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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

MELISSA BONNEY et al.,

Plaintiffs and Appellants,

v.

CITY OF MENIFEE et al.,

Defendants and Respondents.

E071952

(Super.Ct.No. RIC1705941)

OPINION

APPEAL from the Superior Court of Riverside County. Sharon J. Waters, Judge.

Affirmed.

Damiani Law Group and Lisa J. Damiani for Plaintiffs and Appellants.

Aarvig & Associates, Maria K. Aarvig and Diane K. Huntley for Defendant and Respondent Meniffee Unified School District.

Melissa and David Bonney appeal from the order denying their petition for relief under Government Code section 946.6 from filing timely government tort claims with the Menifee Unified School District (the District).<sup>1</sup> We affirm the order denying the petition.

### BACKGROUND

On November 2, 2016, a vehicle struck Melissa while she was walking in a crosswalk at the intersection of Newport Road and Evans Road.<sup>2</sup> Traffic lights and crosswalk signs controlled the four-way intersection. Melissa was taken by ambulance to the hospital.

Law enforcement officers were dispatched to the scene and investigated the accident. The police report from the incident included statements from the driver of the vehicle that struck Melissa and from one witness, Jody Baker. Baker explained that “she was working as a school crossing guard at the southwest corner of the intersection located at Newport Road and Evans Road at the time of the collision.” Baker described witnessing Melissa cross Newport Road before starting to cross Evans Road and then being struck by a vehicle. The report contained Baker’s full name and birth date, as well as an address and a phone number for her.

At some point soon after the collision, the Bonneys retained an attorney. The attorney received the police report concerning the November 2016 collision on

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<sup>1</sup> Unlabeled statutory references are to the Government Code.

<sup>2</sup> When referring to the Bonneys individually, we will use their first names because of their shared last name. No disrespect is intended.

January 27, 2017. In April 2017, the Bonneys filed suit against the driver of the vehicle and his company, alleging that the driver was acting negligently at the time of the collision and that he was driving a company vehicle and working at that time. Melissa's husband, David, claimed a loss of consortium.

In early March 2018, nearly one year after the complaint was filed, the Bonneys' counsel deposed Baker and learned that the District was her employer. According to Baker, the District did not give her any instruction on how to conduct herself as a crossing guard and also informed her that she did not need to assist adults in crossing the intersection. Baker identified another crossing guard who also was working at that intersection at the time of the collision. Baker said the other crossing guard had told Baker that she did not see the collision because she was talking on the phone. Baker was seated at the time of the collision, with bushes obstructing her view of the intersection.

Several weeks after Baker's deposition, on March 29, 2018, the Bonneys filed separate government tort claims for damages under section 954.4 with the District alleging injuries arising out of the November 2016 collision. A couple of weeks later, the District notified the Bonneys' attorney that David's claim did not comply with the statutory claim presentation requirements. On April 30, 2018, the Bonneys each filed amended claims with the District. On May 10 and 17, 2018, the District notified the Bonneys that the claims were untimely and that their only recourse was to apply for leave to present late claims. On May 22, 2018, the Bonneys separately applied to the District for leave to present late claims under section 911.4. The District did not respond.

The Bonneys later petitioned the superior court under section 946.6 for relief from the government claim presentation requirement. In November 2018, the trial court denied the petition, concluding that the Bonneys failed to establish by a preponderance of the evidence either excusable neglect under section 946.6 or delayed discovery for purposes of accrual of the causes of action. The court explained: “With knowledge of the presence of a crossing guard, her identity and address and what she witnessed, contained in the police report petitioners had sufficient information to at least put them on inquiry notice of another possible defendant.”

The next month, on December 13, 2018, the Bonneys sought leave to file an amended complaint to add causes of action against the crossing guards and the District based on delayed discovery. One week later, the court entered judgment of dismissal on the petition for relief under section 946.6 pursuant to the November 2018 order. On January 4, 2019, the Bonneys filed a notice of appeal from the November 2018 order. On January 11, 2019, the court denied the motion for leave to amend the complaint as an improper motion for reconsideration of the November 2018 order.

