S256665

IN THE
SUPREME COURT OF CALIFORNIA

LUIS SHALABI

Plaintiff and Appellant

v.

CITY OF FONTANA, et al.

Defendants and Respondents.

REVIEW OF A DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION TWO, CASE NO. E069671
SAN BERNARDINO COUNTY SUP. CT., CASE NO.: CIVDS1314694

RESPONDENTS' OPENING BRIEF ON THE MERITS

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I. ISSUE PRESENTED

Code of Civil Procedure § 12 provides: "The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded." In cases where the statute of limitations is tolled, is the first day after tolling ends included or excluded in calculating whether an action is timely filed?

II. INTRODUCTION

Relying on this Court's opinion in Ganahl v. Soher, 5 P. 80 (Cal. 1884) ("Ganahl"), the Superior Court entered a defense judgment based on California's two-year statute of limitations. See, Code Civ. Pro., §§ 312, 335, 335.1. The plaintiff was a minor when the cause of action accrued, and the statute of limitation was tolled during his minority under Code of Civ. Proc. § 352. Counting the plaintiff's 18th birthday, as required by Ganahl, the plaintiff filed his action two years and one day after tolling had expired.

The Court of Appeal reversed, declining to follow Ganahl and relying on Code of Civ. Proc. § 12 to grant the Plaintiff one extra day: the day after tolling expired. This Court granted review. As discussed below, the Court of Appeal erred and this Court should uphold Ganahl, which follows the Legislature's unambiguous instructions on how to count statutes of limitations deadlines.

III. SUMMARY OF ARGUMENT

Code of Civil Procedure § 12 provides: "The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded."

In the litigation context, § 12 is designed to give parties the full measure of days to satisfy statutory deadlines. Thus, partial days are excluded from the count towards expiration of a litigation deadline. See, Price v. Whitman, 8 Cal. 412, 417 (1857)("[A]s a fraction of a day cannot be counted, by excluding the first and counting the last day, the full time [is] allowed" to parties in meeting deadlines.); Phelan v. Douglass, 11 How.Prac. 193 (N.Y. 1855)(part days are excluded "since, if counted, it would fail to give the party to be affected the ***whole of that day***, but only a fractional part of it. . .. [¶] The law will not take notice of fractions of a day, and the fraction is excluded.")

Only full days are included in the deadline count. Id. Thus, as regards the running of the statute of limitations, the "accrual" of a cause of action on a partially spent day is excludable under § 12. See, e.g., Wixted v. Fletcher, 192 Cal.App.2d 706, 709 (1961)(stating the rule).

In Ganahl, this Court correctly determined that the day after tolling ends is included within the limitations period, at least in cases where that day is a full and complete day. Ganahl also rightly found that the day

following expiration of minority tolling is a full day for statute of limitations counting purposes. Ganahl is consistent with case law from California and the majority of jurisdictions that have considered the issue. The Legislature has seen no reason to overrule Ganahl, nor should this Court.

IV. STATEMENT OF THE CASE

A. The Incident

On May 14, 2011, City of Fontana police officers located Plaintiff Luis Shalabi's father after he had stolen two cars. (Volume I, Clerk's Transcript ("CT") page 5.) Rather than submit to arrest, Shalabi's father responded by using one of his stolen vehicles as a deadly weapon against law enforcement. (Id.) The Fontana officers survived this attack. (Id.) Shalabi's father did not. (Id.)

B. Trial Court Proceedings

After a period of minority, on December 3, 2013 Shalabi filed this suit. (I CT 1.) Shalabi asserts one cause of action under 42 U.S.C. § 1983 against the City, Officer Vanessa Waggoner, and Officer Jason Perniciaro. (I CT 125, 130, 377-378.)

The Superior Court bifurcated the matter and held a threshold bench trial regarding statute of limitations issues. (I RT 17-19.) For purposes of trial, the parties stipulated that: (1) Plaintiff's date of birth was December 3, 1993; (2) Plaintiff reached the age of majority on December 3, 2011; and

(3) Plaintiff filed his original complaint on December 3, 2013. (II CT 415, 417.)

The trial court found this Court's statute of limitations opinion in Ganahl v. Soher, 5 P. 80 (Cal. 1884) to be dispositive. Specifically, the Ganahl Court addressed how to properly calculate the statute of limitations for minor plaintiffs (like Shalabi). Id. After a survey of relevant law, the Ganahl Court found that the statute of limitations begins to run on the day the minor plaintiff attains his majority. Id.

Consistent with Ganahl, the trial court rightly found that Shalabi's 18th birthday (December 3, 2011) must be counted against the pertinent two-year statute of limitations. (I RT 23-24.) The trial court further found that the limitations period thereafter expired on December 2, 2013. (I RT 23-24.) As Shalabi's suit was filed one day beyond this deadline (on December 3, 2013), the trial court properly found that Shalabi's suit was time barred. (I RT 24.) Plaintiff appealed.

C. The Court of Appeal's Decision

The Fourth District Court of Appeal, Division 2, reversed the trial court's judgment. See, Shalabi v. City of Fontana, 35 Cal.App.5th 639 (2019) ("Shalabi"). The Court of Appeal did not dispute that the trial court had correctly applied Ganahl to the statute of limitations issue in this case. Id. at 644 ("Ganahl did explain that [the plaintiff's] birthday started the

running of the statute of limitations because [he] had the entirety of his birthday to file the lawsuit.")

Even so, the Court of Appeal declined to simply affirm the trial court's judgment as Ganahl requires. Instead, the lower court suggested that Ganahl was wrongly decided as it failed to consider a statute (i.e., Code of Civ. Proc. § 12) which was in existence at the time Ganahl was decided. Id. at 644; see, Code of Civ. Proc. § 12 ("The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded.")

From this, the Court of Appeal found that Ganahl was, in its view, of no precedential value:

> Ganahl did explain that [the plaintiff's] birthday started the running of the statute of limitations because [he] had the entirety of his birthday to file the lawsuit. . .. However, Ganahl did not explain how the court could create an exception to section 12, which requires the first day be excluded when calculating time. Because Ganahl did not cite section 12 or explain how the court could create an exception to a law created by the Legislature, we conclude Ganahl is not binding authority on the issue of how to calculate time under section 12.

Id. at 644 (citation omitted.)

Respondents sought rehearing on the grounds that: (1) Code of Civ. Proc. § 12 was in existence at the time this Court decided Ganahl, (2) the law presumes that the Ganahl court gave all due consideration to Section 12

before it ruled, and (3) stare decisis principles consequently preclude the Court of Appeal from disregarding Ganahl's holding. The Court of Appeal denied the Petition without comment.

Subsequently, this Court granted review. As noted above, the issue before the Court is whether the day after tolling expires is included in counting the statute of limitations.

V. STATEMENT OF APPEALABILITY

The trial court's judgment of dismissal is appealable [Code Civ. Proc., § 904.1(a)(1)], and this Court has jurisdiction to review the Court of Appeal's decision. See, Dix v. Superior Court, 53 Cal.3d 442, 455 n.8 (1991) ("Under article VI, section 12, subdivision (b) of the California Constitution ..., we have jurisdiction to 'review the decision of a Court of Appeal in any cause.'") (italics omitted).

