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 3 No. G049773
Superior court of Orange County,
Hon. Kirk Nakamura Case No. 30-2013-00684104

OPENING BRIEF ON THE MERITS

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

S230510 -M.(J.)v.HUNTINGTONBEACHUNIONHIGHSCHOOLDISTRICT

Full Name of Interested Entity/Person	Party / Non-Party		Nature of Interest
Johnny McWhorter	[✓]	[ ]	plaintiff (financial interest)
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
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Submitted by: **Janet Rachel Gusdorf**

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INTRODUCTION

The Tort Claims Act intended to remove "traps for the unwary" litigant, but in this case, the Court of Appeal has erected and enforced a new snare for minors. A minor who satisfies his duty to timely notify the public entity of his claim must nevertheless jump through a series of unnecessary procedural hoops to secure the very result he was entitled to from the outset. Meanwhile, the public entity may lie in wait, refuse to notify the minor of its action (or inaction), and ambush the minor who, at no fault of his own, was a few months late in petitioning the court for relief.

The minor suffers yet another loss at the hands of the public entity – first, his physical injuries; now, his day in court. Meanwhile, the public entity is rewarded for, and incentivized to continue, subverting its duties.

For the past fifty years, this Court has interpreted the Tort Claims Act liberally for minors, protecting minors from acts of adults they cannot control. The purpose of the claims provisions is to provide timely notice to the public entity, with sufficient information to enable the entity to investigate the claim, and to settle it, if appropriate, without the expense of litigation. When a minor presents a timely application (i.e., within one year of the accrual of his claim), he satisfies that purpose. Whether the public entity chooses to act on his application or notify him of its action (or

inaction) is neither within the minor's control, nor relevant as to whether the entity received timely notice of the claim.

The time has arrived for this Court to remove the procedural snare of Section 946.6 for a minor who diligently files his timely application to file a late claim, and who timely files his judicial complaint.

ISSUE PRESENTED FOR REVIEW

Must a claimant under the Government Claims Act file a petition for relief from Government Code section 945.4's claim requirement, as set forth in Government Code section 946.6, if he has submitted a timely application for leave to present a late claim under Government Code section 911.6, subdivision (b)(2), and was a minor at all relevant times?

SHORT ANSWER

No. A claimant under the Government Claims Act need not file a petition for relief from Government Code section 945.4's claim requirement, as set forth in Government Code section 946.6, if he has submitted a timely application for leave to present a late claim under Government Code section 911.6, subdivision (b)(2), and was a minor at all relevant times.

This result may be achieved by applying ordinary rules of statutory construction. It may further be achieved in one of three alternative ways

where the public entity fails to act on the minor's timely application to file a late claim.

- One, the minor's timely application may be "deemed granted," triggering the provisions of Government Code sections 912.2, 912.4, 913, and 945.6(b)(2), and negating the need for a Section 946.6 petition.
- Two, the minor's timely application (coupled with the attached claim) should be deemed a "timely" claim under Government Code section 911.2, and negating the need for a Section 946.6 petition.
- Three, where the public entity does not notify the minor of its action on his application or claim, but the minor diligently files his judicial complaint before the expiration of the statutory period triggered by the accrual of his claims, a court should be permitted to exercise its equitable powers to relieve the minor from Section 946.6's statutory period.

STATEMENT OF THE CASE

On October 27, 2011, plaintiff, appellant, and petitioner, J.M., a 15-year-old student at Fountain Valley High School, suffered head trauma when he was tackled during a school-sponsored football game. (1 CT 12, 15, Opn. p 3.) He continued to participate in the full-contact football practice, and began to experience headaches, dizziness, and nausea. (1 CT 12, Opn. p. 3.) His causes of action for personal injury against the District[1] accrued no earlier than October 31, 2011, when a doctor diagnosed J.M. with double concussion syndrome. (1 CT 12, Opn. pp. 3-4.)

After the six-month period following the date of accrual of his causes of action, J.M. retained counsel and, on October 24, 2012, his counsel presented an application for leave to present a late claim pursuant to section 911.4 on the ground that J.M. was a minor for the entire six-month period following the accrual of his causes of action. (1 CT 12-13, 15, Opn. at p. 4.) The District failed to act upon the application. (1 CT 13, Opn. at p. 4.)

On October 28, 2013, J.M. filed a petition under section 946.6 to the superior court for an order relieving him from the claim requirement. (1 CT 10-15, Opn. at p. 4.) He also filed his judicial complaint that same day, within two-years of the accrual of his causes of action. (1 CT 2.) The

[1] This brief refers to the public entity as "the District," "the Board," and "public entity." These names are interchangeable unless otherwise specified.

superior court denied his petition as untimely because it was filed more than six months after the date on which his application to present a late claim was deemed to have been denied by the District's inaction. (1 CT 32, Opn. at p. 4.) J.M. timely appealed. (1 CT 34-35, Opn. at p. 4.)

On September 30, 2015, the Court of Appeal filed its original Opinion in this case. (Opn. at p. 1.) The Court of Appeal affirmed the trial court's order, because it concluded that, under subdivision (c) of Government Code section 911.6, J.M.'s timely application for leave to file a late claim was "deemed denied" on the 45th day after its submission, thus triggering Section 946.6's six-month limitations period in which to petition the superior court. (Opn. at pp. 3, 9, 12-13.) Additionally, the Court of Appeal concluded that the written notice provision of Section 911.8 does not apply to applications "deemed denied" by operation of law under Section 911.6, subdivision (c). (Opn. at p. 18-19.) The Court of Appeal additionally concluded that equitable relief was not applicable, and that, notwithstanding public policy, such policy could not warrant construing section 946.6 in favor of granting J.M. relief. (Opn. at pp. 17-18, 19.)

J.M. filed a Petition for Rehearing, challenging inter alia, the implication of the court's decision, particularly regarding the inequitable and illogical application of Section 911.8's written notice provision. J.M. explained that the Legislature recognized that Section 946.6's six-month statute language was likely to create "snares" or traps for the unwary

claimant (as it did in this case), and by including section 911.8, intentionally created redundancy to warn litigants and prevent depriving them of their day in court due to these technicalities. In light of this provision, therefore, J.M. argued that the Legislature never intended to distinguish between claimants whose applications were explicitly denied versus those whose applications were implicitly denied (at no fault or control of their own).

In response to plaintiff's Petition for Rehearing, the Court of Appeal filed an Order Modifying Opinion and Denying Rehearing (with no change in judgment) on October 22, 2015. (Modified Opn. at pp. 1-2.) The Modified Opinion added a paragraph, explaining that Section 911.8, subdivision (a) reflects the Legislature's choice to require written notice only when the government entity acts on an application, and that the six-month period is easily determined from the date an application is "deemed denied." (Modified Opn. at pp. 1-2.)

This Court granted review.