In February 2019, the Bonneys filed a second notice of appeal from the order denying the motion for leave to file an amended complaint. This court dismissed that appeal. Consequently, the only appeal presently before us is the appeal from the

November 2018 order denying the petition under section 946.6 for relief from the claim presentation requirement.<sup>3</sup>

## DISCUSSION

### *A. The Government Claims Act and Relief from the Claim Presentation Requirement*

The Government Claims Act (§ 810, et seq.) provides that no person may sue a public entity for money damages based on personal injury “unless he or she first presents a written claim to the entity within six months of the time [his or] her cause of action accrues, and the entity then denies the claim.” (*S.M. v. Los Angeles Unified School District* (2010) 184 Cal.App.4th 712, 717; §§ 911.2, 945.4.) A person who fails to file a timely claim must apply to the public entity for leave to present a late claim within one year after the accrual of the cause of action. (§ 911.4, subs. (a)-(b).) If the public entity denies the application to present a late claim (or it is deemed denied) (§ 911.6), the claimant may within six months of that denial petition the superior court for relief from the claim presentation requirement altogether under section 946.6, subdivisions (a) and (b).

Under section 946.6, subdivision (c), the court shall relieve the petitioner from the claim presentation requirement if (1) the application for leave to present a late claim was filed with the public entity no later than one year after the cause of action accrued, and

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<sup>3</sup> The Bonneys also filed a claim against the City of Menifee (City), which was denied as untimely. The City did not respond to their subsequent application to file a late claim. The Bonneys also petitioned for relief from the claim presentation requirement as to the City. When the trial court denied the Bonneys relief from the claim presentation requirement as to the District, the trial court denied the petition as to the City too. The Bonneys do not raise any arguments as to the City on appeal.

(2) at least one of four further conditions is satisfied. As relevant here, two of those conditions are that (1) the injured person was physically or mentally incapacitated during the six-month claim presentation period “and by reason of that disability failed to present a claim during that time” (§ 946.6, subd. (c)(3)), and (2) “[t]he failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect” (§ 946.6, subd. (c)(1)). (*Lincoln Unified School Dist. v. Superior Court* (2020) 45 Cal.App.5th 1079, 1089 (*Lincoln*)). “Before a court may relieve a claimant from the statutory tort claim filing requirements, the claimant must demonstrate by a *preponderance of the evidence* both that the application to the public entity for leave to file a late claim was presented within a reasonable time and that the failure to file a timely claim was due to mistake, inadvertence, surprise or excusable neglect.” (*Department of Water & Power v. Superior Court* (2000) 82 Cal.App.4th 1288, 1293 (*DWP*); *Tammen v. County of San Diego County* (1967) 66 Cal.2d 468, 474 (*Tammen*)).

We review the denial of a petition for relief under section 946.6 for abuse of discretion. (*Lincoln, supra*, 45 Cal.App.5th at p. 1089.) “Abuse of discretion is shown where uncontradicted evidence or affidavits of the plaintiff establish adequate cause for relief.” (*Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1778 (*Munoz*)).

The underlying principle of section 946.6 is that whenever “possible cases be heard on their merits, and any doubts which may exist should be resolved in favor of the application.” (*Ebersol v. Cowan* (1983) 35 Cal.3d 427, 435.) We therefore review an order denying a petition under section 946.6 more rigorously than an order granting such a petition. (*Ibid.*)

## B. Denial of Petition Seeking Relief from Claim Presentation Requirement

The Bonneys claim that the trial court abused its discretion by denying their petition because they demonstrated by a preponderance of the evidence that the failure to present a timely claim was the result of excusable neglect and Melissa’s physical and mental incapacity. We do not agree.<sup>4</sup>

