
> Notice of any action taken under this section rejecting a claim in whole or in part shall be given in writing by the clerk, secretary or auditor of the local public entity to the person who presented the claim."

Of significant interest to this case, there was no timeline by which the public entity had to act on the claim, and there was no option of inaction and "deemed denial" at the time. In other words, a public entity had the option of acting on a claim whenever it wanted, not bound by a particular statutory timeframe.

That same year, 1959, section 716 was enacted, the precursor to section 946.6. With 716, if a plaintiff missed the deadline to file a claim with the public entity, that plaintiff was required to file a Petition *with the court* for leave to file a late claim with the public entity:

716. The superior court of the county in which the local public entity has its principal office shall grant leave to present a claim after the expiration of the time specified in Section 715 if the entity against which the claim is made will not be unduly prejudiced thereby, where no claim was presented during such time and where :

(a) Claimant was a minor during all of such time; or

(b) Claimant was physically or mentally incapacitated during all of such time and by reason of such disability failed to present a claim during such time; or

(c) Claimant died before the expiration of such time

Application for such leave must be made by verified petition showing the reason for the delay. A copy of the proposed claim shall be attached to the petition. The petition shall be filed within a reasonable time, not to exceed one year, after the time specified in Section 715 has expired. A copy of the petition and the proposed claim and a written notice of the time and place of hearing thereof shall be served on the clerk or secretary or governing body of the local public entity not less than 10 days before such hearing. The application shall be determined upon the basis of the verified petition, any affidavits in support of or in opposition thereto, and any additional evidence received at such hearing.

In 1959, there was no section 911.4 Application to be presented to the public entity. Instead, section 716 stood as a pseudo-writ, in that the

courts made the decision whether that public entity would accept the late claim as timely. The court would grant an Application if the plaintiff was a minor, incapacitated, or died during the claims period. Note that section 716's title was "persons under disability."

Then, in 1963, the Government Claims Act changed. The 700's were repealed and replaced.[3] Section 912.2 was enacted and mandated that a public entity respond to a claim within 45 days or the claim would be deemed denied.

For the first time, the Legislature provided, *vis-à-vis Government Code* §§ 911.4 to 911.8, for an Application to be presented *to the public entity* if the claim for damages was late.

> "Sections 911.4 to 911.8 are new. These sections permit *public entities* to grant leave to present a late claim under certain circumstances. This will make a court proceeding to obtain leave to present a late claim necessary only in those cases where the public entity does not grant such leave. Under the existing law applicable to local public entities, late claims may be presented only in limited types of cases and a court proceeding is necessary in every case before a late claim may be presented." *Cal. Gov't Code* § 911.4 (*citing* 4 Cal.L.Rev.Comm. Reports 1001 (1963)) (*emphasis added*).

As with the response times to the claim, the public entity was given a finite amount of time (35 days, later expanded to 45 days) by which to respond to the Application.

Importantly, the Law Revision Commission indicated that Applications were discretionary ("permit") to circumvent the court Petition process. The Commission also noted that because the grant of the Application was discretionary, the Application could be denied (or deemed

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3 "715 and 716 of the Government Code, now repealed and part of a predecessor statute to the California Tort Claims Act of 1963." *Church v. Humboldt Cty.*, 248 Cal.App.2d 855, 858-59 (1967).

denied) and then the Petition process, which predates section 911.4, would be necessary.

The Commission also indicated that "Under the existing law applicable to local public entities," former section 716, that "a court proceeding (the Petition) is necessary in every case before a late claim may be presented."

Because the grant of the Application was discretionary, section 716 was replaced with section 912[4], which read:

> "(b) The superior court shall grant leave to present a claim after the expiration of the time specified in Section 911.2 if the court finds that the Application to the board under Section 911.4 was made within a reasonable time not to exceed one year after the accrual of the cause of action and was denied or deemed denied pursuant to Section 911.6 and that:
>
> 1. The failure to present the claim was through mistake, inadvertence, surprise or excusable neglect unless the public entity against which the claim is made establishes that it would be prejudiced if leave to present the claim were granted , or
> 2. The claimant was a minor during all of the time specified in Section 911.2 for the presentation of the claim; or
> 3. The claimant was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of such disability failed to present a claim during such time; or
> 4. The claimant died before the expiration of the time specified in Section 911.2 for the presentation of the claim."

As can be seen, even with the advent of the Application, section 912 still mandated that a Petition was necessary because the Legislature envisioned

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4 *Manquero v. Turlock Joint Union High Sch. Dist. of Stanislaus & Merced Ctys.*, 227 Cal.App.2d 131, 133 (1964).

that a public entity may deny the Application. As noted by *Kendrick v. City of La Mirada,* 272 Cal.App.2d 325, 329-30 (1969):

> "However, they did not dispense with the necessity of first obtaining judicial relief before filing an action where the entity (board) has denied the Application to present a late claim, either by express denial or by non-action and denial by operation of law."

With section 912, the Petition was still a pseudo-writ as the court was able to determine whether a late claim should be allowed to be filed with the public entity.