VI. STANDARD OF REVIEW

The pertinent facts regarding the running of the statute of limitations in this case are stipulated and undisputed. (II CT 417.) The Court of Appeal's application of pertinent statute of limitations law to these undisputed facts is reviewed de novo. See, California Bldg. Indus. Assn. v. Bay Area Air Quality Mgmt. Dist., 62 Cal.4th 369, 381 (2015) ("We review the Court of Appeal's interpretation of [a] statute de novo.").

ARGUMENT

VII. GANAHL CORRECTLY INCLUDED THE FIRST DAY AFTER TOLLING ENDED IN THE STATUTE OF LIMITATIONS COUNT.

A. Many Key Dates In the Statute of Limitations Count Are Undisputed.

At the outset, many key statute of limitations principles in this case are – or should be – undisputed. Specifically, all parties agree that California's personal injury statute of limitations governs the timeliness of Plaintiff's federal 42 U.S.C. § 1983 claim. See, Maldonado v. Harris, 370 F.3d 945, 954 (9th Cir. 2004)("In determining the proper statute of limitations for actions brought under 42 U.S.C. § 1983, [courts] look to the statute of limitations for personal injury actions in the forum state.") Under California law, the applicable statute of limitations for personal injury actions is two years. Id. (citing Code Civ. Proc. § 335.1).[1]

[1] See, Owens v. Okure, 488 U.S. 235, 250 (1989) ("courts considering § 1983 claims should borrow the general or residual statute for personal injury actions"); Williams v. Horvath, 16 Cal.3d 834, 838 (1976) ("the courts, whether state or federal, typically apply the state limitations statute which governs actions to redress the wrong most closely analogous to that described in the complaint").

By contrast, the "accrual date" of a § 1983 cause of action is determined with reference to federal law alone. See, Wallace v. Kato, 549 U.S. 384, 387-88 (2007). Under federal common law principles, courts apply "the standard rule that [accrual occurs] when the plaintiff has 'a complete and present cause of action,' " that is, when "the plaintiff can file suit and obtain relief." Id. (citing Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 201 (1997)).

Here, Plaintiff complains regarding the death of his father, an event which all parties agree took place on May 14, 2011. (I CT 5.) Plaintiff's cause of action "accrued" for statute of limitations purposes at that point. See, e.g., Brown v. Buck, 614 Fed.Appx. 590, 592 (3d Cir. 2015)("Brown alleged that the officers used excessive force against him when they shot him on March 22, 2011, and his claim accrued then."); Estate of B.I.C. v. Gillen, 710 F.3d 1168, 1176 (10th Cir. 2013)(§ 1983 claim for loss of familial association arising from a family member's death accrues at the time of death.)

The day of the accrual of Plaintiff's case is excluded in the statute of limitations count by virtue of tolling for Shalabi's under-age status. See, Code Civ. Proc., § 352(a); Shalabi v. City of Fontana, 35 Cal.App.5th 639, 642 (2019). Tolling for Plaintiff's minority status ended at the expiration of his 17th year of age (i.e., December 2, 2011.) (II CT 417.) Shalabi

thereafter had "two years" remaining on his statute of limitations to file suit. See, Code Civ. Proc. § 335.1.

The sole remaining question is whether – under Code of Civ. Proc. § 12 -- the expiration of Shalabi's under-age tolling counts in measuring the statute of limitations. If it does, Shalabi's case is time-barred.

B. Section 12's Enaction and Purpose As Regards Litigation Deadlines.

The Court of Appeal's decision rested on the faulty assumption that, whenever a statutory deadline requires calculation, Code of Civ. Proc. § 12 always dictates that "day one" of the count be ignored. This reading is at odds with the history and text of § 12, as well as case law confirming that the method of counting is always dependent upon the circumstances of each case.

The "first day" issue presented by this matter has persisted over centuries of litigation. "After reviewing the cases up to his time, [British jurist] Lord Mansfield concluded 'that the cases for two hundred years had only served to embarrass a point which a plain man of common sense and understanding would have no difficulty in construing.'" People v. Clayton, 18 Cal.App.4th 440, 443 (1993). "Lord Mansfield enunciated a rule looking

to the circumstances of each case — whether the first day was included or excluded in computing a time period was dependent upon the context and subject matter." Id.

Apart from common law, "many jurisdictions adopted statutes similar to [Code of Civ. Proc. § 12] enacted by California in 1851 [in] its original Practice Act: 'The time within which an act is to be done, as provided in this Act, shall be computed by excluding the first day, and including the last....' (Stats. 1851, ch. 5, § 530, p. 134.)" Clayton, 18 Cal.App.4th at 444; see, Mun. Imp. Co. v. Thompson, 201 Cal. 629, 632 (1927)("[T]he rule laid down in section 12 of the Code of Civil Procedure ... is a re-enactment of section 307 of the original Practice Act (St. 1850, p. 455).").[1]

As with the common law treatment of the issue, whether or not § 12 operates on the "first day" of a time count varies depending on the circumstances of each case. For example, cases involving the calculation of timely public hearing dates for municipal resolutions undertake one analysis keyed to the underlying statute's purpose and wording. See, Mun.

[1] Earlier established American states have enacted similar provisions of even older vintage. See, e.g., Easton v. Chamberlin, 3 How. Pr. 412, 412 (N.Y. 1849) (citing New York statute providing that "the time within which an act is to be done as herein provided, shall be computed by excluding the first day and including the last").

Imp. Co. v. Thompson, 201 Cal. 629, 632 (1927)(including the "first day" in the count for such purposes).[2] Cases involving the calculation of an ordinance's effective date undertake a different analysis – again keyed to the relevant statute's wording and purpose. See, Ley v. Dominguez, 212 Cal. 587 (1931)(excluding "first day" of ordinance's publication in the relevant count).

The count required here – a statute of limitations count – is, of course, a type of litigation deadline. The rationale for § 12's "first day" exclusion in this setting is grounded in principles of fairness and statutory construction. Where a statute gives a party a litigation deadline for accomplishing a task, § 12 helps to ensure that the party receives the ***full*** measure of days granted them to meet the deadline. The "first day" – where

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[2] § 12 has been raised in a wide variety of circumstances, and the result has been highly fact dependent. Compare, Dep't of Corr. & Rehab. v. State Pers. Bd., 238 Cal.App.4th 710, 720 (2015) (employees' first day of employment is counted as first day of "probationary period," and not excluded); In re Michael D., 211 Cal.App.3d 1280, 1283 (1989) (where agreement was allowed for a period "not to exceed six months," the first day the agreement is executed is counted under the statute); with, In re Anthony B., 104 Cal.App.4th 677, 682-683 (2002) ("where proceedings under section 654.2 are resumed on the one-year anniversary of the filing date of the petition, the resumption occurs '12 months from the date the petition was filed.'"); Latinos Unidos de Napa v. City of Napa, 196 Cal.App.4th 1154, 1160–1161 (2011) (statute requiring notice to be posted "for a period of 30 days" excludes the first day of posting)..

the triggering event happens – is already partly spent at the time of the event in issue. To count that partly spent day against a litigation deadline would shortchange the party from the full measure of time granted them to meet the deadline. It would also violate the Legislative definition of a "day". See, Gov. Code, § 6806 ("A day is the period of time between any midnight and the midnight following."). Under § 12, that ***partial*** day is excluded from the count. Instead, litigation counts begin with the following ***full*** day. See, Price v. Whitman, 8 Cal. 412, 417 (1857)("[A]s a fraction of a day cannot be counted, by excluding the first and counting the last day, the full time [is] allowed" to parties in meeting deadlines.); Phelan v. Douglass, 11 How.Prac. 193 (N.Y. 1855)(part days are excluded "since, if counted, it would fail to give the party to be affected the ***whole of that day***, but only a fractional part of it. . .. [¶] The law will not take notice of fractions of a day, and the fraction is excluded.")