LEGAL DISCUSSION

I.

GOVERNMENT CODE SECTION 911.6, SUBDIVISION (b)(2), *MANDATES* THE BOARD *GRANT* A MINOR'S TIMELY APPLICATION TO FILE A LATE CLAIM.

A. Overview of applicable statutes

Before a plaintiff may sue a public entity, the plaintiff must present the entity with a timely written claim for damages. (Gov. Code § 911.2.) The time for filing such claims is currently within six months after the cause of action accrues. (Gov. Code § 911.2.) In the absence of an exception, failure to timely file a claim bars a plaintiff's lawsuit. (Gov. Code § 945.4; *Shirk v. Vista Unified School District* (2007) 42 Cal.4th 201, 208-209.)

The Tort Claims Act sets forth specific exceptions and relief under delineated circumstances, permitting certain categories of individuals to file late claims. Government Code sections 911.4 through 911.8 govern such procedure. Section 911.4, subdivision (a) permits a party who fails to present its claim within the required six-month period to submit a written application to the public entity for leave to present its claim. (Gov. Code § 911.4(a).) Subdivision (b) requires this written application to be submitted "within a reasonable time not to exceed one year after the accrual of the cause of action." (Gov. Code § 911.4(b).)

Government Code section 911.6 governs how the public entity must handle the written applications for leave to file late claims. Subdivision (a) requires the Board to grant or deny the application within 45 days. It also provides a method by which the claimant and public entity may mutually extend such period.

Subdivision (b), at issue here, sets forth four categories of circumstances in which the public entity *must grant* the claimants application for leave to present its late claim: "The board *shall grant* the application where one or more of the following is applicable:...(2) The person who sustained the alleged injury, damage or loss was *a minor* during all of the time specified in Section 911.2 for the presentation of the claim." (Gov. Code § 911.6(b)(2), emphasis added.) For at least fifty years, this Court has interpreted subdivision (b)(2)'s language as mandatory. (*Hernandez v. County of Los Angeles* (1986) 42 Cal.3d 1020, 1028-1031, discussing *Tammen v. County of San Diego* (1967) 66 Cal.2d 468, 479-480 and *Williams v. Mariposa County Unified Sch. Dist.* (1978) 82 Cal.App.3d 843, 849, 851-852.)

Subdivision (c)'s catch-all language confuses the analysis, as this case exemplifies. The Court of Appeal found, notwithstanding subdivision (b)'s requirement that the public entity *shall grant* a minor's timely application for leave to present its late claim, subdivision (c) allows the Board to subvert that mandate. Subdivision (c) states, "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 or, if the period within which the board is required to act is extended by agreement pursuant to this section, the last day of the period specified in the agreement." (Gov. Code § 911.6(c).)

Government Code section 946.6 provides a procedure for petitioning the superior court for relief from the public entity's denial (explicit or "deemed") of an application for leave to present a late claim under Section 911.6. Subdivision (b) of Section 946.6 states, "The petition shall be filed within six months after the application to the board is denied or deemed to be denied pursuant to Section 911.6." (Gov. Code § 946.6(b).) Subdivision (c) requires the court to relieve the petitioner from the requirements of Section 945.4 under specified conditions (satisfied in this case).

B. Government Code section 911.6, subdivisions (b)(2) and (c) are irreconcilable concerning the board's ability to grant or deny a minor's application to file a late claim.

When construing any statute, the Court's task is to determine the Legislature's intent when it enacted the statute, "so that [it] may adopt the construction that best effectuates the purpose of the law." (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 625, quoting *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.) The inquiry begins with the statute's words, which ordinarily are "the most

reliable indicator of legislative intent." (*Hassan, supra,* 31 Cal.4th at 715.) The words should be given their "ordinary and usual meaning and should be construed in their statutory context." (*Ibid.*) "These canons [of statutory interpretation] generally preclude judicial construction that renders part of the statute "meaningless or inoperative."" (*Id.* at 715-716, quoting *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274.) Additionally, words should be given the same meaning throughout a code unless the Legislature has indicated otherwise. (*Id.* at 716, citing *People v. Roberge* (2003) 29 Cal.4th 979, 987.)

Applying these principles to subdivisions (b)(2) and (c) of Government Code section 911.6, it is impossible to reconcile the language without rendering one or the other "meaningless or inoperative." (*Hassan, supra,* 31 Cal.4th at 715-716.) Subdivision (b)(2) requires the Board to grant a minor's application to present a late claim under the circumstances presented in this case, whereas arguably Subdivision (c) considers the Board's inaction a denial of that application.

Both subdivisions use mandatory language "shall." For instance, Subdivision (b)(2) states, in pertinent part: "The board *shall grant* the application [to present a late claim] where...the following is applicable: ...(2) The person who sustained the alleged injury, damage or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim." (Gov. Code § 911.6(b)(2), emphasis added.) In stark contrast,

however, subdivision (c) appears to mandate the precise opposite result: "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...." (Gov. Code § 911.6(c), emphasis added.)

Attempting to reconcile the two provisions results in an absurdity. To "deem" the Board's inaction on plaintiff's application a "denial" allows the Board to violate subdivision (b)(2)'s mandate (i.e., to grant the minor's application).

Another canon of interpretation should resolve the absurd result. Code of Civil Procedure section 1859 states, in pertinent part: "In the construction of a statute the intention of the Legislature, [...], is to be pursued, if possible; and when a general and particular provision are inconsistent, the *latter* is paramount to the former. So a *particular intent will control a general one* that is inconsistent with it." (Emphasis added.) Here, subdivision (b) is extremely specific, defining four unique scenarios in which the Board "shall grant" a timely application for leave to present a late claim. In contrast, subdivision (c) is broadly written, general, and acts as a *default procedure* that applies to all cases in which the Board fails to act on the application. Because subdivision (c) acts as a default, and its language is not as specific as subdivision (b)(2) (i.e., applying only to claimants who were minors during the time specified in Section 911.2 for

the presentation of the claim), Subdivision (b)(2) should trump Subdivision (c).

However, even if this Court disagrees that this issue can be resolved based on the statutory language and canons of statutory interpretation, this Court's prior decisions, the Legislative history, and public policy, all mandate the identical result.

C. In the face of Section 911.6's irreconcilable language, legislative history and public policy mandate an interpretation of Section 911.6 that does not permit subdivision (c) to render subdivision (b) a nullity.

1. The Tort Claims Act should be liberally construed.

Where statutory language may reasonably be given more than one interpretation, "courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute." (*Shirk v. Vista Unified School District* (2007) 42 Cal.4th 201, 211.)