In 1965, section 912 was repealed and replaced with section 946.6. The Law Revision Commission Comments of section 912 note:

> "This section is repealed in favor of a new section (Section 946.6) that provides a simplified procedure for seeking judicial relief from the claims presentation procedures in certain cases after the governing board has failed to act favorably on an Application made to it for leave to present a late claim."

With section 946.6, instead of acting as a pseudo-writ, the Petition for the first time allowed the plaintiff to completely circumvent the claims filing requirement if the Petition is granted. As explained by *Church v. Humboldt Cty.*, 248 Cal.App.2d 855, 858-59 (1967): "the obvious purpose of the Legislature in repealing section 912 and enacting section 946.6 was to expedite late claim proceedings against governmental entities."

"In replacing former section 912 with section 946.6, the Legislature expressed its opinion that, on balance, it is less important for the public entity to pass upon the validity of the claim than that the entire panoply of proceedings (administrative and judicial) be expedited." *Los Angeles City Sch. Dist. v. Superior Court*, 9 Cal.App.3d 459, 468 (1970). In other words, the new Application procedure was still subservient to court

intervention. The Commission again recognized that a public entity had the discretion to deny or ignore an Application.

B. THE PRINCIPLE OF STARE DECISIS DICTATES THAT THIS COURT UPHOLD THE PETITION PROCESS

In 2004, this Court in *State v. Superior Court (Bodde)*, 32 Cal.4th 1234, 1245 (2004) reiterated that a section 946.6 Petition is necessary, confirming the law that has been in existence since 1959 and followed by every court except for *E.M. v. Los Angeles Unified Sch. Dist.*, 194 Cal.App.4th 736 (2011), discussed *infra*. *See, i.e., Dominquez v. Butte Cty.*, 241 Cal.App.2d 164, 167-68 (1966) (Petition is necessary if an Application was denied). The Petitioner requests that this court not only abolish the Government Claims Act statutory scheme, but also requests this court to overturn its own precedent. Stare decisis dictates otherwise.

"The doctrine of stare decisis teaches that a court usually should follow prior judicial precedent...This doctrine is especially forceful when, as here, the issue is one of statutory construction, because the Legislature can always overturn a judicial interpretation of a statute...[A] court should be reluctant to overrule precedent and should do so only for good reason." *Bourhis v. Lord*, 56 Cal.4th 320, 327 (2013). A relevant factor in influencing stare decisis is whether the decision being reconsidered has become a basic part of a complex and comprehensive statutory or regulatory scheme or is simply a specific, narrow ruling that may be overturned without affecting any statutory or regulatory scheme. *People v. Mendoza*, 23 Cal.4th 896, 924 (2000). The US Supreme Court in *Payne v. Tennessee*, 501 U.S. 808 (1991) advises: "Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent

development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Adhering to precedent 'is usually the wise policy..."

Here, as the Petitioner claims, the Government Claims Act is an intricate web of statutes that are not always in sequential order. For example, section 945.4, in Part 4 of *Government Code* Division 3.6, mandates that a claim be filed, while section 905, in Part 3, identifies the types of suits that require a claim. Moreover, the Petition is a basic part of the Government Claims Act and predates the Application. The Legislature has always envisioned the necessity of court intervention with a Petition.

Because of the complexity of the statutory scheme, this Court cannot simply eradicate the Petition without also disposing of the Application and the 6-month time limit by which to file a claim for damages, discussed below. Moreover, because this is an issue of statutory construction, the Legislature always has the option of abolishing the Petition. Stare decisis dictates that the Petition procedure remain intact.

C. CONCLUSION

As can be seen from the "History" section, the Petition process is an integral part of the Government Claims Act and has been in existence for almost sixty years. The Application process is a newer procedure that has always been discretionary and subservient to the Petition. The history of the Government Claims Act has always envisioned that an Application could be "deemed denied" even for minors, and that a tardy litigant must obtain relief from the superior courts. Accordingly, this history of the Government Claims Act and the stare decisis dictates that this court not abolish the almost 60-year-old Petition procedure.

IV. THE PETITION IS NECESSARY TO SAVE A LITIGANT WHO FAILS TO FILE A TIMELY WRITTEN CLAIM, A PREREQUISITE TO SUIT AGAINST A PUBLIC ENTITY

This court has repeatedly held that before filing suit against a public entity, "a plaintiff must present a timely written claim for damages to the entity." *Shirk v. Vista Unified School Dist.* 42 Cal.4th 201, 208 (2007). This interpretation comes directly from *Government Code* §945.4, which reads:

> "Except as provided in Sections 946.4 and 946.6, no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division." (*emphasis added*).

At first glance, it appears that a lawsuit may be filed simply after a claim "has been acted upon by the board," an argument put forward by the Petitioner. This plain non-in-depth reading is probably the explanation for the *E.M. v. Los Angeles Unified Sch. Dist.*, 194 Cal.App.4th 736, 747-48 (2011) court's *erroneous* reasoning, discussed more fully below, that: "Accordingly, plaintiff's August 4, 2008 Application for leave to present a late claim satisfied the Tort Claims Act claim presentation requirement. On September 25, 2008, the District advised plaintiff it had rejected the Application. Plaintiff thereby satisfied the procedural prerequisite, prior to

filing suit, of **presenting a claim** to the District and having the claim acted upon by the District. (§ 945.4.)..."