Once a petitioner retains counsel, “it is the responsibility of legal counsel to diligently pursue the pertinent facts of the cause of action to identify possible defendants.” (*Munoz, supra*, 33 Cal.App.4th at p. 1779.) We consequently must analyze the conduct of counsel to determine whether there was excusable neglect. (*Mitchell v. Department of Transportation* (1985) 163 Cal.App.3d 1016, 1021 (*Mitchell*)). In deciding whether counsel’s error is excusable, we look to: “(1) the nature of the mistake or neglect; and (2) whether counsel was otherwise diligent in investigating and pursuing the claim.” (*Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 276 (*Bettencourt*); *Munoz*, at p. 1782.) “In examining the mistake or neglect, the court inquires whether ‘a reasonably prudent person under the same or similar circumstances’ might have made the same error.” (*Bettencourt, supra*, at p. 276; *Munoz*, at pp. 1782-1783.) “A petitioner or counsel for a petitioner must show more than the mere failure to

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<sup>4</sup> The Bonneys also contend that their “suit against [the District] was not barred under section 950.4.” That is correct but irrelevant. Section 950.4 applies only to suits against current or former employees of a public entity. (§ 950.4 [“A cause of action against a public employee or former public employee is not barred . . .”]; *Black v. County of Los Angeles* (1976) 55 Cal.App.3d 920, 928.) The Bonneys do not seek to sue Baker or any other employees of the District. Rather, they seek to sue the District, so their suit is barred by section 945.4 and section 950.4 does not apply.

discover a fact until too late; he or she must establish the failure to discover that fact in the use of reasonable diligence.” (*Munoz*, at p. 1783.)

The Bonneys retained counsel within three months of the accident, well within the six-month period for presenting a claim to the District.<sup>5</sup> (§ 911.2, subd. (a).) It therefore was the responsibility of their counsel to diligently pursue the relevant facts for any possible causes of action and to identify possible defendants. (*Munoz*, *supra*, 33 Cal.App.4th at p. 1779.) We therefore review the conduct of the Bonneys’ attorney to determine whether it amounted to excusable neglect. (*Mitchell*, *supra*, 163 Cal.App.3d at p. 1021.)

The Bonneys maintain that the information contained in the police report did not put their attorney on notice of the possible negligence of the District or the crossing guards because Baker “did not disclose her employment status, her negligent acts or the negligence [of the District], in failing to provide [her] training.” The Bonneys’ focus on information that is not included in the report is misplaced. The information contained in the report actually led the Bonneys to discover the alleged negligence of the District and its employees. Because of the information that was contained in the police report, the Bonneys’ attorney knew about Baker and eventually deposed her. That deposition led to the discovery of the alleged negligence of the District and its employees. The same information that led the Bonneys’ attorney to depose Baker in March 2018 was available

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<sup>5</sup> It is not clear from the Bonneys’ attorney’s declaration when exactly the attorney was retained. However, because the attorney stated that she received the police report on January 27, 2017, it is reasonable to infer that she was retained by then.

to the attorney in January 2017, when the attorney received the police report well within the six-month claim presentation period. The relevant inquiry therefore is why the Bonneys' attorney failed to act on the information contained in the report much sooner and whether a reasonably prudent person in the same or similar circumstances would have acted accordingly.

According to the Bonneys' attorney, she and her associate did not begin the process of attempting to locate Baker until sometime “[d]uring the course of discovery,” which did not begin until early in July 2017—eight months after the collision, three months after the original complaint was filed, and two months after the claim presentation deadline. The Bonneys claim that the manner in which their attorney handled the case was “based on standard practices establish[ed] in the field of personal injury law.” This contention is based on two attorneys' declarations submitted in support of the petition—one from the Bonneys' attorney and one from a former colleague of the Bonneys' attorney.

After being retained and before filing the complaint, the Bonneys' attorney visited Melissa in the hospital and visited the scene of the collision. Melissa could not recall the collision. No crossing guards were posted at the intersection when the attorney visited, and no school was visible from the intersection. On the basis of that investigation, the Bonneys' attorney claimed that when the complaint was filed she “did not have any facts before [her] that supported any claim against the [c]ity . . . or other public entity.” She further claims that she “was not aware of any involvement of [the District] because neither the Bonneys, nor any other factual source available at the time, gave rise to any

facts that indicated [the District] regulated or supervised the intersection where the incident occurred.” But that is not so.