Against this backdrop, § 12 has been properly applied in a variety of litigation contexts to give parties the full measure of days to accomplish statutorily assigned deadlines. § 12 does not lengthen or shorten the measure of full "days" afforded to a party to satisfy statutory deadlines. Rather, and consistent with Gov. Code § 6806's definition of "day" as being a ***full*** day, § 12 has been applied to exclude ***fractional*** "days" from the computation of a variety of litigation deadlines. See, e.g., Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, ¶ 6:386

(The Rutter Group 2019) ("defendant's answer is due within 30 days after service of the complaint. ... The 30-day period is computed by excluding the first day and including the last .... [CCP § 12 et seq.]"); O'Donnell, Pac. Emp. Ins. Co., Interveners v. City & Cty. of San Francisco, 147 Cal.App.2d 63, 66 (1956) ("in computing the time for the filing of an appeal the day on which the judgment is entered must be excluded."); Welden v. Davis Auto Exch., 153 Cal.App.2d 515, 521 (1957) (where party "was entitled to ten days notice of the motion to dismiss," "service was complete on June 12, 1956. Excluding that day, we find that the motion was heard on the tenth day, i.e., June 22, 1956."); Lamanna v. Vognar, 17 Cal. App. 4th Supp. 4, 8 (1993) ("The three-day notice was served on Wednesday, May 20, therefore Wednesday, May 20, is not counted because the first day is excluded [§ 12]; the first day of the three-day period following service of the notice was Thursday, May 21."). In all of the foregoing cases, and others like them, § 12 was applied to exclude ***fractional*** days.

Prospective plaintiff litigants facing a statute of limitations deadline also benefit from § 12. For more than 100 years, California courts, including this Court, have held that the fractional date of accrual of a cause of action is "the first day," to be excluded in counting the limitations period. See, e.g., Wixted v. Fletcher, 192 Cal.App.2d 706, 709 (1962)(stating the rule); Soc'y of Cal. Pioneers v. Baker, 43 Cal.App.4th 774, 785 n.12 (1996) (§ 12 "appl[ies] to the computation of time for

statutes of limitation"); SCT, (U.S.A.), Inc. v. Mitsui Manufacturers Bank, 155 Cal.App.3d 1059, 1064 (1984) ("In computing the statute of limitations periods in California ... the day upon which the cause of action accrues is excluded...."); Donian v. Danielian, 90 Cal.App. 675, 678 (1928) ("Excluding the first date, and including the last, it appears that this action was brought within the five years."); First Nat. Bank of Long Beach v. Ziegler, 24 Cal.App.503, 504 (1914) ("In computing the time constituting the period embraced within a statute of limitation, ... later cases .. are quite uniformly harmonious in their holding that [the date of accrual] day should be excluded, . . .as fractions of a day are not considered. . .."); Dingley v. McDonald, 124 Cal. 90, 94–95 (1899) ("the whole current of modern authority ... is in favor of excluding the first day in cases where the expression of our statute [of limitation] is used, 'after the liability was created.' ... In this state the case is set at rest by section 12, Code Civ. Proc., which requires the exclusion of the first day.").[2]

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[2] § 12 calls for exclusion of the ***accrual date***, May 14, 2011, because it is the salient, partial "first day" for statute of limitations purposes. "It is a fundamental principle in determining when the statute of limitations commences to run, that it runs from the time a cause of action accrues . . .." Barlow v. City Council of City of Inglewood, 32 Cal.2d 688, 694 (1948), quoting Irvine v. Bossen, 25 Cal.2d 652 (1944). "The statute continues to run from the point of accrual until the complaint is filed." Haning et al., Cal. Practice Guide: Personal Injury, ¶ 5:112 (The Rutter Group 2018).

As this is a litigated matter, the key issue in this case is whether the day after Shalabi's under-age tolling ended is the type of fractional day which § 12 was designed to remedy. This Court has, of course, already provided the answer in Ganahl v. Soher, 5 P. 80 (Cal. 1884).

Tolling does not change these principles. "A tolling provision 'stops the clock' from running and is distinguishable from an enlarged limitations period." Barker v. Garza, 218 Cal.App.4th 1449, 1469 (2013). "In the context of the tolling of a statute of limitations, we have noted that 'tolling' is properly analogized to the stopping and restarting of a clock." People v. Leiva, 56 Cal.4th 498, 507 (2013). "[A] tolling statute ... does not postpone the date of accrual." Rubenstein v. Doe No. 1, 3 Cal.5th 903, 911 (2017) (discussing Code Civ. Proc., § 340.1). Other jurisdictions unanimously agree with the analogy.

"The proverbial clock starts to run when the action accrues... In a complement to accrual, tolling is a concept which suspends the running of a limitations period to an accrued action. The proverbial clock is stopped when the action is tolled." In re African-Am. Slave Descendants Litig., 304 F.Supp.2d 1027, 1067 (N.D. Ill. 2004). Tolling "does not delay the start of the limitations clock, but rather halts its ticking after the limitations period has accrued." Dixon v. Gonzales, 481 F.3d 324, 330 (6th Cir. 2007).

The date of accrual is "when the limitations clock starts"; tolling "mean[s] stopping a limitations clock that was already ticking." Packgen, Inc. v. Bernstein, Shur, Sawyer & Nelson, P.A., 209 A.3d 116, 130 n.14 (Me. 2019). In other words, " 'tolling' a statute of limitations signals stopping the clock." Artis v. District of Columbia, 138 S. Ct. 594, 603 (2018).

C. In measuring statutes of limitation, Ganahl properly counts the day after tolling expires because the plaintiff has the "whole of the day" to sue.

The issue in this case is, of course, when does the statute of limitations resume once tolling ends? Ganahl v. Soher, 5 P. 80 (1884) provides the answer -- the day after tolling ends is a ***full*** "day" and it consequently counts towards the running of the statute of limitations. See, Ganahl, 5 P. at 81.