Read more in depth, section 945.4 does not simply state that presentation of a claim is sufficient, as the Petitioner and *E.M.* assert- instead, 945.4 states that presentation of the claim must be "in accordance with ...Chapter 2 (commencing with Section 910)" prior to filing suit. Within Chapter 2 is *Government Code* § 911.2, which mandates that a claim for damages be presented within six months of accrual. Taken together, a suit may not be filed unless and until a timely claim for damages has been presented to the public entity. *Shirk v. Vista Unified School Dist.*, 42 Cal.4th 201, 208 (2007). This language and scheme was also present in 1959, discussed *supra.* Even the erroneous *E.M. v. Los Angeles Unified Sch. Dist.*, 194 Cal.App.4th 736 (2011) acknowledges that:

> "Timely claim presentation is not merely a procedural requirement, but rather a condition precedent to plaintiff's maintaining an action against defendant, and thus, an element of the plaintiff's cause of action." *Id.* at 744-745 (*emphasis added*).

If the claim is not filed within six months of accrual, then a plaintiff is barred from suit without some relief or excuse therefrom. The Government Claims Act provides for three ways in which section 945.5 may be complied with: 1) simply filing a timely claim, 2) filing an Application with the public entity and having that Application granted, and/or 3) filing a Petition for relief with the court (and having it granted). To be sure, this Court declared the same in 2004:

> "As an initial matter, we note that the Legislature has provided numerous ways to obtain relief from the claim presentation requirement. For example, sections 911.4, 911.6, 911.8 and 946.6

> contain a detailed scheme permitting litigants to Petition the public entity and the court for leave to present a late claim... Accordingly, we see no reason to ignore the overwhelming precedent establishing that failure to allege compliance or circumstances excusing compliance with the claim presentation requirement subjects a complaint to a general demurrer for failure to state facts sufficient to constitute a cause of action." *State v. Superior Court (Bodde)*, 32 Cal.4th 1234, 1245 (2004).

With this case, the Supreme Court has asked if number 3, the Petition, is necessary. The answer again is yes.

The practical necessity of the Petition is borne out in this case. Here, the plaintiff did not file a timely claim, but instead filed an Application to the District. The District ignored the Application and it was deemed denied. Therefore, on the date of deemed denial, the plaintiff still had not filed a *timely* claim.

That leaves the questioned 946.6 Petition. Without that Petition, the plaintiff would have no remaining avenue by which to be excused from late claim filing and he would thus be barred from suit. With the Petition, however, the plaintiff now has an avenue to be excused entirely from having to file a late claim. Unfortunately, the plaintiff did not timely file his Petition.

Hypothetically, if this court repeals section 946.6, it would also have to repeal sections 945.4 and section 911.4. This is because section 945.4 mandates that a *timely* claim be filed prior to suit. Without the possibility of court intervention with a 946.6 Petition, however, it would be unfair to make a *timely* claim a prerequisite to suit when the public entity can simply ignore a section 911.4 Application. Note that, as discussed in the history section, there originally was no Application, and the public entity had no option to ignore a claim. However, the statutes were amended to provide the public entity the option to ignore a claim, *and* the Application process

was enacted which also provided for the possibility that a District could ignore an Application.

For these same reasons, the Application statutes must also be abolished because if there is no requirement that a timely claim be filed, then there is no purpose of having an Application for leave to file a late claim.

As indicated *supra*, the courts should not interpret a statute in such a way as to make an entire procedure nugatory. Moreover, because the abolition of the Petition would necessary mean that the Application would have to be disposed of and the six-month statute by which to file a claim would have to be addressed, the principle of stare decisis militates against abolishing the Petition.

In the following section are other reasons why the Petition is necessary, and the District responds to some of the arguments put forth by the Petitioner.

V. THE TERM "MAY" IN SECTION 946.6 SHOULD BE INTERPRETED AS MANDATORY

Section 946.6 (a) reads, in pertinent part:

> "(a) If an Application for leave to present a claim is denied or deemed to be denied pursuant to Section 911.6, a Petition *may* be made to the court for an order relieving the Petitioner from Section 945.4."

The word *may* could suggest that a Petition is not necessary. Although there is no interpretation of the word "may," it is more likely that it is a conciliatory word to the putative plaintiff in that "if you still want to sue the public entity, you can file a Petition, or you may decline to proceed."

Indeed, the law revision commission comments indicate the necessity of a Petition after the denial of an Application:

> "Under the original procedure enacted in 1963, a claimant was required to file (within 20 days after the Application for leave to present a late claim was denied or deemed denied pursuant to Section 911.6) a Petition in court for leave to present a late claim to the public entity. See Section 912 (repealed)."

The District does note, however, that the original procedure was actually enacted in 1959, discussed above. The subsequent Commission comments, also discussed above, further indicate that a Petition is necessary. In addressing the amendments, *Kendrick v. City of La Mirada*, 272 Cal.App.2d 325, 329-30 (1969) held that "they did not dispense with the necessity of first obtaining judicial relief before filing an action where the entity (board) has denied the Application to present a late claim, either by express denial or by non-action and denial by operation of law."

