

Appellate Reports

Claim against public entity is barred where the plaintiff failed to file a timely late-claim petition after his initial claim was deemed denied

By Jeffrey I. Ehrlich

J.M. v. Huntington Beach Union High School District

(2017) __ Cal.4th __ (Cal. Supreme)

Who needs to know about this case? Lawyers litigating claims against public entities.

Why it's important: Holds that a claim against a public entity is barred by the failure to satisfy the requirements of the Tort Claims Act where the plaintiff failed to file a timely late-claim petition after his initial claim was deemed denied, even though the entity would have been required under the Tort Claims Act to grant the petition – if it had been filed.

Synopsis: J.M. was injured in a high-school football game, suffering a concussion. Although a trainer advised the coach that J.M. might have suffered a concussion, he was allowed to participate in full contact practice several days later. He was subsequently diagnosed with double concussion syndrome. On the facts alleged, J.M.'s personal injury action accrued on October 31, 2011, the date of his diagnosis.

J.M. did not file a claim within six months, as required by section 911.2, subdivision (a). He retained counsel after that period elapsed, and counsel presented the District with an application to file a late claim on October 24, 2012, nearly a year after the claim accrued. The application was timely under section 911.4. The District took no action. Section 911.6, subdivision (c) (section 911.6(c)) provides that if a public entity does not act on a late claim application, it is deemed denied on the 45th day after it was presented. Thus, by operation of law, J.M.'s application was deemed denied on December 8, 2012.

On October 28, 2013, counsel petitioned the superior court for relief from the obligation to present a claim before bringing suit. Under section 946.6, subdivision (b), such a petition must be filed within six months after a late claim application is either denied or deemed denied. The trial court rejected J.M.'s petition, noting that it should have been filed by June 9, 2013. The Court of Appeal affirmed, and the Supreme Court did too, *disapproving E.M. v. Los Angeles Unified School Dist*. (2011) 194 Cal.App.4th 736, under which J.M.'s suit would have been allowed to proceed.

Section 911.6, subdivision (b) states that a public entity "shall" grant a late claim application if "[t]he person who sustained the alleged injury ... was a minor during all of the time ... for the presentation of the claim." (§ 911.6(b)(2).) A minor is entitled to relief whether or not the minor's parents or counsel acted diligently, so long as the application is made within the year after the cause of action accrued. If the entity "fails or refuses to act" on a late claim application, it "shall be deemed to have been denied on the 45th day" after it is presented. (§ 911.6(c).)

J.M.'s principal contention is that the terms of section 911.6(b)(2), which required the District to grant his application, supersede the "deemed to have been denied" terms of section 911.6(c). He argues that the two subdivisions are irreconcilable, and the specific terms of subdivision (b)(2) must be given precedence over the general "default" provisions of subdivision (c). The Court held that his premise was faulty.

Section 946.6(c)(2) directly addresses J.M.'s circumstances. The Legislature would not have created a specific but superfluous provision for relief from the deemed denial of a minor's late claim application. J.M. suggests the statute was intended to allow an applicant to seek a remedy based on minority for the first time in court, after presenting some other ground for relief in an application to the entity. He offers nothing in the way of legislative history to support this suggestion, and its logic is difficult to discern. Section 946.6(c)(2) gave J.M. a clear avenue to challenge the denial of his application. His counsel simply failed to take advantage of it.

Arbitration; mutual assent; arbitration provision in product-safety and warranty brochure not enforceable: *Norcia v. Samsung Telecommunications America, LLC* (9th Cir. 2017) 845 F.3d 1279.

Norcia filed a class action complaint against Samsung alleging that it made misrepresentations about the performance of the Galaxy S4 phone. Samsung moved to compel arbitration of the dispute on the ground that an arbitration provision, which was contained in a warranty brochure included in the Galaxy S4 box, was binding on Norcia. The district court's denied Samsung's motion to compel arbitration. Affirmed.

When Norcia purchased the phone at a Verizon store he was given a receipt titled "customer agreement." It stated, in part, that he agreed to the current Verizon "Customer Agreement," which

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included the terms and conditions for the services and features he agreed to purchase. The customer agreement also included a statement that Norcia agreed to arbitrate any disputes, but it did not mention Samsung.