The minor plaintiff in Ganahl "was born April 11, 1855." Id. Under the then-extant minority period, plaintiff "became of age ***the first minute*** of the eleventh day of April, 1876, and by virtue of [the statute of limitations] he was entitled to commence an action for the recovery of whatever interest he had in the land within the period of five years thereafter, but not after the expiration of that period." Ganahl, 5 P. at 80–81 (emphasis added.). Consistent with California's definition of a "day" as being a full day, the Ganahl Court found that the day after expiration of tolling counts against the statute of limitations:

> In computing the [statute of limitations] period of five years we must include the eleventh day of April, 1876, because, as the plaintiff in question attained his majority the ***first minute*** of that day, he had the ***whole of the day*** in which to sue; and computing that as the first day of the five years, the whole period of five years expired with the tenth day of April, 1881, and the action not having been commenced until the

> eleventh of April, 1881, was barred by the provisions of the statute.

Ganahl v. Soher, 5 P. 80, 80–81 (1884) (emphasis added); see, In re Harris, 5 Cal.4th 813, 845-846 (1993) (stating the same).

As noted above, California's decision to count full "days" against the running of the statute of limitations is consistent with the statutory definition of the term "day". See, Gov. Code, § 6806 ("A day is the period of time between any midnight and the midnight following.") It is also grounded in the recognition that including a fractional "day" in calculating a statutory deadline does not accord a party the benefit of the full measure of days granted to them by statute. One of the seminal cases on this point is from New York -- Phelan v. Douglass, 11 How.Prac. 193 (N.Y. 1855).

Phelan reached the same holding as Ganahl on functionally identical facts. The Phelan court discussed numerous cases illustrating the difference between full and partial days under the law. Id. at 194-95. The court then explained why the statute of limitations does ***not*** exclude the day after a disability ceases:

> It has become a well-established rule in this state, that whenever an act is to be done in a certain number of days, months, or years, from the happening of any event, or the doing of any act, that, in the computation of time, the day on which the event happened, or the act was done, is to be excluded.... The reason of this rule is very obvious: the law takes ***no notice of fractions of a day***.... Time is not, therefore, computed from the hour of the day on which the event happened,

to the corresponding hour of the day of performance; but the computation is ***from*** the day when the act was done, such day being regarded as a *point of time.* The computation begins with the *expiration* of such day. It is thus computed literally *from* such day, that is, from its *close,* its ending, its expiration. [¶] It will be observed that the day so excluded in all these cases has been partially spent -- it is, in part, actually gone when the event happens -- and for that reason is also excluded, since, if counted, it would fail to give the party to be affected the ***whole of that day,*** but only a fractional part of it, and yet count it as a whole day. [¶] The law will not take notice of fractions of a day, and the fraction is excluded. But the reason of the rule ceases whenever the party affected has a whole and entire day, as one of those to be included in the computation. [¶] ... Whenever the whole day, and ***every moment*** of it, can be counted, then it should be; whenever, if counted, the party would, in fact, have but a ***fractional part of it,*** then it should not be counted. [¶] By counting it in the first class of cases, the party has the full and entire number of days, months, or years, intended to be given. In the other he gets the fractional parts of the day less than his full time.... [¶] Here, as we have seen, the party could have sued on the 13th day of December, 1841. His ***disability*** to sue ended with the expiration, with ***the last moment of the 12th day of December,*** 1841. With the last moment of that day his ***disability was removed,*** and he could sue during the whole of the 13th, and ***each moment of that day.*** He had ten whole years after such "***disability removed***" to bring his suit. We must, in computing that ten years, take in the 13th day of December, 1841, because he had the whole and ***entire part of that day*** to sue in -- not a fractional part, but each and every moment of it -- computing that as the first day of the ten years, and that period expired with the expiration of the 12th day of December, 1851. He did not sue until

> the 13th of that month, and then his whole ten years had expired, and the statute barred his claim.

Phelan, 11 How.Prac. at 194-197 (italics in original; other emphasis added).

Under Ganahl, Phelan, and the line of dispositive precedent they represent, the day after under-age tolling ended (Shalabi's 18th birthday) was a full day as defined by Gov. Code, § 6806. Accordingly, the trial court rightly found that Shalabi's 18th birthday (December 3, 2011) must be counted against the pertinent two-year statute of limitations, which thereafter expired on December 2, 2013. (I RT 23-24.) As Shalabi's suit was filed one day beyond this deadline (on December 3, 2013), the trial court properly found that Shalabi's suit was time barred. (I RT 24.)

D. Ganahl Reflects the National Rule by Counting the day after Tolling Expires Against the Statute of Limitations.

The Ganahl rule comports with how our sister states have counted the day after tolling expires in statute of limitations cases. There is perhaps no better summary of the national law on this subject than the American Law Reports: "In those cases where the statute of limitations is suspended during a period of disability because of infancy and is continued after the period of disability, it has been held that the first day after the disability ceases is to be ***included*** in the computation of the period of time limited by

statute in which to bring the action after the disability ceases." N.J. Marini, Annotation, Inclusion or Exclusion of First and Last Day for Purposes of Statute of Limitations, 20 A.L.R.2d 1249, 1255 (1951)(emphasis added.), citing Ganahl v. Soher, 5 P. 80 (Cal. 1884), Phelan v. Douglass, 11 How. Pr. 193 (N.Y. 1855), Ross v. Morrow, 85 Tex. 172, 173 (1892), Pate v. Thompson 179 S.W.2d 355 (1944, Tex. Civ. App), and Taylor v. Aetna Life Ins. Co., 49 F.Supp. 990 (D.C. Tex. 1943).

The annotation's conclusion comes with good reason. And the Ganahl rule has only grown stronger and more widespread with the passage of time. See, e.g., Thompson v. Adm'r New Jersey State Prison, 701 F. App'x 118, 122 n.2 (3d Cir. 2017) ("When counting the number of days the limitations period ran, we begin by counting the first day after the tolling period expired....") (applying New Jersey law); Owens v. Mai, 891 So. 2d 220, 223 (Miss. 2005) ("While the filing of a complaint tolls the statute of limitations," if there is no service "within 120 days ..., the limitations period resumes running at the end of the 120 days."); Hamner v. BMY Combat Systems, 869 F.Supp. 888, 891–92 (D. Kan. 1994) ("the limitations period is tolled up through and including plaintiff's period of military service, which was July 20, 1992. Therefore, the first day the two-year statute of limitations period began to run was July 21, 1992. ... Because plaintiff did not file his complaint until July 21, 1994, the court finds it was untimely."); Gilbert v. Maine Med. Ctr., 483 A.2d 1237, 1240 (Me. 1984)

(the "applicable statute of limitations shall be tolled for a period of 90 days.... The period of limitation, therefore, does not *resume* until the ninety-first day."); Ludwig v. Glover, 357 So. 2d 233, 238 (Fla. Ct. App. 1978) ("jurisdiction ... terminated at midnight on July 17, 1976. ... [T]he day from which the count is commenced [July 17th] is excluded."); Kirkpatrick v. Hurst, 484 S.W.2d 587, 588 (Tex. 1972) ("the right of Mrs. Hurst to enforce her claim for injuries to her body arose the first instant of January 1, 1968, and existed during the whole of this day. Accordingly, there is no basis for excluding this day in computing the period of limitation...."); Fowler v. Anderson, 25 Mich.App. 404, 406, 181 N.W.2d 671, 672 (1970) ("The running of the stat[ute] of limitation was 'tolled,' i.e., interrupted and suspended [citation], for 90 days. September 17, 1968 was the 90th day. On September 18, 1968, 'the end of the ninety-day period, the statute again started to run.").[1]