Moreover, the word "may" is also used in the Application statute, section 911.4. The Petitioner does not contend that *the Application* is not necessary to comply with the Government Claims Act when one's claim is tardy. Section 911.4 (a) reads:

> "When a claim that is required by Section 911.2 to be presented not later than six months after the accrual of the cause of action is not presented within that time, a written Application *may* be made to the public entity for leave to present that claim."

Similarly, section 945.4 also uses the term "may" in setting the rule on filing a claim prior to a lawsuit: "no suit for money or damages *may* be brought against a public entity..." it is also not contended that a claim is not a necessary prerequisite as part of the Government Claims Act.

Looking at the Government Claims Act as a whole, the word "may" appears in mandatory prerequisites of suit. As a recap, "may" appears in 945.4 which governs filing a claim before a suit, "may" appears in 911.4 which mandates that an Application be filed if a claim is late, *and* "may" appears in section 946.6 which, as the District and all case law, except for *E.M.*, contends is mandatory.

Statutory construction indicates that a statutory scheme should be reviewed as a whole, and not just in portions. Therefore, all of the avenues for suit, a claim, Application, and Petition, should be read in concert. All of the relevant statutes use the word "may."

VI. THE LEGISLATURE DID NOT PROVIDE LENIENCY FOR NON-INCAPACITATED MINORS RELATIVE TO THE PETITION STATUTE OF LIMITATIONS

The plaintiff claims that the necessity of filing a Petition for a minor is somehow legally inappropriate. This contention, however, was decided against 50 years ago in *Hom v. Chico Unified Sch. Dist.*, 254 Cal.App.2d 335, 337-38 (1967). The *Hom* court held that time limitations on section 911.4 and 946.6 relative to minors are not unconstitutional. *Hom* went on to hold:

> The Legislature may constitutionally alter, modify or eliminate common-law rules governing public as well as private tort liability, subject only to constitutional restrictions against arbitrary classification. (*Flournoy v. State of California*, *supra*, 230 Cal.App.2d at p. 524, 41 Cal.Rptr. 190.) The procedurally favored position in which claims statutes place public entities is not unconstitutionally discriminatory. (*Dias v. Eden Township Hospital Dist.*, 57 Cal.2d 502, 504, 20 Cal.Rptr. 630, 370 P.2d 334.) On the assumption that the disabilities and handicaps which occasionally

characterize minors should evoke legislation ameliorating the position of minors, the Legislature has supplied that amelioration.

Minors and adults are equally subject to the 100-day limitation on the presentation of personal injury claims. (Gov.Code, s 911.2.) Presentation and rejection of a claim is a prerequisite to suit, whether by a minor or adult. (s 945.4.) Both minors and adults may escape the 100-day limitation by applying to the entity for leave to present a late claim, the Application to be made within a reasonable time, not to exceed one year after the accrual of the cause of action. (s 911.4.) From that point onward, the minor receives more favored statutory treatment. An adult who was not physically or mentally incapacitated during the 100-day period, must show that his failure to act within that period was occasioned by mistake, inadvertence, surprise or excusable neglect and that the public entity was not prejudiced; while the minor need show only that he was a minor during the 100-day claim period. (s 911.6.) The same distinction in treatment appears in [section 946.6]

In effect, Government Code sections 911.6 and 946.6 grant minors a period of claim filing consisting of 100 days plus a reasonable time, not exceeding one year, for filing an Application for relief. If, within the extended period fixed by section 911.4, the minor files an Application, relief is mandatory. (*Tammen v. County of San Diego*, 66 A.C. 480, 491-492, 58 Cal.Rptr. 249, 426 P.2d 753.) Thus the Legislature has established a classification supplying more lenient claim filing conditions for minors and compensating for the disadvantages which sometimes – but not always – characterize minority status. (See *Tammen v. County of San Diego*, *supra*, at pp. 491-492, 58 Cal.Rptr. 249, 426 P.2d 753; **923 *Frost v. State of California*, 247 A.C.A. 378, 387, 55 Cal.Rptr. 652.)

For reasons which are not apparent here, the present plaintiff's Application for leave to file a late claim was not presented to the school board within the one-year period. In view of the one-year limitation in Government Code section 911.4, the school board was powerless to grant relief and, under Government Code section 946.6, a court would have been equally powerless." *See also Carr v. State of California*, 58 Cal.App.3d 139, 142-44 (1976).

The take away from *Hom* is two-fold. First, the Legislature has the power to prescribe statutes of limitations and require pre-lawsuit filings relative to

minors. That is what it has done since 1959 relative to the Petition to the court. Second, because the Legislature enacted section 946.6, it is necessary, and failure to comply bars suit.

In addition, the Legislature did not want to provide leniency to non-incapacitated minors. In section 911.4 (c), the Legislature allowed tolling for minors who are "mentally incapacitated and do[] not have a guardian or conservator of his or her person" or if the minor is "adjudged to be a dependent child of the juvenile court." There is no provision for tolling, even for guardians or invalids, in section 946.6. If the Legislature wanted to provide additional time and leniency, it could have.