The attorney possessed the police report approximately three months before she filed the complaint. That report included a witness statement from a crossing guard that was working at the intersection at the time of the collision. It is therefore irrelevant that the Bonneys’ attorney did not see any crossing guards during her one visit to the intersection. Three months before filing the complaint, the Bonneys’ attorney knew that at least one crossing guard was working at the intersection at the time of the collision. Although the report did not identify the District as Baker’s employer, the Bonneys’ attorney did have notice that some entity, likely a nearby school, employed at least one crossing guard who worked at the intersection at the time of the collision. The Bonneys’ attorney provides no explanation for failing to conduct any investigation into the identity of the employer or into the role of any crossing guard employed to work at that intersection before filing the complaint. Given the information available in the police report, the trial court was not required to credit the Bonneys’ attorney’s factual assertions about not having any information about the possible involvement of the District or any possible claims that may have existed against it or its employees. (*Tammen, supra*, 66 Cal.2d at p. 477 [trial court was not bound to accept or give weight to the attorney’s uncontradicted statement that ““certain aspects of said accident, particularly the relationship between the [municipalities and state government], on the safe keeping and maintenance of Highway 78 was not ascertainable and was not discovered until [10 months after the accident”].)

The Bonneys' attorney attested that it is her normal practice to depose witnesses after she completes written discovery. That is not relevant. Deposing a witness is not the same as interviewing a witness, nor is it the same as conducting an investigation of the incident. "Attorneys representing clients in personal injury matters routinely try to locate as many potential tortfeasors as possible to ensure his or her client receives adequate compensation." (*Greene v. State of California* (1990) 222 Cal.App.3d 117, 122 (*Greene*)). The Bonneys' attorney does not explain how failing to interview Baker sooner or otherwise to investigate the possible negligence of the crossing guard being posted at the intersection amounted to a reasonably diligent effort to locate all possible tortfeasors.

The Bonneys also cite their attorney's former colleague's conclusion that the Bonneys' attorney's "strategy and action taken in pursuit of the Bonneys' personal injury claims was diligent, reasonable and within the standards and accepted practices in the legal community for a personal injury lawsuit[] in the State of California." The trial court was free to reject that attorney's legal conclusion on the ultimate fact at issue, namely, whether a reasonably prudent attorney would have failed to conduct an earlier investigation into the potential misfeasance of both the crossing guard who witnessed the collision and her employer. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 884.) In sum, neither of the portions of the attorneys' declarations cited by the Bonneys provide any explanation as to why it was reasonable for the Bonneys' attorney to fail to conduct an earlier investigation into the possible negligence of Baker or her employer.

Under these circumstances, the trial court did not abuse its discretion by concluding that a reasonably diligent investigation by the Bonneys' attorney would have yielded the information necessary to file a timely government claim. That conclusion is consistent with other cases in which attorneys' conduct in failing to conduct thorough investigations did not amount to excusable neglect.<sup>6</sup> (See *DWP*, *supra*, 82 Cal.App.4th at p. 1295 [attorney's failure to investigate potential liability of public entity or make contact with the public entity during the claim presentation period was not reasonable given that the police report from the vehicle collision said the roadway was flooded because of work done by the entity's employees in the area]; *Shaddox v. Melcher* (1969) 270 Cal.App.2d 598, 600 [presence of a state emblem on the car that struck the plaintiff contradicted contention that she was unaware that the car was owned by the state, and the attorney's failure to ask the reporting law enforcement agency for the identity of the public entity employer of the other car's driver or to investigate other leads provided in