In *Viles v. State of California* (1967) 66 Cal.2d 24, the California Supreme Court discussed the evolution of the modern Government Tort Claims Act, including the legislature's overall goals for the 1963 enactment. Prior to the Act's enactment, public tort liability statutes "were not only inconsistent but []also provided a technical defense against the determination of liability on the merits." (66 Cal.2d at 30.) Although the 1963 Act shortened the time for presentation of claims against the state

from two years to 100 days,[2] it also expanded the situations where relief might be granted to persons who failed to comply with the statutory period through mistake, inadvertence, surprise or excusable neglect, unless the public entity would be prejudiced. (*Ibid.*) The 1963 Act also added the provision for administrative relief, "whereby the public entity was authorized to permit a late claim to be presented upon the same grounds as the granting of a petition by the court, in the hope that the public entity itself would, in a proper case, grant relief so that a court proceeding would be unnecessary." (*Ibid.*)

The Court further discussed the legislative intent of the Government Tort Claims Act:

> The 1963 legislation is remedial and should be *liberally construed.* Both the courts and Legislature have recognized that the labyrinth of claims statutes previously scattered throughout our statutes were traps for the unwary. (Citations.) An attempt has been made by the Legislature to remove such snares. Courts should not rebuild them by a too narrow interpretation of the new enactments.

(*Viles v. State of California* (1967) 66 Cal.2d 24, 31, quoting *Hobbs v. Northeast Sacramento County Sanitation Dis.* (1966) 240 Cal.App.2d 552, emphasis added.)

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[2] The 100-days was later amended to the current six-month period.

2. The Legislature intentionally treats minors with more leniency than other claimants, and intends the Board to grant minors' applications for leave to file late claims.

Although the claim provisions (Gov. Code §§ 911.2, 945.4) apply to minors, the Supreme Court has opined "they apply with *greater liberality* to minors, since under the provisions of section 911.4 and section 911.6, an application for leave to present a late claim made by a claimant who has been a minor throughout the entire [] claim presentation period Must be granted by the board." (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 883-884, italics added, original capitalization.)

The contrast of the Legislature's liberal treatment of minors versus general population is highlighted by another subdivision of Section 911.6(b). Section 911.6, subdivision (b)(1) requires the Board to grant the application where "The failure to present the claim was through mistake, inadvertence, surprise or excusable neglect and the public entity was not prejudiced in its defense of the claim by the failure to present the claim within the time specified in Section 911.2." Subdivision (b)(2) (applying to minors), does *not* require the minor to show that its delay in filing a timely claim did not prejudice the entity.

This distinction was deliberate. (*Hernandez, supra,* 42 Cal.3d at 1027-1028.) The Law Revision Commission (Recommendation Relating to Sovereign Immunity 1009-1010) articulated the Commission's intent to grant minors flexibility in filing late claims, *even at the Board's detriment*:

"In cases where the claimant failed to file his claim within the 100-day period because he was a minor, [...], the statute should permit the claim to be presented within one year after the cause of action accrued even though the public entity may be prejudiced by the late filing of the claim." (See 24 Cal. Government Tort Liability (Cont.Ed.Bar 1964) § 8.31, pps. 390-392].)

The Commission explained why:

> Although as a general principle the public entity should be entitled to prompt notice in order to have an opportunity to investigate the claim and correct or remedy the condition that gave rise to it, the Commission has concluded that, in these rare cases where it ordinarily would not be reasonable to expect the claimant to file a claim, the interest in requiring prompt notice should not be permitted to deprive the claimant or his personal representative of the cause of action, even though the entity might be prejudiced by the late filing. (Recommendation on Sovereign Immunity [4 Cal.L.Revision Comm'n Reports (1963) p. 1010]]; see also 24 Cal. Government Tort Liability (Cont.Ed.Bar 1964) § 8.31, pps. 390-392].).)

3. For fifty years, this Court has recognized the Legislature's intention to treat minors with more leniency than other litigants, and has interpreted the Tort Claims Act to realize that goal.

In *Tammen v. San Diego County* (1967) 66 Cal.2d 468, 479-480, this Court explicitly recognized the Legislature's intent in its 1963 Tort Claims Act to protect the rights of minors, even at the detriment of the public entity. *Tammen* even acknowledged "The language of the sections referred to [former §§ 715-716] was not enacted to penalize minors or to deprive them of their rights in cases

where adults may have slept on their rights – quite to the contrary the statutes are to protect minors." (*Id.* at p. 480.)

This protective interpretation was further explained and expanded in this Court's 1986 decision, *Hernandez, supra*, 42 Cal.3d at 1027-1031, when discussing Sections 911.4, 911.6, and 946.6. This Court stated the obvious: "it is clear from the face of the late-claim provisions that the Legislature intended to establish different standards for the consideration of late-claim applications that are filed on behalf of injured adults and those that are filed on behalf of injured minors." (*Id.* at 1027.) Analyzing Sections 911.6 and 946.6, this Court further acknowledged, "Past cases- stretching back over two decades – have uniformly interpreted the provisions of sections 911.6 and 946.6 and their statutory predecessors as indicating that the Legislature intended to accord special solicitude to the claims of injured minors, and generally intended to require a public entity to accept a late claim filed on behalf of a minor so long as the application is filed with the entity within one year of the accrual of the cause of action." (*Id.* at 1028.)

4. Public policy supports liberal treatment of minors who file timely applications to file a late claim over technical traps for the unwary.

The consequences of an individual's failure to timely file a petition for an order pursuant to Government Code section 946.6 (unless an exception applies) are fatal to the claim. However, California has a strong public policy favoring trial on the merits, over "technical rules that otherwise provide a trap for the unwary claimant." (*Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 275-276, quoting *Viles, supra,* 66 Cal.2d at pp. 32-33.) "The policy favoring trial on the merits is *the* primary policy underlying section 946.6." (*Bettencourt, supra,* 42 Cal.3d at 276, emphasis added.)

Here, the court's interpretation of Section 911.6, subdivision (c)'s "deemed denial" language superseding subdivision (b)(2)'s "shall grant" language, triggered the six-month clock for filing a petition under Section 946.6. But this case should never have gotten to a Section 946.6 petition stage at all because the Board was required to grant appellant's application. (Gov. Code § 911.6(b)(2).)

The "deemed denied" language of Section 911.6, subdivision (c), automatically triggered after 45 days, was intended to *protect* the claimant's ability to sue a non-responsive governmental entity – not thwart it. The Commission recommended 45-days, and the ability to expand that time, to "provide the parties with a flexible time limit within which to negotiate or settle claims, *yet the claimant will not be unduly delayed in the commencement of his action* if litigation becomes necessary."

(Recommendation on Sovereign Immunity [4 Cal.L.Revision Comm'n Reports (1963) p. 1011]], emphasis added.) Thus, the 45-day limit that commences Section 946.6's six-month statutory period is to benefit the plaintiff, not the unresponsive public entity.

Here, the court's ruling favored an interpretation that effectively resolved plaintiff's claims on a technicality rather than the merits and at the plaintiff's detriment. This interpretation also violated public policy.