VII. *E.M.* IS THE *ONLY* CASE THAT HAS EVER HELD THAT NO PETITION IS NECESSARY

A. *E.M.* PRESENTS A CONFUSING AND INCORRECT RECITATION OF THE TORT ACT

Since 1959, the only court case that has held that a Petition is not necessary is *E.M. v. Los Angeles Unified Sch. Dist.*, 194 Cal.App.4th 736 (2011). However, the *E.M.* ruling was odd and inconsistent as will be explained more fully herein. In *E.M.*, the court first recited long-standing California law that:

> "Before suing a public entity, a plaintiff must present a timely written claim for damages to the entity. ([*Government Code*] §**911.2**; *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 208, 64 Cal.Rptr.3d 210, 164 P.3d 630 (*Shirk*).)...
>
> Timely claim presentation is not merely a procedural requirement, but rather a condition precedent to plaintiff's maintaining an action

against defendant, and thus, an element of the plaintiff's cause of action." *Id.* at 744-745 (*emphasis added*).

Note that for this recitation of law, the *E.M.* court cited to *Government Code* §911.2. However, *Government Code* §911.2 does not comment on the mandatory nature of claim filing, but instead simply provides the statute of limitations for the filing of a claim. *Id.* ("A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented ...not later than six months after the accrual of the cause of action"). Instead, it is actually *Government Code* §945.4 that indicates that a timely claim for damages must be presented prior to filing a lawsuit. *Id.* ("no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented... until a written claim therefor has been presented to the public entity in accordance with Chapters 1 and 2 of Part 3 of this division [, *i.e.*, section 911.2]").

Further confusing the Tort Act, the *E.M.* court reasoned:

"Accordingly, plaintiff's August 4, 2008 Application for leave to present a late claim satisfied the Tort Claims Act claim presentation requirement. On September 25, 2008, the District advised plaintiff it had rejected the Application. Plaintiff thereby satisfied the procedural prerequisite, prior to filing suit, of **presenting a claim** to the District and having the claim acted upon by the District. (§ 945.4.)...

At oral argument on appeal, the District's counsel argued that although the District incorrectly denied plaintiff's Application for leave to present a late claim pursuant to section 911.6, plaintiff's only recourse was to Petition the superior court for relief from the claims statute pursuant to section 946.6. We reject the notion that notwithstanding a public entity's erroneous denial of a timely Application for leave to present a late claim, a plaintiff must obtain judicial relief from the claims statute prior to filing a lawsuit. The

> purpose of the claims statute is to give the public entity timely notice of a claim and sufficient information to enable the public entity to investigate the claim and to settle it, if appropriate, without the expense of litigation. (*City of Stockton v. Superior Court* 42 Cal.4th 730, 738, 68 Cal.Rptr.3d 295, 171 P.3d 20 (2007)). Plaintiff's timely Application for leave to present a late claim satisfied the technical requirements of the statutory scheme as well as the purpose of the statute." *E.M.*, 194 Cal.App.4th at 747-48.

What *E.M.* essentially held here is that simply filing a claim, [attached to the request to file a late claim] no matter how late, is sufficient to comply with the Tort Act. Earlier in the *E.M.* opinion, however, the *E.M.* court recognized that the Tort Act has been interpreted to mandate that a plaintiff file a timely claim, yet the Court simply states that a claim (without reference to timing) must be filed. This is erroneous and contradictory. It is odd that the *E.M.* court would in one portion of the opinion recognize that a claim has to be timely prior to filing a lawsuit, while in another portion hold that a claim does not have to be timely.

Moreover, *E.M.*, also essentially overturned section 911.6, subdivision (c), which gave that public entity defendant the right to ignore/deny the Application. In addition, *E.M.*'s reasoning relative to not having to file a Petition is contradicted by the history of Tort Act. As indicated, at its inception in 1959, there was no section 911.4 Application, but only a Petition to the court. It was not until 1963 that the Legislature provided for a pre-Petition Application. If the Legislature did not want a putative plaintiff to comply with the Petition process, it would not have enacted it.

E.M. also based its reasoning on the incorrect exposition of law that mere notice to a public entity is sufficient to comply with the Tort Act. As a matter of law, however, notice of a potential suit is insufficient to circumvent the claims statute.

In 1974, the California Supreme Court addressed this issue in *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 455 (1974). In that case, the plaintiffs contended, "and the trial court concluded, that the class claim filed here satisfied the claims statutes because the city had been provided with notice and information regarding the rights asserted against it, inasmuch as "a number of individuals potentially within the class had filed claims against the city in the past few years." Hence, the city could not sustain a claim of surprise." (*emphasis added*). In rejecting that argument the Supreme Court held and reasoned:

> "We cannot accept this contention. It is not the purpose of the claims statutes to prevent surprise. Rather, the purpose of these statutes is to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation. (*Eastlick v. City of Los Angeles* (1947) 29 Cal.2d 661, 667 [177 P.2d 558, 170 A.L.R. 225]; *Jackson* v. *Board of Education* (1967) 250 Cal.App.2d 856, 859 [58 Cal.Rptr. 763].) **It is well-settled that claims statutes must be satisfied even in face of the public entity's actual knowledge of the circumstances surrounding the claim**." *Id.* (*emphasis added*).