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<sup>6</sup> The only case the Bonneys cite in which excusable neglect was found does not compel a different conclusion. In *DeVore v. Department of California Highway Patrol* (2013) 221 Cal.App.4th 454, the petitioners learned during a preliminary hearing in a related criminal matter that less than two hours before the collision that killed the decedent, a highway patrolman had stopped the drunk driver who was allegedly at fault. (*Id.* at pp. 457-458.) The Court of Appeal concluded that the petitioners' failure to consult an attorney before the claim presentation period expired was excusable because "nothing in the accident report or the records of the [California Highway Patrol] would have led plaintiffs *or* an attorney acting with reasonable diligence to discover the earlier traffic stop or the identity of [the particular highway patrolman who made the earlier traffic stop] (and the audio/video recording from his patrol car)." (*Id.* at p. 462.) That scenario bears no resemblance to the present case. The Bonneys retained counsel within the claim presentation period, counsel received the police report just a few months after the accident, and the information in the report eventually led counsel to discover the alleged negligence of the District and its employees.

the report was not reasonable]; *Rojes v. Riverside General Hospital* (1988) 203 Cal.App.3d 1151, 1163 (*Rojes*) [failure of the petitioner’s attorney to take “any affirmative action” to ascertain whether the hospital was a public entity was not reasonably prudent], overruled on another ground in *Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, 1607-1608; *Leake v. Wu* (1976) 64 Cal.App.3d 668, 673 [applying same standard under section 950.4 and concluding neglect was inexcusable given that the “attorney apparently conducted no investigation, such as simple inquiry to the hospital, to determine whether the doctors might have been county employees”]; *Greene, supra*, 222 Cal.App.3d at p. 122 [police report clearly reflected that accident occurred on State Route 1, and state ownership and control of highway was established by statute, so it was unreasonable for counsel to rely on county’s assertion to counsel’s secretary that the road was owned by the county and to fail to investigate further].)

The Bonneys also maintain that the trial court abused its discretion by failing to grant the section 946.6 petition because Melissa was incapacitated during the six-month claim presentation period. The trial court did not expressly rule on the Bonneys’ incapacity claim. In the absence of express findings, we presume under the doctrine of implied findings that “the trial court impliedly made every factual finding necessary to support its decision.” (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 48.)

While mental or physical incapacity during the claim presentation period is a ground for relief under section 946.6, subdivision (c)(3), in arguing that Melissa was incapacitated the Bonneys do not rely on that statutory provision. Instead, the Bonneys

argue on appeal, as they did in the trial court, that the one-year period for applying to present a late claim with the District was tolled under section 911.4, subdivision (c)(1), because of Melissa’s alleged incapacity. Those two provisions are not identical. Section 911.4 provides that the one-year period for applying to file a late claim is tolled for any “time during which the person who sustained the alleged injury, damage, or loss . . . is mentally incapacitated and does not have a guardian or conservator of his or her person.” (§ 911.4, subd. (c)(1).) Tolling is mandatory if those conditions are met. (*Ibid.* [time of incapacity “shall not be counted”].) The claimant need not demonstrate that the failure to file was the result of the incapacity.

Section 946.6, in contrast, provides that a petitioner is relieved from the claim presentation requirement (assuming all other statutory conditions are met) if the injured person was physically or mentally incapacitated during the six-month claim presentation period “and *by reason of that disability* failed to present a claim during that time.” (§ 946.6, subd. (c)(3), italics added; *Draper v. City of Los Angeles* (1990) 52 Cal.3d 502, 509 (*Draper*) [“The subdivision is designed to assure both that the claimant was disabled during the filing period and that the disability was the reason the claimant could not file timely”].) We thus analyze whether the trial court abused its discretion by concluding that Melissa’s purported incapacity was the reason for her failure to file a government claim within the six-month claim presentation period. “[I]f the claimant’s condition was such that the *claimant could have authorized* another to file the claim on his or her behalf, the claimant was not incapacitated from filing the claim.” (*Barragan v. County of Los Angeles* (2010) 184 Cal.App.4th 1373, 1384.) Melissa retained an attorney within