D. The Court of Appeal's interpretation of Section 911.6 nullifies subdivision (b)(2).

The Court of Appeal concluded there is no conflict between subdivisions (b)(2) and (c) of Section 911.6 because the section "anticipates that a board may act on an application by granting or denying it, or that a board may do nothing at all." (Opn. at p. 9.) The court correctly recognizes that, if the board acts, it shall grant the minor's application. (Opn. at p. 9.) However, the court incorrectly concludes that if the board fails to act on a minor's timely application, section 911.6(c) controls and the application is deemed denied. (Opn. at p. 9.) The court reasons that Section 911.6(c) makes no exception for the circumstances presented in subdivision (b). (Opn. at p. 9.)

However, as previously discussed, subdivision (b) *is* the limited exception to subdivision (c). Under those specific conditions, the board has no discretion to deny a claim, either explicitly or implicitly by inaction.

II.

THE LEGISLATURE NEVER INTENDED FOR MINOR APPLICANTS TO BE DEPRIVED OF GOVERNMENT CODE SECTION 911.8'S NOTICE PROTECTION.

Government Code section 911.8, subdivision (a) provides that "[w]ritten notice of the board's action upon the application" must be given in the prescribed manner. "If the application is denied," the notice must include a warning substantially in the form set forth in section 911.8, subdivision (b). The statute requires bold font to emphatically and unmistakably warn the claimant that Government Code section 946.6's six-month statute of limitations has been triggered:

> "**WARNING**"
> "If you wish to file a court action on this matter, you must first petition the appropriate court for an order relieving you from the provisions of Government Code Section 945.4 (claims presentation requirement). See Government Code Section 946.6. Such petition must be filed with the court within six (6) months from the date your application for leave to present a late claim was denied."
> "You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately."
> (Gov. Code § 911.8(b).)

Here, the Court of Appeal concluded that this language means the Board is required to give written notice only when *explicitly* denying a claimant's application, but, if the board's inaction is "deemed" a denial of the claimant's application (i.e., by failing to act within the time set forth in section 911.6(c)), the board is *not* required to provide such notice. (Opn. at

pp. 7, 18-19.) The Court of Appeal reasoned the word "action" in subdivision (a) of section 911.8 means that respondent was "not required under the statutory framework to give written notice of its *inaction* upon [appellant's] application." (Opn. p. 18.) Thus, under the Court of Appeal's interpretation and analysis, appellant was not required to receive notice under section 911.8 because the board denied his claim as a matter of law, by inaction, rather than explicitly.

The Court of Appeal did not cite any law or Legislative history to support its narrow interpretation of Section 911.8. However, it argued for situations where the Board implicitly denies the application, the claimant can easily calculate the last day for filing a petition. (Modified Opn. p. 2.) But the last day for filing a petition can *always* be easily calculated from the date the Board acts on the application as exemplified by the fact that section 946.6's six-month period is triggered by the date of the Board's action, not from the date of its notice of such action. (*Rason v. Santa Barbara City Housing Authority* (1988) 201 Cal.App.3d 817, 825.) Further, the court's interpretation is at best, troubling and undermines the protections intended for minors whose applications the Board was required to grant.

The Court of Appeal's interpretation rewards and incentivizes governmental shirking of its statutorily mandated responsibilities. There is no dispute that, under Section 911.6, subdivision (b), had the Board "acted"

on appellant's application, the Board was required to *grant* appellant's application. (*Whitfield, supra,* 10 Cal.3d at 883-884.) And, had the Board improperly denied the application, explicitly or implicitly, section 946.6 offers claimants the opportunity to *correct* the board's mistaken denial.

But it only does so if the applicant *timely* petitions the superior court. Thus, the innocent minor whose application the Board simply ignores, is materially disadvantaged in his ability to timely petition the superior court, as compared to the innocent minor upon whose application the Board takes action. The latter receives section 911.8's protection; the former does not. And the distinction is entirely up to the Board, not the minor.

It is *no answer* that both litigants may equally read section 946.6 and learn of the six-month statute of limitations. The statutory provisions of the Tort Claims Act must be read together, and if the notice afforded by section 946.6's language had been deemed adequate by the Legislature, the Legislature would have never passed section 911.8. In other words, if the notice section 946.6 affords is adequate, why did the Legislature feel the need to offer *any* litigants notice that their six-month statute of limitations has commenced? Technically speaking, section 911.8 is redundant of the statute of limitations portion of section 946.6.

The answer is not, as the Court of Appeal suggests at page 18 of its opinion, based on whether the minor has attorney representation. If that were the case, Section 911.8 would only apply to unrepresented claimants.

But the section applies to *all* claimants – represented and pro per – whose applications have been explicitly denied by the Board.

The answer must be that the Legislature recognized that the Section 946.6's six-month statute language was likely to create "snares" or traps for the unwary claimant (as it did in this case), and by including section 911.8, intentionally created redundancy to warn litigants and prevent depriving them of their day in court due to these technicalities. (See e.g., *Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 275-276; *Viles v. State of California* (1967) 66 Cal.2d 24, 31.) "[T]he obvious intent of subdivision (b) of section 911.8 was to give an unsuccessful applicant the information that applicant would need in order to file a timely section 946.6 petition." (*D.C. v. Oakdale Joint Unified School Dist.* (2012) 203 Cal.App.4th 1572, 1580.)

Under the Court of Appeal's interpretation of Section 911.8, the public entity would lack motivation to ever take any "action" on an application, especially because the public entity's inaction excuses it from providing notice of the short limitations period. It is the *minor,* not the public entity, who benefits from such notice, and the *public entity* that benefits from the minor's lack thereof (because when the minor fails to timely file his section 946.6 petition, the public entity never has to pay on the underlying claim). This result *defies* the Legislature's intention to protect minors. Indeed, the Court of Appeal's interpretation leaves the

minor claimant (who has special standing under the government claim statutory scheme and whose claim was improperly denied), with diminished rights, because not only is his application improperly denied, but his right to fair notice is stolen.

The statutory scheme, as interpreted by the Court of Appeal, lacks consistency because the public entity has power to control which minor does and which minor does not obtain explicit notice of an improperly rejected late claim. The Court of Appeal's interpretation would logically influence public entities to counsel their employees to NEVER explicitly act on a minor's claim.

III.

A MINOR WHO HAS FILED A TIMELY APPLICATION TO FILE A LATE CLAIM *IS NOT REQUIRED* TO PETITION THE SUPERIOR COURT UNDER GOVERNMENT CODE SECTION 946.6 IF THE BOARD FAILS TO COMPLY WITH SECTION 911.6(B)(2)'S MANDATE TO GRANT THE APPLICATION.