To Respondents' knowledge, only three cases have departed from the majority rule, which, consistent with Ganahl, counts the day after tolling expires against the statute of limitations. The first case is Nelson v. Sandkamp, 227 Minn. 177, 34 N.W.2d 640 (1948), in which the Supreme

[1] Rules similar to § 12 have been used, on occasion, to calculate the length of tolling periods by excluding the first day in the tolling period. See, Van Tassell v. Shaffer, 742 P.2d 111, 112, 114 (Utah Ct. App. 1987). But this type of exclusion would not salvage Shalabi's time-barred case.

Court of Minnesota applied a Minnesota statute that, unlike California law, suspended the limitations period "during the period a plaintiff is within the age of 21 years ***and for an additional period of one year after the plaintiff's disability for infancy has ceased.***" Id., at 178-179 (emphasis added). As explained by the court, "plaintiff had one year after his disability of infancy ceased in which to bring his action. From the first moment of October 20, 1944, plaintiff had the capacity to bring the action, but on what date did the year expire? Does [Minnesota's statute], which provides that a period of time prescribed by law shall be computed so as to exclude the first and include the last day, apply?" Id., at 180-181. "There will be no uniformity or certainty if the application of the statute is to be made dependent upon the circumstances of each case. Undoubtedly, in making [Minnesota's analogue to § 12] expressive of the common-law rule, the legislature intended to provide a certain and uniform rule for the computation of periods of time prescribed or fixed in all statutes, except in those cases where the statutory terms affirmatively indicate the contrary." Id., at 181-182. "We find nothing in [Minnesota's statute] to make the rule inapplicable herein. It follows, in computing the period of one year from the time plaintiff's disability of infancy ceased, that we must exclude October 20, 1944, the first day when he was possessed of capacity to bring his action, and include all of October 20, 1945." Id., at 182. Because California jurisprudence holds that circumstances matter in

computing time, and California has no similar statute declaring the end of minority as a trigger for a counting period, Nelson does not warrant departure from the majority rule exemplified by Ganahl.

The second case is Fields v. Fairbanks N. Star Borough, 818 P.2d 658 (Alaska 1991), in which the Supreme Court of Alaska noted "that attainment of the age of majority is analogous to other events that trigger running of time periods; the limitation period excludes the day of the event (attainment of majority), and includes the last day in the period, unless that day is a holiday. [Plaintiff's] disability of minority ceased as of her eighteenth birthday. Thus, the two-year statute of limitations began to run on February 4, 1988 and ended on February 3, 1990," her birthday. Id., at 661.

However, in Fields, the primary issue before the Court was not whether the birthday is included or excluded under general counting rules; as indicated by the court, the sole question was as follows: "We are presented with the narrow question of when a minor reaches the age of majority for the purpose of computing the applicable limitations period." Id., at 659. The thrust of the opinion was to overrule the "coming of age" rule, in favor of the modern birthday rule, which counts the 18th birthday as day 1 of the plaintiff's majority. This Court should decline to follow Fields' dicta, which includes no analysis whatsoever of the issue currently before this Court.

Likewise, in Mason v. Bd. Of Educ. of Baltimore Cty., 375 Md. 504, 826 A.2d 433 (2003), the Court of Appeal of Maryland stated that "[Plaintiff] attained 18 years of age on April 3, 1997, and the disability was removed as of that date. Under our statutory method of computation, April 3, 1997, the date of removal of the disability, was not included in the three-year period. [Citation.] Thus, the statute of limitations began to run on April 4, 1997, and ended April 3, 2000." Id., at 514.

As with Fields, the Mason decision offers no analysis for its method of calculation, and the issue on review was "when ... a minor become an adult—the day before the minor's eighteenth birthday or on the day of the birthday? We shall hold, consistent with the common law rule (the coming of age rule) for computing a person's age, the day that the person was born is included in the calculation so that a person attains a given age on the day preceding the anniversary of their birth." Id., at 506. As in Nelson, the statute at issue in Mason triggered the count from the end of the tolling period. Id., at 507 ("When a cause of action ... accrues in favor of a minor or mental incompetent, that person shall file his action within the lesser of three years or the applicable period of limitations after the date the disability is removed."). California has no similar statute declaring the end of minority as a trigger for the limitations period and Mason does not warrant departure from the majority rule exemplified by Ganahl.

In short, the considered weight of national authority supports the result reached in Ganahl. Much of what contrary authority exists amounts to either dicta, unhelpful ipse dixit announcements or both. The Court should uphold Ganahl, and reaffirm that the ***full*** day after tolling expires is included within the calculation of statutes of limitation.

E. The Court of Appeal Erred On Multiple Levels.

The Court of Appeal's statute of limitations count misapplied the forgoing bedrock time computation principles. Specifically, the Court of Appeal utilized Code of Civ. Proc. § 12 to exclude the day after Shalabi's minority tolling ended from the statute of limitations count. See, Shalabi, 35 Cal.App.5th at 644. The Court of Appeal made this exclusion even though, in the litigation context, § 12 exists to protect parties from being shortchanged on deadlines due to the counting of ***fractional*** "days". See, Price, 8 Cal. at 417 ("[A]s a fraction of a day cannot be counted, by excluding the first and counting the last day, the full time [is] allowed" to parties in meeting deadlines.) And the day after Shalabi's minority tolling ended was a ***full*** – ***not*** fractional – day. See, Ganahl, 5 P. at 80–81 (the day after minority tolling ends is a full day that counts against the running of the statute of limitations "because, as the plaintiff in question attained his

majority the ***first minute*** of that day, he had the ***whole of the day*** in which to sue. . ..")(emphasis added).

"Where the reason for the rule ceases the rule should not apply." Sekt v. Justice's Court of San Rafael Twp., 26 Cal.2d 297, 308 (1945); Civ. Code, § 3510 (same). In ruling as it did, the Court of Appeal ignored the rationale for § 12 in the litigation context and applied it in a circumstance where it was never intended to operate.

The Court of Appeal's ruling also ignores the wording of the statute of limitations statute itself. The plain language of the statute is unambiguous: an action for personal injury "can only be commenced within [two years], after the cause of action shall have accrued...." Code Civ. Proc., §§ 312, 335, 335.1. A " '[y]ear' means a period of 365 days." Gov. Code § 6803. In turn, "[a] day is the period of time between any midnight and the midnight following." Gov. Code, § 6806. Thus, Shalabi had 730 full "days" to file his lawsuit – a deadline that expired in this case the day before Plaintiff filed his complaint. (I CT 1).