The Supreme Court recently reiterated this legal principle in 2012:

> "Even if the public entity has actual knowledge of facts that might support a claim, the claims statutes still must be satisfied. (*City of Stockton, supra,* 42 Cal.4th at p. 738, 68 Cal.Rptr.3d 295, 171 P.3d 20.). *DiCampli-Mintz v. Cty. of Santa Clara*, 55 Cal. 4th 983, 990-91 (2012).

Importantly, this Court in *DiCampli-Mintz* relied on *City of Stockton.* Note how *E.M.* selectively relied on *City of Stockton,* citing only the portion that states the Tort Act is meant to provide notice while completely ignoring the remainder of the opinion that despite such notice, the

requirements of the Government Tort Act, including the need for a Petition, be complied with

In addition to being internally inconsistent, *E.M.* is inconsistent with a prior case in the same appellate district on the issue, *City of Los Angeles v. Superior Court*, 14 Cal.App.4th 621, 627-28 (1993). That case held:

> "If the public entity denies an Application for leave to file a late claim, the claimant **must** obtain a court order for relief from the requirements of the claims act before filing suit. Our colleagues in Division Six of this appellate district have noted: "A Petition for such an order **must** be filed with the court within six months after the Application is denied or deemed denied." (*Citing Rason v. Santa Barbara City Housing Authority,* 201 Cal.App.3d 817, 823 (1988)).

In 1966, the second appellate district in *Dominquez v. Butte Cty.*, 241 Cal.App.2d 164, 167-68 (1966) also addressed the issue. In *Dominguez*, the plaintiff filed a Petition with the court 16 days past the statutory deadline. In that case, just as here:

> "Plaintiff's Petition to the court states that this delay was caused by the inability of Petitioner's attorneys 'to ascertain the procedures and time limitations for filing this Petition, as altered, amended and added by the 1963 Legislature, until the date of this Petition, said attorneys having tried diligently, and without success, to obtain copies of the new legislation from several sources.' Plaintiff then contends that the limitation in section 912 is not mandatory or jurisdictional but discretionary."
>
> In rejecting that argument, the court went on to state:
>
> "The history of the section lends strong support to the determination that the legislative intent was to make the limitation jurisdictional. Section 912, adopted in 1963, is based upon former section 716 (Stats.1959, ch. 1724, p. 4136) which provided that the Petition to the superior court for leave to file a delayed claim 'shall be filed within a reasonable time, not to exceed one year, after the time specified in Section 715 has expired.' Section 715 provided (as did section 911.4 later) that the Application to the board of supervisors for leave to file a claim for injury to personal property should be filed within 100 days and for injury to real property within one year.

> Thus section 716 set the outside limitation to apply to the court for relief to one year and 100 days after accrual of the cause of action for injury to personal property and to two years after accrual of the cause of action for injury to real property.
>
> The Legislature in enacting section 912 apparently decided that the time previously allowed for applying to the superior court for relief was too long and changed it to a flat 20 days and intended that that limitation be mandatory and hence jurisdictional. It would seem that this limitation should be regarded as is the limitation in seeking relief in court proceedings under section 473 of the Code of Civil Procedure. It is well settled that the six months' limitation in that section is jurisdictional and that the court may not consider any motion made thereunder after the prescribed period has expired (Solot v. Linch (1956) 46 Cal.2d 99, 105, 292 P.2d 887; *168 Thompson v. Vallembois (1963) 216 Cal.App.2d 21, 24, 30 Cal.Rptr. 796; see the many citations therein set forth).
>
> No good reason appears for a determination that the legislative intent in enacting section 912 was that a claimant, dilatory in presenting a claim against a public body and being permitted to apply to that body for relief therefrom, should, when such relief is denied, not be held to a strict compliance with the time requirement for Application to the superior court for relief."

The court held that because the Petition was late, as in this case, the Petition was properly denied. Notably *and* oddly, *E.M.* did not at any point cite to either the *City of Los Angeles*, *Rason,* or *Dominguez* cases.

In summary, *E.M.* is internally inconsistent and inconsistent with all other cases on the matter, including one from its own appellate District which it failed to even consider. *E.M.* should be overturned.

VIII. WITHOUT SUBDIVISION (C) OF SECTION 911.6 THERE IS NO TIME LIMIT FOR THE PUBLIC ENTITY TO GRANT THE APPLICATION IF AT ALL

The Petitioner is also advocating for the abolition of section 911.6 (c). Pet. Br. at 15, *et. seq.* However, the Petitioner's arguments in this

regard do not present a good reason to overturn precedent and render subdivision (c) nugatory.

Specifically, the public entity can delay granting the Application if there is no time limit, identified in subdivision (c). Recall that in 1959, the public entity's had no time limit by which to respond to a claim. Apparently, there were some logistic issues with that, and a 45-day period was enacted. Without subdivision (c), as was the case in 1959, in theory, the public entity can wait until after the applicable *Code of Civil Procedure* statute of limitations to grant the Application, and then the plaintiff has no recourse because he is outside the statute of limitations. Without subdivision (c) or the Petition, the plaintiff cannot circumvent the public entity's delay.