This Court requested briefing on whether a minor must petition for relief from Government Code section 945.4's claim requirement, as set forth in Government Code section 946.6, if he has submitted a timely application for leave to present a late claim under Government Code section 911.6, subdivision (b)(2). The answer should be a resounding "no."

In addition to the ordinary principles of statutory construction already addressed in Arguments I and II, supra, there are three additional, independent, alternative bases supporting this answer. These explanations require reviewing the interplay of several provisions of the Government Code and cases construing those sections. However, before proceeding, it may be helpful to revisit the big picture. 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* (2007) 42 Cal.4th 730, 738.)

When a minor submits a timely application for leave to file a late claim, pursuant to Government Code section 911.4, the proposed claim

must be attached. (Gov. Code § 911.4(b).) Thus, no later than one year from the accrued injury, the public entity receives timely written notice of a minor's claim and sufficient information to investigate and, if desired, settle it. And, as previously discussed, the Board has no discretion and is required to grant a minor's timely application to file a late claim under Government Code section 911.6, subdivision (b). (*Hernandez, supra,* 42 Cal.3d at 1028; *Tammen, supra,* 66 Cal.2d at 479-480.)

A. Basis One: Section 946.6's six-month statutory period was *never* triggered because the Board implicitly granted appellant's timely application to file a late claim.

The Court of Appeal expressed concern that our interpretation of Sections 911.6, subdivisions (b)(2) and (c) places a plaintiff's application into limbo. (Opn. at p. 12.) Not so. So what happens 45 days after the minor submits his application to the Board, and the Board has not acted? Pursuant to subdivision (b), the application should be "deemed granted" under such a scenario.

Despite section 911.6's language, such an implicit *grant* of an application was recognized as a possibility by Division One of the Fourth Appellate District in *Harvey v. City of Holtville* (1967) 252 Cal.App.2d 595, 597 ["By its action the council impliedly granted plaintiff's application to make a late presentation"].) Although *Harvey*'s facts were materially distinguishable from our case, *Harvey*'s significance is not its

application of the law as much as its acknowledgment of what the law allows. Where a Board is required to grant a minor's timely application for leave to file a late claim, its inaction (coupled by its refusal to send notice of its denial under Section 911.8) may properly be construed as an implicit grant of the application and implicit denial of the minor's claim.

Admittedly, our review of case law has not revealed circumstances (other than *Harvey*'s recognition of that possibility) in which such analysis has been applied. However, our case presents issues of first impression.

The rest of the analysis is simple.

Under Government Code section 912.2, if an application to file a late claim is granted, the claim is deemed to have been presented to the Board upon the day the leave is granted. In this case, that would have been December 9, 2012 (i.e., the 45th day after appellant filed his timely application on October 24, 2012).

Under Government Code section 912.4, if the Board fails to act on a *claim* (as opposed to an *application* to file a late claim), the claim shall be deemed to have been rejected on the last day of the period within which the Board was required to act upon the claim (i.e., 45 days). Government Code section 913, subdivision (a) requires *written* notice of the action (or *inaction that is deemed rejection under Section 912.4)* in the manner prescribed by Section 915.4.

If the Board provides such written notice, the suit must be presented

in state court within six months of that notice in accordance with Government Code section 913. (Gov. Code § 945.6(a)(1).) *However,* if written notice is not given in accordance with Section 913, the suit must be presented in state court *within two years from the accrual of the cause of action.* (Gov. Code § 945.6(a)(2).)

Applying these statutes to this case, (a) appellant satisfied his requirements under the Tort Claims Act, (b) appellant's judicial complaint was timely, and (c) appellant's cautionary section 946.6 petition is moot:

- Appellant was diagnosed with double-concussion syndrome on October 31, 2011. (1 C.T. 12, Opn. at 13-14.)
- Appellant filed a timely application to file a late claim on October, 24, 2012, within one year of his double-concussion syndrome diagnosis. – Gov. Code §§ 911.4, 911.6(b)(2); *Hernandez, supra,* 42 Cal.3d at 1028. (1 C.T. 12-13, 15, Opn. at p. 4.)
- Appellant's application was deemed granted on December 9, 2012 (i.e., 45 days after he filed his application), and thus his claim was deemed to be presented to the Board on that day. – *Harvey, supra,* 252 Cal.App.2d at 597; Gov. Code § 912.2.
- The Board did not take any action on appellant's claim, thus denying his claim as a matter of law. – Gov. Code § 912.4. (1 C.T. 13, Opn. at p. 4.)

- The Board did not provide appellant written notice of its inaction, as required. – Gov. Code § 913. (1 C.T. 13, Opn. at p. 4.)
- Appellant was therefore required to file his lawsuit in superior court within two years of the accrual of his personal injury cause of action. – Gov. Code § 945.6(a)(2).
- Appellant filed his personal injury lawsuit in Orange County Superior Court on October 28, 2013, which was within two years of the accrual of his action (i.e., October 31, 2011). – 1 C.T. 2 [Register of Actions #2].)

The Court of Appeal opined that because appellant filed a petition under section 946.6, he does not take the position that his application was granted. (Opn. at p. 12.) Wrong. Appellant filed his petition under an abundance of caution, while *also* filing his judicial complaint on the same day (having not received notice from the Board under Section 911.8 of either its acceptance or denial of his application). Appellant should not be penalized for covering his bases. That the petition was denied is ultimately irrelevant because it was never necessary in the first place. (See e.g., *E.M. v. Los Angeles Unified School District* (2011) 194 Cal.App.4th 736, 748 [concluding plaintiff's belated petition for relief under section 946.6 was an "irrelevancy" because the late claim application was timely and satisfied the claims statute].)

B. Basis Two: Where the Board has no discretion to deny a minor's timely application to file a late claim, such application (coupled with the attached claim) should be deemed a "timely" claim under Government Code section 911.2.

A second, independent reason exists why a minor need not petition for relief from Government Code section 945.4's claim requirement, as set forth in Government Code section 946.6, if he has submitted a timely application for leave to present a late claim under Government Code section 911.6, subdivision (b)(2). Indeed, the analysis completely bypasses the interplay between Government Code section 911.6's subdivisions (b)(2) and (c). Simply, this Court should deem a minor's timely application to file a late claim to constitute a timely claim under Government Code section 911.2.

In other words, where (as here) it is undisputed that a minor has filed a timely application to file a late claim (i.e., within one year of the accrual of the action), there is *no* purpose for subjecting the minor to the procedural pitfalls and technical traps of Sections 911.6, 911.8, and 946.6 just to secure his right to present the very claim *he has already presented* to the public entity (i.e., by attaching his claim to his application as required under Section 911.4).