Under the Court of Appeals' holding, persons exiting a disability would have ***one more full day*** for their statute of limitations deadline than the Legislature actually granted them. See, State v. Wertheimer, 781 N.W.2d 158, 163 (Minn. 2010) ("The State would have us define 'year' to be a year and a day and a ten-year-period to be ten years and one day. We cannot square this definition with the common meaning of the term 'year.'

"); In re Welfare of H.A.D., 764 N.W.2d 64, 67 (Minn. 2009) ("The State's argument — essentially arguing that there are 366 days in a year — lacks merit."). Needless to say, statutory re-writes of this type are impermissible. See, Woods v. Young, 53 Cal.3d 315, 323 (1991) ("In construing statutes, we must determine and effectuate legislative intent. To ascertain intent, we look first to the words of the statutes.")(citations omitted.); id. ("Interpretations that lead to absurd results . . .are to be avoided."); Code Civ. Proc. § 1858 (courts have responsibility for ascertaining and declaring what the statutory text chosen by Legislature means, "not to insert what has been omitted, or to omit what has been inserted. . ..")

The Court of Appeal's attempt to characterize the day after tolling ended as the date Shalabi's claim "accrued" is also a non-starter. As noted above, Plaintiff's claim accrued at the time of the subject use of force incident. See, e.g., Brown v. Buck, 614 Fed.Appx. 590, 592 (3d Cir. 2015)("Brown alleged that the officers used excessive force against him when they shot him on March 22, 2011, and his claim accrued then."); Estate of B.I.C. v. Gillen, 710 F.3d 1168, 1176 (10th Cir. 2013)(§ 1983 claim for loss of familial association arising from a family member's death accrues at the time of death.)

It is the date of the use of force that starts the statute of limitations clock. Indeed, "[i]t is a fundamental principle in determining when the

statute of limitations commences to run, that it runs from the time a cause of action accrues and it invariably accrues when there is a remedy available." Barlow v. City Council of City of Inglewood, 32 Cal.2d 688, 694 (1948), quoting Irvine v. Bossen, 25 Cal.2d 652 (1944). "The statute continues to run from the point of accrual until the complaint is filed." Haning et al., Cal. Practice Guide: Personal Injury, ¶ 5:112 (The Rutter Group 2018). And it is this partial accrual day that is the excluded "first day" under § 12.

Once this day is excluded, § 12 does not provide for exclusion of other days (such as the day after tolling ends). As one court put it, "'first means first." Rich v. Thatcher, 200 Cal.App.4th 1176, 1178 (2011); see. United States v. Emory, 314 U.S. 423, 430 (1941) ("We are aware of no canon of statutory construction compelling us to hold that the word 'first' in a 150 year old statute means 'second' or 'third', unless [the relevant legislative body] later has said so or implied it unmistakably."). When it comes to counting, "first" means "preceding all others," "earliest in time," "before any or some other person or thing (as in time, space, rank, or importance)," and "beginning, outset." Webster's Third New International Dictionary 856-857 (2002). The "first" day of the statute of limitations count – the day of accrual – is the "beginning," the day "preceding all others," and the "earliest in time" insofar as Shalabi's statute of limitation is concerned.

It is also significant that the Legislature chose to term "the first day," as opposed to the phrase "a first day." "Use of the indefinite articles 'a' or 'an' signals a general reference, while use of the definite article 'the' (or 'these' in the instance of plural nouns) refers to a specific person, place, or thing." Pineda v. Bank of Am., N.A., 50 Cal.4th 1389, 1396 (2010); see, Bozanich v. Kenney, 3 Cal.3d 567, 570 (1970) ("The word 'the' and the words 'a' or 'an' mean entirely different things."). As just noted, "the first day" of the statute of limitations is the day of accrual, and the Legislature did not change the identity of "the first day" for minors.

Additionally, the Legislature used the term "the first day" (singular), not "first days" (plural). Although the singular generally includes the plural, this rule does not apply where the "context requires otherwise." Minish v. Hanuman Fellowship, 214 Cal.App.4th 437, 464 (2013). The nature of the word "first" in the context of the entire phrase "the first day" indicates the Legislature's intent that there is only one first day. When counting a single period of time, such as the statute of limitations at issue here, it is not possible to have more than one "first day." "The first day" of Shalabi's statute of limitations occurred at the time of his father's death, long before his 18th birthday.

VIII. THE COURT OF APPEAL ERRED BY NOT FOLLOWING GANAHL.

A. As it did in In re Harris, 5 Cal.4th 813 (1993), this Court should, once again, uphold Ganahl as good law.

Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2409 (2015) (citations omitted.) "It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." Id.

"Stare decisis enhances the continuity of legal rules. It calls upon individual Justices to remain cognizant of their membership in an enduring institution with a history that predates them and a future that will extend beyond their tenure." Randy J. Kozel, Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis, 97 TEXAS L. REV., 1125, 1126 (2019). "Whether applied to statutory decisions or other cases, stare decisis draws together Justices across time notwithstanding their disagreements." Id. at 1127.

"An argument that [the Supreme Court] got something wrong – even a good argument to that effect – cannot by itself justify scrapping settled

precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then." Kimble v. Marvel Entertainment, supra, 35 U.S. at 2409 (2015). "The doctrine of stare decisis teaches that a court usually should follow prior judicial precedent even if the current court might have decided the issue differently if it had been the first to consider it." Bourhis v. Lord, 56 Cal.4th 320, 327 (2013).

"This doctrine is especially forceful when, as here, the issue is one of statutory construction, because the Legislature can always overturn a judicial interpretation of a statute. The doctrine of stare decisis is not absolute, and sometimes it is appropriate to overrule prior precedent, even precedent interpreting a statute." Bourhis, 56 Cal.4th at 327. "Nevertheless, a court should be reluctant to overrule precedent and should do so only for good reason." Id.; see, IBP, Inc. v. Alvarez, 546 U.S. 21, 32 (2005) ("Considerations of stare decisis are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for several decades.").

For over 100 years prior to this case, the Ganahl decision has been read and applied in California and elsewhere as the opinion was written. See, e.g., People v. Dudley, 53 Cal.App.2d 181, 184 (1942) (agreeing that the Ganahl plaintiffs' claim "was clearly barred by the five year statute of limitations...."); German Sav. & Loan Soc. v. Hutchinson, 68 Cal.52, 54 (1885) ("It is said in the case of Ganahl v. Soher, 5 Pac. Rep. 80, that the

time of a minor's minority is calculated from the first minute of the day on which he is born to the first minute of the day corresponding which completes the period of minority; and, in calculating the time within which he may thereafter bring an action, as he attains majority on the first minute of a day, the whole of that day is to be calculated as the first day of the time within which he may bring the action."); Bradley v. Cole, 67 Iowa 650, 25 N.W. 849, 857 (1885) (same); Perry Cty. v. R.R. Co., 43 Ohio St. 451, 456, 2 N.E. 854, 862 (1885) (same); Stewart v. McBurney, 1 A. 639, 646 (Pa. 1885) (same); N.J. Marini, Annotation, Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249, 1255 (1951) (same).