Further, subdivision (c) does not present a technical trap. Subdivision (c) has been in existence since 1963 and is in the same "Part" as 911.4, the statute, which makes an Application mandatory. Indeed, it is probably on the same page as 911.4 in some Code books.

IX. WHEN IN RECEIPT OF AN APPLICATION AND CLAIM, THE PUBLIC ENTITY IS ONLY REQUIRED TO RESPOND TO THE APPLICATION, NOT THE APPLICATION AND CLAIM

The Petitioner presents an incorrect alternative scenario to the procedural history of this case. Pet. Br. at 33. The important cog in his argument is that because the District did not respond to the Application, it was granted. This interpretation is completely contrary to section 911.6 (c) and misunderstands the plaintiff's own argument.

First, section 911.6 (c) dictates that after 45 days, *an Application* is deemed *denied*. Instead, what the plaintiff seems to be arguing for is a *Harvey*-like scenario. Specifically, the Petitioner contends that if the Application is ignored, then the claim must necessarily be deemed granted. This is contrary to the existing law and misunderstands *Harvey*. In *Harvey v. City of Holtville*, 252 Cal.App.2d 595, 596 (1967), the plaintiff submitted an Application to the public entity for leave to present a late claim. The claim was attached to the Application. In response, the public entity sent a letter that stated: "This acknowledges receipt of the claim of Carolyn Darlene Harvey against the City of Holtville in the amount of $10,744.00. At its meeting last evening, the Council by Resolution No. 950 denied the claim and referred it to the city's insurance carrier." *Id.* at 596.

Because the City did not mention the action *on the Application*, the court hypothesized that "By its action the council impliedly granted plaintiff's Application to make a late presentation." *Id.* at 597. The court deduced this dicta because the claim could not have been denied unless the Application was first granted- a public entity cannot grant or deny a late claim, it can only return it as untimely. *Cal. Gov. Code* section 911.3. Here instead, the District did not provide *any* response to the plaintiff, and thus, pursuant to 911.6 (c), the Application was deemed denied. The Petitioner misunderstands *Harvey*.

Further, Harvey supports the District's position because the 946.6 Petition, just as in this case, was not timely filed: "The court was not authorized to consider a Petition filed after expiration of the 20-day period." *Id.* at 597. It is unclear why the Petition would have cited to *Harvey*.

The plain language of section 911.6 defeats the Petitioner's argument. Section 911.6 indicates that the public entity "shall grant or deny the Application." Section 911.4 (b) mandates that the "the proposed claim shall be attached to the Application." Further, section 911.6 indicates that "If the board fails or refuses to act on an Application within the time prescribed by this section, the Application shall be deemed to have been denied on the 45th day." Taken together, the Legislature intended the claim to be attached to the Application, but only required the public entity to respond to the Application, not separately to the claim and Application. Further, the Legislature envisioned that if there was no response to the Application, then the Application, not the claim, would be deemed denied. Indeed, the only way that a public entity could consider a claim is if it was allowed to be late-filed with the grant of the Application. Because the Application was ignored, there was no jurisdiction to consider the claim.

X. SUBMITTING A TIMELY APPLICATION DOES NOT AUTOMATICALLY RENDER THE ATTACHED CLAIM TIMELY

The Petitioner is requesting that this court hold that when a minor submit a timely Application, that his claim be automatically deemed timely. Pet. Br. at 35. This request is contrary to the statutory scheme and should be ignored.

Throughout the history of the Government Claims Act, the plaintiff who failed to file a timely claim has always had to obtain relief. In 1959, there was no Application, but the putative plaintiff had to file a Petition with the court. The mere filing of that Petition did not make the attached

claim timely. Instead, if granted, it required the plaintiff to file a claim with the public entity.

Moreover, minors have always been treated the same as invalids and decedents in terms of the statutory time period for a Petition. What the Petitioner is really asking is to amend the Application scheme to now separate minors, for the first time since 1959, from invalids and decedents.

The plaintiff is also requesting that minors essentially have a one-year statute of limitations while everyone else has only a six-month statute of limitations. If the legislature wanted to provide this additional time, it would have. Case in point is the childhood sexual abuse statute of limitations in *Code of Civil Procedure* § 340.1 which provides a special statutory period for minors that are victims of sexual abuse. Moreover, the Legislature amended Government Code § 905 to add subdivision (m) which now does not require that a claim for damages be filed with a public entity for minors who are victims of sexual abuse. The Legislature did not provide any other open-ended statute of limitations for minors relative to public entity lawsuits. The Legislature wanted and wants minors to abide by the six-month statute of limitations by which to file a Petition.

To the extent that the Petitioner relies on *Hernandez v. Cty. of Los Angeles*, 42 Cal.3d 1020(1986) for his argument in this regard, *Hernandez* actually supports the District's position. The plaintiff in *Hernandez* actually filed a timely Petition so that the court had jurisdiction to consider his wrongfully denied 911.4 Application. *Id.* at 1023. The plaintiff here did not file a timely Petition.