Although this solution does not strictly follow the statutory language, it is nevertheless consistent with, and a logical extension of, this

Court's analysis and holding in *Hernandez, supra,* 42 Cal.3d at 1029-1031. *Hernandez* analyzed the meaning and applicability of the "reasonable time" language in Government Code section 911.4, subdivision (b), as applied to late claim applications by minors.[3] This Court concluded when a late-claim application is filed on behalf of a minor within a year of the accrual of the minor's cause of action, and when any delay in filing the claim is not attributable to the minor himself, the governmental entity is required to grant permission to file the claim and may not deny the application on the basis of a delay attributable to the minor's parents or attorney. (*Hernandez, supra,* 42 Cal.3d at 1027, 1030-1031.)

This Court recognized as early as 1966 that courts have "interpreted sections 911.6 and 946.6 and their statutory predecessors as indicating that the Legislature intended to accord special solicitude to the claims of injured minors, and generally intended to require a public entity to accept a late claim filed on behalf of a minor so long as the application is filed with the entity within one year of the accrual of the cause of action." (*Hernandez, supra,* 42 Cal.3d at 1028, citations omitted.) This Court further concluded, in light of the "clear indication in sections 911.6 and 946.6 that the

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[3] Government Code section 911.4, subdivision (b) states: "The application shall be presented to the public entity as provided in Article 2 (commencing with Section 915) *within a reasonable time* not to exceed one year after the accrual of the cause of action and shall state the reason for the delay in presenting the claim. The proposed claim shall be attached to the application." Emphasis added.

Legislature intended to apply an 'excusable neglect' qualification to late claims by adults but *not* to late claims by minors...that the special solicitude for late claims filed on behalf of minors should be realized by holding that – at least for purposes of the 'reasonable time' requirement – the neglect or ignorance of the minor's parents or attorney will not be attributed to the minor so as to bar a late-claim application that is filed within one year of the accrual of the minor's action." (*Id.* at 1029.)

This Court expanded on its analysis. It recognized that the 1963 claims act was intended to protect the rights of minor, even at the prejudice of the public entity. (*Hernandez, supra,* 42 Cal.3d at 1029.) It further acknowledged the statutory language was "not enacted to penalize minors or deprive them of their rights in cases where adults may have slept on their rights – quite to the contrary the statutes are to protect minors." (*Ibid.*) This Court further approved of *Williams v. Mariposa County Unified Sch. Dist.*'s finding that Subdivision (c)(2) of Section 946.6, which tracks the language of Subdivision (b)(2) of Section 911.6, "was not enacted to penalize minors or to deprive them of their rights in cases where adults may have slept on a minor's rights. [Citations.] **The rights of a minor under that provision should not be lost by failure or neglect on the part of a third party over whose actions the minor has no effective control**. [Citation.] '[T]he only determination for the court is whether *the minor acted diligently* in seeking relief from his [or her] failure to file [a claim] within" the statutory period.

(*Id.* at 1029-1030, bold emphasis added.) The *Williams* court refused to attribute the lack of diligence of the minor's mother and attorney to the minor, so as to defeat his claim. (*Id.* at 1030, citing 82 Cal.App.3d at 851-852.)

Hernandez shows in cases where a minor has filed his timely application to file his late claim *within one year* of the accrual of his cause of action, he has legally acted diligently. Why then should the minor be penalized for the lack of diligence of adults who were required to grant his application? Why should the minor be penalized for the lack of diligence of adults who were required to warn him of his rights and time constraints for petitioning a superior court for relief? Why should the minor be penalized for his attorney's reasonable expectation and reliance on the assumption that the public entity will do its job and grant the application? Under *Hernandez*'s reasoning, the minor's claim should not be defeated. He fulfilled his legal duty to notify the Board; this Court should deem his timely application to be a timely claim under Section 911.2 (if it does not deem the Board's inaction to be an implicit grant of the application and denial of the claim, as argued in Section A, supra).

C. Basis Three: Where a minor files a timely application and receives no notice of the Board's action or inaction, relief from Section 946.6's six-month statute of limitations should be granted based upon equitable principles, due process, and Legislative intent.

Assuming, arguendo, this Court agrees with the Court of Appeal that a Board's inaction under Section 911.6(c) is deemed an implicit denial of the minor's timely application (i.e., triggering Section 946.6's six-month statute of limitations), this Court should likewise recognize an exception for minors who, like appellant, do not receive notice under Section 911.8. As previously articulated, a minor claimant who files his timely application to file a late claim under Section 911.4 has *satisfied his duty* to give reasonable notice to the public entity of his claim. Yet, where the public entity not only fails to do *its* duty to explicitly *grant* his application (Gov. Code § 911.6(b)(2)), and *also* fails to do its duty to explicitly *notify* the minor of its implicit denial (Gov. Code § 911.8), the public entity has placed the minor in peril of missing his opportunity for relief.

The Tort Claims Act embraces the application of equitable principles, where appropriate. (See e.g., *Rand v. Andreatta* (1964) 60 Cal.2d 846, 849-850 [holding equitable estoppel is available to excuse entire lack of compliance]; *Sheeley v. City of Santa Clara* (1963) 215 Cal.App.2d 83 [applying doctrine of substantial compliance]; *Addison v. State of California* (1978) 21 Cal.3d 313, 316 [applying doctrine of equitable tolling to six-month period under former Government Code

section 945.6].)

In *Rason, supra,* 201 Cal.App.3d 817, the Second Appellate District Court of Appeal anticipated a scenario much like our case presents. That case involved distinguishable facts, including analysis under subdivision (b)(1), not (b)(2), of Section 911.6, and involving the Board's *explicit* denial of the application to file a late claim. *Rason* held Section 946.6's six-month period accrued from the date of the denial of the application, not the date of the notice. (201 Cal.App.3d at 825.) In so-concluding, the court relied on the fact that the delay between the Board's denial of the application versus the Board's notice of the denial of the application, was short (e.g., approximately one month, leaving five months to file their 946.6 petition). (*Ibid.*)

Relevant here, *Rason* contrasted the facts before it with a hypothetical scenario in which notice of a denial was given considerably later. The court opined, "If such a delay was considerable, due process might estop the public entity from asserting that the six-month period ran from the date action was taken. For example, if notice of a denial is given five months and twenty-eight days later, absent unusual circumstances, the public entity would be estopped from blocking a claim due to the running of the six-month period. The claimant would be granted a reasonable period of time in which to file a petition." (*Rason, supra,* 201 Cal.App.3d at 825.) Such reasoning applies with even *greater* force here, where appellant never

received *any notice* of the Board's decision.

A primary basis for prior courts upholding the constitutionality of the Tort Claims Act is the notice claimants are afforded of the limitations on their rights. (See e.g., *Stanley v. City and County of San Francisco* (1975) 48 Cal.App.3d 575, 578-580.) Yet, here, appellant received none. And the applicable statutes are not only rife with procedural traps for the unwary, but were arbitrary and ambiguous. Even if this Court does not believe that the statutory scheme, as applied in this case, rose to the level of a due process violation, it nevertheless supports a finding of equitable estoppel from requiring appellant to satisfying Section 946.6's six-month statutory period.