In 1993, this Court was faced with the issue of whether Ganahl was a binding, precedential decision. In re Harris, 5 Cal.4th 813, 848, n.18. (1993). At that time, this Court forcefully reaffirmed the obvious – i.e., Ganahl ***is*** binding "precedent" (id., at 848, n.18) as it is "a California Supreme Court case" (id., at 849).

The Harris Court reaffirmed Ganahl's holding that a person reaches the age of majority on the first minute of an 18th birthday. "The statutory language of Civil Code section 26, though far from lucid, indicates the Legislature intended to adopt the 'birthday rule.' It states the appropriate period 'must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing

the period of minority.'" Id., at 844. "Because a person is deemed to have been born on the first minute of the day, the period of minority ends on that 'same minute' 18 years later. In other words, the period of minority terminates on the first minute of one's 18th birthday." Id. at 844–845.

Additionally, the U.S. Court of Appeals for the Ninth Circuit has followed Ganahl as binding precedent governing the precise issue before the Court: whether the day after tolling expires is excluded under § 12. See, Cabrera v. City of Huntington Park, 159 F.3d 374, 379 (9th Cir. 1998). As here, the Cabrera plaintiff vigorously asserted that "Ganahl lacks precedential value because it fails to discuss and consider [Code of Civ. Proc.] § 12." Id. at 379. The Ninth Circuit rightly rejected this argument in two well-crafted sentences: "...Section 12 was enacted in 1872, twelve years before the Ganahl decision. Once again, absent a subsequent legislative change or an overruling decision, this court is bound by the California Supreme Court's interpretation of California limitation statutes." Id. at 379. As noted by the Ninth Circuit, the Harris Court recently held that Ganahl "is still good law" in California. Id.

B. The Ganahl Court was aware of § 12, and the briefing before the Court specifically noted the general rule of excluding the "first day."

In evaluating this Court's precedent, it is appropriate to determine whether the Court gave "consideration or analysis" to an extant rule or

statute. Cf., Fluor Corp. v. Superior Court, 61 Cal.4th 1175, 1223 (2015). In construing this Court's prior opinions, the Court may look to the parties' briefs to determine what issues were considered. See, Bank of Am. of California v. City of Glendale, 4 Cal.2d 477, 485 (1935)(applying the rule); Pac. Indem. Co. v. Transp. Indem. Co., 81 Cal.App.3d 649, 659, n.2 (1978) ("Reference to briefs is a permissible method of ascertaining what issues were before a court.").

The Fontana Defendants have filed a Request for Judicial Notice with the Court, comprised of all of the briefs filed in the Ganahl matter, Case No. 8441, which have been produced by the California State Archives. (Request for Judicial Notice ["RJN"] 000001). See, McAdory v. Rogers, 215 Cal.App.3d 1273, 1275 (1989) (granting judicial notice of briefs filed in connection with prior published opinion). The briefs show that the Ganahl Court considered a range of issues, including § 12 and an in-depth discussion of Phelan v. Douglass, 11 How. Pr. 193 (N.Y. 1855).

The opening brief in Ganahl reveals that three heirs brought suit for ejectment on April 11, 1881, to recover possession of a piece of property in San Francisco that had been acquired by the decedent, Henry Ganahl. (RJN 000003-5.) Mr. Ganahl's wife (Maria), daughter (Elizabeth), and youngest son (Henry Jr.) were the plaintiffs. (RJN 000005.) Elizabeth was born May 21, 1853; Henry Jr. was born April 11, 1855. (RJN 000005.) At trial, "the court instructed [the jury] that, under section 1573 of the Code of Civil

Procedure, the present action was barred, as to the plaintiff Henry [Jr.], for the reason that the same was not commenced within three years after he arrived at the age of majority. The plaintiffs excepted to such charge. [Citation.] The jury gave [a] verdict for the defendants." (RJN 000006.)

Judgment was entered in favor of defendants in the Superior Court, and plaintiffs appealed to this Court.[3] (RJN 000004.) On appeal, the plaintiffs argued that Section 1537 did not apply under the circumstances. (RJN 000008-9.) The plaintiffs limited their discussion to the three-year statute of limitations, and did not initially address the five-year statute that ultimately proved fatal: Code of Civil Procedure section 328.

The defendants' brief asserted that the complaint was barred by the statute of limitations. (RJN 000014.) "Neither of the plaintiffs are within either of the savings clauses of section 328 of the Code of Civil Procedure. [¶] The section provides that a person within the age of majority may bring an action within five years after such disability shall cease, but such action shall not be commenced after that period." (RJN 000017.) "The mother never labored under any disability, and Ann Elizabeth Ganahl was born on the 21st of May, 1853, and was, when this action was commenced, on April 11th, 1881, over twenty-seven years of age, and Henry Gordon Ganahl was

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3 Courts of Appeal had not yet been created. See, In re Wells, 174 Cal. 467, 472 (1917) (summarizing the history of the 1903 creation of the first District Courts of Appeal).

born on the 11th day of April, 1855, and became of age on the first minute of the 10th day of April 1876, and had all of that day to commence the action, and the five years within which he could commence this action expired on the 9th day of April, 1881." (RJN 000017.) Instead of the "birthday rule," the defendants relied on the common law "coming of age" rule, which held, "The age of majority is completed on the beginning of the day preceding the anniversary of the person's birth." (RJN 000017.)

The defendants relied heavily on the case of Phelan v. Douglass, 11 How. Pr. 193 (N.Y. 1855). The defense argued that, similar to the plaintiff in Phelan, Henry Jr. "became of age on the beginning of the 10th day of April 1876. He had the whole of the 10th day of April, 1876, to sue in, and the five years expired on the last moment of the 9th day of April, 1881, and his claim, if any, is barred by the statute." (RJN000018.) Defendants also cited Civil Code §§ 25 and 26. (RJN000018.) Moreover, "Section 328 of the Code of Civil Procedure says that a person laboring under such disability may commence an action *within* the period of five years after such disability shall cease, but not *after*." (RJN000018.) Defendants' counsel stated, "I know of no rule of law allowing any time thereafter to commence the action, even if the last day of that time is Sunday." (RJN000018.) The brief also discussed an alternative argument for upholding the judgment based on the three-year statute of limitations,

which this Court did not reach in its initial opinion, although it also coincidentally involved the issue of counting time. (RJN000018-23.)

With respect to that the alternative issue, Defendants did, however, point out to the court the rule that, "in computing time from the date, or day of the date, or from certain acts or events, the first day must be excluded." (RJN000021.) The brief contains more than one reference to this rule, now embodied in § 12: "the first day must be excluded and last day included." (RJN000021.) Likewise, the decision in Phelan v. Douglass, 11 How. Pr. 193 (N.Y. 1855), on which the defendants so heavily relied, also acknowledged, "[i]t has become a well-established rule in this state, that whenever an act is to be done in a certain number of days, months, or years, from the happening of any event, or the doing of any act, that, in the computation of time, the day on which the event happened, or the act was done, is to be excluded." Id., at 194. We must presume the Court read the parties' briefs and considered the authorities cited therein.