the six-month claim presentation period and a lawsuit was filed on her behalf within that period. It follows that Melissa also could have authorized her attorney to file a government claim on her behalf during the same period. The trial court therefore did not abuse its discretion by implicitly concluding that Melissa's failure to file a timely government claim did not result from her physical or mental incapacity during that period. (*Tammen, supra*, 66 Cal.2d at pp. 474-475 [holding that the fact that the plaintiff had consulted with attorneys within the claim presentation period showed that the failure to present a timely claim was not caused by her incapacity].) Moreover, the trial court also did not abuse its discretion by denying the petition as to David on the same ground, because the incapacity provision excuses only the person who suffered the incapacity. (§ 946.6, subd. (c)(3).)

We also reject the Bonneys' argument that the trial court improperly relied on evidence outside of the record presented by the District's attorney during oral argument. During the hearing on the petition, the District's attorney told the court that she had looked up Baker in "Transparent California" and found that one of the three women with that name was listed as working for the District. Regardless of whether that argument was improper, the Bonneys have not demonstrated any prejudice. There is no evidence that the trial court relied on the information orally provided by the District's counsel. After hearing from both parties, the court took the matter under submission without expressing an opinion on the arguments presented. Then, in its written ruling, the trial court denied the petition because of the information about Baker that was contained in the police report: "With knowledge of the presence of a crossing guard, her identity and

address and what she witnessed, contained in the police report petitioners had sufficient information to at least put them on inquiry notice of another possible defendant.”

In sum, we conclude that the trial court did not abuse its discretion by concluding that the Bonneys did not demonstrate that the failure to comply with the claim presentation requirement was the result of excusable neglect or incapacity. Because the trial court’s ruling on those requirements was not an abuse of discretion, we need not and do not address whether the Bonneys met the separate statutory requirement that the application to file a late claim be filed within one year of the accrual of the causes of action (§ 911.4, subd. (b)). (*Tammen, supra*, 66 Cal.2d at p. 478.) We consequently do not address any of the Bonneys’ arguments about the timeliness of their claims and express no opinion about the timeliness of those claims.<sup>7</sup> (*Ngo v. County of Los Angeles* (1989) 207 Cal.App.3d 946, 951; *Rason v. Santa Barbara City Housing Authority* (1988) 201 Cal.App.3d 817, 828-829.)

We also need not and do not address the Bonneys’ claim that the District failed to carry its burden of demonstrating that it would be prejudiced by a late filing. The District

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<sup>7</sup> Because we need not address the issue of timeliness, we need not and do not address the following arguments by the Bonneys: (1) whether the delayed discovery doctrine applied to postpone the accrual date of the causes of action; (2) whether the one-year period for filing a late claim with the District was tolled under section 911.4, subdivision (c)(1), because of Melissa’s alleged incapacity; (3) whether the timeliness of the claims was an issue to be determined by a jury in the trial on the Bonneys’ complaint rather than by the judge in ruling on their petition for relief from the claim presentation requirement; (4) whether the District waived its timeliness argument with respect to Melissa by failing to respond to Melissa’s initial government tort claim; (5) whether the limitation period could be equitably tolled; and (6) whether the District should be equitably estopped from asserting the statute of limitations of the claims statute based on alleged material omissions by its employee.

was under no obligation to demonstrate prejudice, because the Bonneys failed to carry their own burden of demonstrating that excusable neglect, incapacity, or one of the other factors listed in section 946.6, subdivision (c), caused them to fail to file a timely claim. (*Tammen, supra*, 66 Cal.2d at p. 478; *Rojes, supra*, 203 Cal.App.3d at pp. 1163-1164.)

For all of the foregoing reasons, we conclude that the trial court did not abuse its discretion by denying the petition for relief from the claim presentation requirement.

DISPOSITION

The order denying the Bonneys' petition for relief under section 946.6 is affirmed. The District shall recover its costs of appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MENETREZ  
J.

We concur:

McKINSTER  
Acting P. J.  
SLOUGH  
J.