Although the Court of Appeal found the doctrine of equitable tolling inapplicable, its basis was its erroneous conclusion that appellant did not pursue an alternative remedy to his section 946.6 petition. (Opn. at p. 17-18.) The Court was mistaken. As previously discussed, appellant simultaneously filed his judicial complaint in the Orange County Superior Court when he filed his Section 946.6 Petition. (See 1 C.T. 2 [Register of Actions #: 2, 4].) Thus, contrary to its belief, the Court of Appeal held the power to suspend or extend the statute of limitations as necessary to ensure fundamental practicality or fairness. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370.)

The California Supreme Court has applied equitable tolling "in carefully considered situations to prevent the unjust technical forfeiture of causes of action, where the defendant would suffer no prejudice." (*Ibid.*, citing e.g., *Lambert v. Commonwealth Land Title Ins. Co.* (1991) 53 Cal.3d 1072, 1080, [claim against title insurer accrues upon insurer's refusal to defend title, but two-year limitations period is equitably tolled until underlying title action is resolved]; *Prudential–LMI Com. Insurance v. Superior Court* (1990) 51 Cal.3d 674, 687–693 [one-year period to sue on casualty insurance policy begins upon "inception of the loss," but is equitably tolled from timely notice of loss until insurer denies claim]; *Addison, supra,* 21 Cal.3d at 317–321 [six-month period for state court suit against public agency was equitably tolled during plaintiffs' timely federal suit raising both federal and state claims]; *Elkins v. Derby* (1974) 12 Cal.3d 410, 414–420 [one-year period for personal injury action was tolled while plaintiff, acting in good faith, pursued worker's compensation remedy against defendant]; *Bollinger v. National Fire Ins. Co.* (1944) 25 Cal.2d 399, 410–412 [15–month period to sue on fire insurance policy was tolled while timely prior action, erroneously dismissed as premature, was pending].)

As these cases illustrate, the effect of equitable tolling is that the limitations period *stops running* during the tolling event, and begins to run again only when the tolling event has concluded. (*Lantzy, supra,* 31 Cal.4th

at 370-371.) As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred. (*Ibid.*)

The equitable tolling doctrine "fosters the policy of the law of this state which favors avoiding forfeitures and allowing good faith litigants their day in court." (*Addison, supra,* 21 Cal.3d at 320-321.) Its application requires (1) timely notice and (2) lack of prejudice to the defendant, and (3) reasonable and good faith conduct on the part of the plaintiff. (*Id.* at p. 319.) "As with other general equitable principles, application of the equitable tolling doctrine requires a balancing of the injustice to the plaintiff occasioned by the bar of his claim against the effect upon the important public interest or policy expressed by the ... limitations statute." (*Id.* at 321.)

Appellant not only provided the Board timely notice of his claim (eliminating any potential prejudice to the Board), he acted reasonably and in good faith. His application to the Board for leave to file a late claim was timely made. (1 C.T. 12, 15; Gov. Code §§ 911.2, 911.4, 911.6.) He understood the Government Code Section 911.6(b)(2) required the Board to grant his application. He never received notification pursuant to Government Code Section 911.8, that the Board denied his claim. He reasonably relied on the specific language of Section 911.6(b) instead of the

more general language of Section 911.6(c). When he had not received notice that the Board had granted his application, he preemptively (so he thought) petitioned the court for relief, so as to preserve his ability to pursue his claims prior to the passing of the two-year statute of limitations applicable to personal injury claims. He simultaneously filed his judicial complaint, also to preserve his claims. This conduct showed good faith in attempting to provide both notice of his claim to defendant, and also to comply with the statutory limitations period. In short, although this Court may ultimately conclude plaintiff was wrong in his interpretation of Section 911.6 and whether Section 946.6's six-month period was ever even triggered, plaintiff's interpretation and conduct were nevertheless founded upon his reasonable, good faith, reading of the statutory language. The appellate court had the authority and discretion – despite its belief that it did not – to grant appellant relief through equitable tolling and/or equitable estoppel (when appellant filed a timely application to file his late claim and never received notice from the Board that his application or claim was rejected).

Equitable relief is appropriate here. It is further supported by the Legislative history and public policy underlying the Tort Claims Act. The Tort Claims Act was created in 1963, in part, to authorize public entities to grant applications like appellant's, "in the hope that the public entity itself would, in a proper case, grant relief so that a court proceeding would be

unnecessary." (*Viles, supra,* 66 Cal.2d at 30.) The Court of Appeal's interpretation of Section 911.6 fundamentally undermines that goal. It also undermines the Legislature's intent to apply the provisions of the Tort Claims Act more liberally to minors (*Whitfield, supra,* 10 Cal.3d at 883-884), to not punish diligent minors for the actions (or inactions) of adults (*Hernandez, supra,* 42 Cal.3d at 1028-1031), and to liberally construe the Tort Claims Act (*Viles, supra,* 66 Cal.2d at 31).

D. Nullifying section 946.6's requirements in cases like this involving minors, would not open the floodgates for other litigants under the other subsections of Section 911.6(b).

It is important to note, should this Court apply any of the interpretations offered in Sections (A) through (C) above, that such application would not open the floodgates or create an exception that swallows the other provisions of Section 911.6. What makes this case so unique is the combination of a minor litigant, and the Board's complete lack of discretion to act on his timely application. The person is either a minor or not; no discretion is necessary to make that determination, and therefore, whether subdivision (b)(2) applies may be determined as a matter of law without the Board's exercise of discretion or resolution of disputed facts.

In contrast to subdivision (b)(2), subdivisions (b)(1) and (b)(3) require predicate findings that the Board must first consider and resolve to

determine whether the applicant even falls within those subdivisions. If the applicant does not satisfy the requirements for (b)(1) or (b)(3), then the Board is under no obligation whatsoever to grant the application.

For example, subdivision (b)(1) requires the Board to grant an application where "[t]he failure to present the claim was through mistake, inadvertence, surprise or excusable neglect and the public entity was not prejudiced in its defense of the claim by the failure to present the claim within the time specified in Section 911.2." (Gov. Code § 911.6(b)(1).) The Board, necessarily, must evaluate the specific facts of the case, make a finding as to mistake/inadvertence/surprise/excusable neglect, *and* balance the prejudice to the public entity. During such evaluation, the Board may determine the applicant does not actually satisfy (b)(1) and thus, that the Board may deny (explicitly or implicitly) the application under subdivision (c). That determination (that the applicant did not fall within (b)(1)) may be properly reviewed by a court through a Section 946.6 petition.