On December 9, 1884, this Court issued its opinion in Ganahl, which accepted the defendants' argument only in part. While the defendants argued that Henry Jr. reached the age of majority of April 10, 1876 (RJN000018), this Court adopted the "birthday rule" and ruled that he actually reached the age of majority on his 21st birthday, April 11, 1876. Ganahl, 5 P. at 416. As this Court would later acknowledge in Harris, the Ganahl Court rejected the common law "coming of age" rule that one

attains the age of majority the day before his 21st birthday (which was then the age of majority). The Court did, however, agree with the defendants' reliance on Phelan v. Douglass, 11 How. Pr. 193 (N.Y. 1855). In casting its holding, Ganahl borrowed from Phelan. Compare, Phelan, 11 How. Pr. at 197 ("in computing that ten years [day one of majority] must be taken in, as he had the whole and entire part of that day to sue in; and computing that as the first day, the ten years expired on, and at the expiration of [the day before the ten year anniversary]"), with Ganahl, 5 P. at 416 ("In computing the period of five years we must include [day one of majority] because ... he had the whole of the day in which to sue; and computing that as the first day of the five years, the whole period of five years expired [the day before the five year anniversary].").

As confirmed by the briefs, this Court was well aware of the general rule excluding the "first day." (RJN000021.) Yet, this Court did not exclude Henry Jr.'s 21st birthday, presumably because it was plainly not the "first day" of anything impactful. Accordingly, the panel in Ganahl affirmed the trial court's judgment.

There is more, however, as this Court reheard the matter en banc, and the parties submitted additional briefing. The plaintiffs' petition for review asserted that Ganahl "was based on a misconstruction of section 328 of the Code of Civil Procedure." (RJN000043.) Specifically, the petition argued that, because the last day to file fell on a Sunday, § 12 extended the

time to file until the next court day. (RJN000044.) This Court granted the petition. Ganahl v. Soher, 68 Cal. 95 (1885) ("Ganahl II").

In their brief that followed, the plaintiffs addressed the issue concerning the three-year statute of limitations. (RJN000027.) The issue also, coincidentally, concerned whether a day was included within a count or not, and the plaintiffs ***relied*** on Code of Civ. Proc. § 12 and ***quoted*** the text of the statute. (RJN000031.) The plaintiffs then returned to their discussion of the five-year statute. (RJN000039.) They stated the "method of computation that was adopted by [Ganahl I]" was "undoubtedly correct." (RJN000040.) Despite the in-depth study of § 12 in preceding sections of the brief, the plaintiffs did not bothering arguing that Henry Jr.'s 21st birthday was "the first day" for purposes of Code of Civ. Proc. § 12. Instead, he argued that § 12 extended the statute of limitations because the last day was a Sunday. (RJN000041.)

The defendants' supplemental brief cited and discussed Phelan at length to establish that the count began the day of Henry Jr.'s 21st birthday. (RJN000051.) The defendants also argued that the last day was not excluded based on the peculiarly restrictive language of Code of Civ. Proc. § 328. (RJN000051-52.) Ultimately, this Court affirmed the trial court's judgment on the basis of the statute of limitations, and rejected the plaintiffs' additional arguments. See, Ganahl II, 68 Cal. at 97. In short, this Court did not withdraw or modify its prior opinion.

Ganahl is precedent, even if this Court did not deem it necessary to discuss § 12. Cf., Matter of Penn Cent. Transp. Co., 553 F.2d 12, 15 (3d Cir. 1977) ("We cannot accept . . .the novel precept that a precedent is not controlling no matter how clear it is if counsel in a subsequent proceeding can advance a new argument on the point."); Patel v. U.S. Attorney Gen., 917 F.3d 1319, 1324, n.4 (11th Cir. 2019) ("we cannot get around the prior . . . precedent rule just because the prior panel did not consider this argument; there is no exception for that."). On this point too, the Court should uphold its settled precedent.

C. The Court should follow its precedent, which has been tacitly approved by the Legislature.

"When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute." Coker v. JPMorgan Chase Bank, N.A., 62 Cal.4th 667, 688, (2016). "As with most canons of statutory construction, the applicability of this guideline varies with context." Id. "Here 'there exists both a well-developed body of law interpreting a statutory provision and numerous amendments to a statute without altering' our understanding of the statute's purposes or the approach our cases have taken to determining its applicability." Id., at 689.

Tellingly, the Ganahl rationale and holding have never been disturbed by the Legislature. Rather, the underpinnings of Ganahl have been reaffirmed by the Legislature. In 1992, the Legislature enacted Family Code § 6500, which was previously located at Civil Code § 26, without disturbing Ganahl. Likewise, the statute of limitations at issue in Ganahl -- Code of Civil Procedure § 328 -- has been revisited and amended by several generations of legislators, including in 1903, 1994, and 2014. Time after time, the Legislature has not seen fit to change the law as decided by this Court.

The "Legislature is presumed to know of existing case law" -- including Ganahl. People v. Superior Court (Lavi), 4 Cal.4th 1164, 1179 n. 9 (1993). The Legislature's acceptance of Ganahl's holding through amendment to the tolling statute is, of course, "indicative of legislative approval of [the courts'] interpretation" of pertinent statute of limitations law. Id.; see, id. at 1184 ("The Legislature is presumed to have known of these previous decisions [regarding a statute's meaning] , and its failure to address their holdings in subsequent amendments [to the statute in issue] is tantamount to acquiescence in those decisions."). This provides yet another compelling reason to uphold Ganahl, and reverse the decision of the Court of Appeal.

IX. CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's decision, and hold that the first day after tolling ends is included, and not excluded, in calculating whether an action is timely filed.

DATED: September 27, 2019

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 10,928 words as counted by the Microsoft Office Word 2016 version word-processing program used to generate this brief.

DATED: September 27, 2019

Respectfully submitted,
LYNBERG & WATKINS
A Professional Corporation

By: /s/ S. FRANK HARRELL
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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of eighteen and not a party to the within action. My business address is 1100 Town & Country Road, Suite 1450, Orange, California 92868, (714) 937-1010.

On September 27, 2019, I mailed the foregoing document described as **RESPONDENTS' OPENING BRIEF ON THE MERITS** on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Ortiz Law Group 1510 J Street, Suite 100 Sacramento, CA 95814-2097 jesse@jesseortizlaw.com Counsel For Plaintiff LUIS SHALABI (1 copy)	Clerk of the Court, Dept. S32 Hon. Wilfred J. Schneider Jr. SAN BERNARDINO COURTHOUSE 247 W. Third Street San Bernardino, CA 92415 Trial Judge (1 copy)
Fourth District Court of Appeal 3389 Twelfth Street Riverside, CA 92501 (1 Copy)	Supreme Court 350 McAllister St. San Francisco, CA 94102 (1 original plus 13 paper copies)

I placed the envelope for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in sealed envelopes with postage fully prepaid.

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

Executed on September 27, 2019, at Orange, California.

Debra Miranda

DEBRA MIRANDA