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XI. THE LEGISLATURE DID NOT INTEND TO PROVIDE *EQUITABLE* TOLLING FOR MINORS

The Petitioner seems to suggest that if this court finds that a Petition is necessary, that the six-month statute of limitations should be tolled. Pet. Br. at p. 39. This request should be denied as this issue was addressed more than 40 years ago.

Specifically, prior to January 1, 1971, *Code of Civil Procedure* § 352 allowed for tolling for minority:

> "(a) If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335) is, at the time the cause of action accrued either under the age of majority or insane, the time of the disability is not part of the time limited for the commencement of the action."

Los Angeles City Sch. Dist. v. Super. Ct. (1970) 9 Cal.App.3d 459 relied on this provision to allow a tardy suit by a minor to proceed. Keeping in mind the maxim that the Government Claims Act is meant to constrict liability, the Legislature overruled the holding of *Los Angeles City Sch. Dist. v. Super. Ct.* (1970) 9 Cal.App.3d 459 by amending section 352 to add subsection (b) as follows:

> "This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) or Chapter 2 (commencing with Section 910) of Part 3, or Chapter 3 (commencing with Section 950) of Part 4, of Division 3.6 of Title 1 of the Government Code. This subdivision shall not apply to any claim presented to a public entity prior to January 1, 1971."

The Law Revision Commission Comments note:

> "Subdivision (b) has been added so that Section 352, which operates to toll the statute of limitations for minors, insane persons, and prisoners, will not apply to the causes of action against a public entity..."

In accord is *Todd v. Los Angeles County* (1977) 74 Cal.App.3d 661, which holds that the time limitations within *Government Code* § 946.6 are not tolled for minority. *Id.* (*citing Cal. Civ. Proc. Code* § (b)).

Further, the Legislature addressed tolling within the confines of the Government Claim Act. Relative to the 911.4 Application, the Legislature specifically prohibits tolling for minors, unless the minor is mentally incapacitate and does not have a guardian ad litem to protect his interests. Or is a ward of the court. *Id.* at subd. (c). There is no similar provision for tolling under 946.6 evidencing the Legislature's intent to not toll for any reason. *Todd v. Los Angeles County* (1977) 74 Cal.App.3d 661.

XII. NULLIFYING THE PETITION PROCESS WOULD OPEN THE FLOODGATES OF LITIGATION

Petitioner erroneously contends that nullifying the need for a Petition would not open the litigation floodgates. This simply is not true. As elucidated above, if the Petition requirement was negated, then too would the need for an Application and the statute of limitations for the claim would likely be extended to two-years.

But, this scenario of *more* time by which to file a suit is contrary to the original intent in the Government Claims Act as recognized by *this* court twice in the last 15 years:

> "Indeed, the Legislature did not intend "to expand the rights of plaintiffs in suits against governmental entities, but to confine potential governmental liability to rigidly delineated circumstances:

immunity is waived only if the various requirements of the act are satisfied."" *State v. Superior Court (Bodde)*, 32 Cal.4th 1234, 1243, 90 P.3d 116, 122 (2004); *DiCampli-Mintz v. Cty. of Santa Clara*, 55 Cal.4th 983, 990-91 (2012).

More time to file a lawsuit necessarily means that there will be more lawsuits against public entities. Case in point is this case- we are here in front of this court because the Petitioner missed multiple statutory time limits. Without those time limitations, he would be free to sue the District.

XIII. CONCLUSION

In summary, the Government Claims Act has always envisioned that a Petition is necessary to save a tardy litigant from his own failure to file a timely claim for damages. Abolishing the Petition requirement would violate stare decisis and overturn the last 60 years of case law and statutory revisions. Moreover, abolishing the Petition would require a complete overhaul of the Government Claims Act. Statutory construction requires that courts provide the Legislature deference in their decision to enact certain laws and procedures. If this court is inclined to abolish the need for a Petition, then the District requests that its ruling be prospective only. *People v. King*, 5 Cal.4th 59, 78-79 (1993).

McCUNE & HARBER, LLP

DATED: April 11, 2016

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CERTIFICATE OF COMPLIANCE

The accompanying Respondent's Brief by HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT complies with the specifications of California Rules of Court 8.204(c)(1). The enclosed Brief is produced using 13-point type, including 13-point type in the footnotes, and contains approximately 10,650 words, which is less than the 14,000 words permitted by this Rule. Counsel relies on the word count of the computer program used to prepare this brief, Microsoft Word.

I certify that the foregoing is true and correct. Executed this 11th day of April, 2016, at Los Angeles, California.

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Attorneys for Defendant and
Respondent, HUNTINGTON BEACH
UNION HIGH SCHOOL DISTRICT

PROOF OF SERVICE

STATE OF CALIFORNIA , COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action; my business address is 515 South Figueroa Street, Suite 1100, Los Angeles, California 90071.

On April 11, 2016, I served the foregoing document described as **RESPONDENT'S BRIEF**, on the interested parties by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

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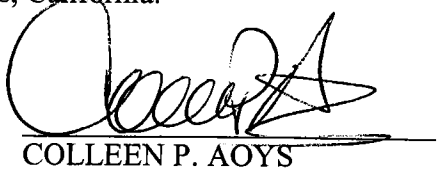
I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 11, 2016, at Los Angeles, California.



COLLEEN P. AOYS