Similarly, subdivision (b)(3) requires the Board to grant an application where, "[t]he person who sustained the alleged injury, damage or loss 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." (Gov. Code, § 911.6(b)(3).) Determining physical or mental incapacity is not as simple as comparing someone's birth date to the date of his application. Of course, it

could be obvious (i.e., if someone were in a vegetative state), but more often, capacity to sue – especially mental capacity – requires reviewing opinions of medical experts. Again, the Board must make predicate findings whether the applicant satisfies the requirement of (b)(3). Its conclusion that (b)(3) does not apply may also be subject to review under a section 946.6 petition.[4]

In other words, it would be consistent with the Legislative intent behind Section 911.6(b) to exempt minors who filed timely applications (and especially those minors who do not receive notice under Section 911.8) from Section 946.6's six-month statutory requirement, but not to exempt other categories of applicants under Section 911.6(b).[5] There was no basis for the Board to explicitly deny appellant's timely application, and therefore, its implicit denial, even if technically allowed (it wasn't), was wrong. It is the discretion the Board holds to make predicate factual determinations, and thus to grant or deny an application, that distinguishes minors applicants from other applicants.

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[4] In contrast, Subdivision (b)(4) is similar to subdivision (b)(2). That provision requires the Board to grant an application where, "[t]he person who sustained the alleged injury, damage or loss died before the expiration of the time specified in Section 911.2 for the presentation of the claim." (Gov. Code, § 911.6(b)(4).) Like determining minority, determining the date of a person's death is as simple and non-discretionary as comparing the date on a death certificate to the date of the application.

[5] We offer no opinion on subdivision (b)(4) because the issue is not before this Court.

For this reason, the Court of Appeal wrongly concluded *Kendrick v. City of La Mirada* (1969) 272 Cal.App.2d 325, 329 resolved the issue and supports the proposition that an application for leave to present a late claim may be denied by operation of law notwithstanding the language of section 911.6(b). (Opn. at pp. 10-12.) *Kendrick* involved an application under Subdivision (b)(1), and the court deemed the Board's inaction as an implicit denial, triggering Section 946.6's statute of limitations. Superior court involvement was necessary because the subdivision (b)(1) analysis cannot be determined as a matter of law. It necessarily requires resolution of disputed facts and balancing of interests. Not so with our case.

Regardless, even had *Kendrick* applied the statute in the manner analyzed by the Court of Appeal in this case, the *Kendrick* opinion did not purport to address or resolve the inconsistent language of subdivisions (b) and (c). But even if it did, "Court-made error should not be shielded from correction." (*People v. King* (1993) 5 Cal.4th 59, 78.) *Kendrick, supra*, does not bind this Court (see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and in fact, *Kendrick* exemplifies why, in absence of this Court's intervention, lower courts will continue to apply an interpretation that nullifies the effect of subdivision (b) of the statute.

E. The Court of Appeal, Second Appellate District, offered well-reasoned guidance for this Court in *E.M. v. Los Angeles Unified School Dist.*

The court in our case disagreed with the Second Appellate District Court of Appeal's decision, *E.M. v. Los Angeles Unified School Dist.* (2011) 194 Cal.App.4th 736, to the extent that it stands for the proposition that a plaintiff who was a minor at the time the injuries were suffered satisfies the claim requirement of section 945.4 simply by presenting an application for leave to present a late claim under section 911.6(b)(2). (Opn. at p. 17.) However, we believe *E.M.* was not only better-reasoned, it also reflects this Court's long-standing explicit intention to protect minors.

E.M. carefully reviewed this Court's prior decision in *Hernandez, supra,* 42 Cal.3d 1020, including this Court's consistent analysis over the past fifty years broadly interpreting and applying the claims act provisions to minors. (*E.M., supra,* 194 Cal.App.4th at 746-747.) Like appellant, plaintiff E.M. was a minor at all relevant times and filed a timely application to file a late claim. (*Id.* at 747.) Unlike appellant, however, the Board explicitly denied E.M.'s application and notified her of that decision. (*Ibid.*) *E.M.* filed her judicial claim within six months of the Board's rejection of her application, under Section 945.6(a)(1). (*Id.* at 748.) She eventually filed an untimely Section 946.6 petition. (*Ibid.*) The court determined that E.M. satisfied *her* requirements under the Tort Claims Act: she had presented her claim to the public entity and had the claim acted

upon by the entity, and her application to file a late claim was timely. (*Id.* at 747, 749.)

The court explained why: "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. [Citation.] 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." (194 Cal.App.4th at 748.)

In reaching this conclusion, the court found E.M.'s untimely section 946.6 petition to be *irrelevant, not fatal*, because E.M.'s judicial complaint was timely filed. (194 Cal.App.4th at 748-749.) This logic applies with equal force to our case. The only significant difference between *E.M.* and our case is one of written notice by the public entity. In *E.M.*, the public entity explicitly notified E.M. of the denial of her application (i.e., and thus, also of her claim), triggering Section 945.6(a)(1)'s six-month statutory period in which to file the judicial complaint. Here, the Board never notified appellant, triggering Section 945.6(a)(2)'s two-year statutory

period, not (a)(1)'s six-month period. Appellant's filing of his judicial complaint on October 28, 2013 was timely under Section 945.6(a)(2).

CONCLUSION

For all of the foregoing reasons, we respectfully urge this Court to reverse the trial court's and Court of Appeal's judgments.

Dated: March 9, 2016

Respectfully submitted,

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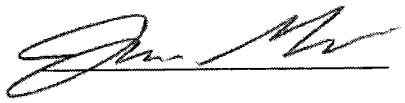
CERTIFICATE OF WORD COUNT
(California Rule of Court 8.520(c)(1).)

Pursuant to California Rules of Court, Rule 8.520(c)(1), the text of this Opening Brief on the Merits, generated using Microsoft Word for Mac 2011, contains 10,165 words, including footnotes.

I certify under penalty of perjury that the foregoing is true and correct. Executed this 9th day of March, 2016, at Westlake Village, California.



Janet R. Gusdorff

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 18 and am not a party to the within action; my business address is 4607 Lakeview Canyon Road, Suite 375, Westlake Village, California 91361.

On March 9, 2016, I caused the foregoing documents described as: **OPENING BRIEF ON THE MERITS**, to be served on the following entities or individuals:

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Respondent in pro per

Hon. Kirk Nakamura, Dept. C15
Orange County Superior Court
700 Civil Center Drive West
Santa Ana, CA 92701
Trial court judge

Clerk, California Court of Appeal
Fourth Appellate District, Division 3
601 West Santa Ana Blvd.
Santa Ana, CA 92701

XX Mail by submitting a sealed envelope with postage fully prepaid to the United States Postal Service.

Clerk, California Supreme Court
Clerk, California Court of Appeal, Fourth Appellate District, Division Three

XX Electronic Service by using the Supreme Court's e-submission form on its website.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed March 9, 2016 at Westlake Village, California.

Janet Gusdorff