The Samsung Galaxy S4 box contained, among other things, a "Product Safety & Warranty Information" brochure. The 101-page brochure consisted of two sections. Section 1 contained a wide range of health and safety information, while Section 2 contained Samsung's "Standard Limited Warranty" and "End User License Agreement for Software." The Standard Limited Warranty section explained the scope of Samsung's express warranty. In addition to explaining Samsung's obligations, the procedure for obtaining warranty service, and the limits of Samsung's liability, the warranty section included the following (in all capital letters): "All disputes with Samsung arising in any way from this limited warranty or the sale, condition or performance of the products shall be resolved exclusively through final and binding arbitration, and not by a court or jury."

Later in the section, a paragraph explained the procedures for arbitration and stated that purchasers could opt out of the arbitration agreement by providing notice to Samsung within 30 calendar days of purchase, either through email or by calling a toll-free telephone number. It also stated that opting out "will not affect the coverage of the Limited Warranty in any way, and you will continue to enjoy the benefits of the Limited Warranty." Norcia did not take any steps to opt out.

Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. As the party seeking to compel arbitration, Samsung bears "the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence."

As a general rule, "silence or inaction does not constitute acceptance of an offer." California courts have long held that "[a]n offer made to another, either orally or in writing, cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent, for the offerer cannot prescribe conditions of rejection so as to turn silence on the part of the offeree into acceptance." There are exceptions to this rule, however. An offeree's silence may be deemed to be consent to a contract when the offeree has a duty to respond to an offer and fails to act in the face of this duty. Also, an offeree's silence may also be treated as consent to a contract when the party retains the benefit offered.

Even if there is an applicable exception to the general rule that silence does not constitute acceptance, courts have rejected the argument that an offeree's silence constitutes consent to a contract when the offeree reasonably did not know that an offer had been made.

There is no dispute that Norcia did not expressly assent to any agreement in the brochure. Nor did Norcia sign the brochure or otherwise act in a manner that would show "his intent to use his silence, or failure to opt out, as a means of accepting the arbitration agreement." Under California law, an offeree's inaction after receipt of an offer is generally insufficient to form a contract. Therefore, Samsung's offer to arbitrate all disputes with Norcia "cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent," unless an exception to this general rule applies.

Samsung fails to demonstrate the applicability of any exception to the general California rule that an offeree's silence does not constitute consent. Samsung has not pointed to any principle of California law that imposed a duty on Norcia to act in response to receiving the Product Safety & Warranty Information brochure. Nor was there any previous course of dealing between the parties that might impose a duty on Norcia to act. Moreover, Samsung has not alleged that Norcia retained any benefit by failing to act. Indeed, the brochure states that Norcia was entitled to "the benefits of the Limited Warranty" regardless whether Norcia opted out of the arbitration agreement.

Short(er) takes:

Legal malpractice statute of limitations: *Flake v. Neumiller & Beardslee* (2017) __ Cal.App.5th __ (Third Dist.)

Flake and other plaintiffs sued various defendants, went to trial, and lost. Neumiller & Beardslee ("N&B") represented the plaintiffs at trial. N&B filed a motion to be relieved as counsel on November 25, 2009, alleging, in part, that another attorney, Sinclair, had agreed to handle the appeal and pending post-judgment motions, and "has been handling these motions." N&B alleged that the clients did not oppose the withdrawal, and the motion was not opposed. The trial court granted it on January 7, 2010.

Flake then sued N&B for legal malpractice on January 6, 2011. N&B moved for summary judgment, arguing that the action had been filed more than one year after they had filed their motion to withdraw. Flake argued that the relevant date was when the motion had been granted, since his lawsuit had been filed within a year of that date. The trial court granted summary judgment, finding that Flake had no objectively reasonable expectation that N&B would continue to perform legal services after it served Flake with the motion to withdraw; thus, the suit was untimely. Affirmed.

Flake argued that the tolling provision provided by Code Civ. Proc., section 340.6, subdivision (a)(2), the so-called "continued representation" rule, applied until N&B's motion to withdraw had been granted, so his action was timely filed.

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N&B's theory on appeal is that no reasonable client could objectively believe N&B was still providing legal services after receiving the motion to withdraw alleging that the case had been handed off to successor counsel (Sinclair). Sinclair was to handle the appeal of the underlying case and *was already handling* the three then-pending postjudgment motions, without objection from N&B's clients. The Court found that N&B had the better argument.

The relevant rule is that, after a client has no reasonable expectation that the attorney will provide further legal services, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney's continuing representation, so the tolling should end.

N&B's motion to withdraw would indicate to any objectively reasonable client that its representation of Flake was over, as it had been completely assumed by another. The motion definitively informed Flake that Sinclair was already handling the pending postjudgment motions and would handle the appeal. Hence, any objectively reasonable client would have understood on receipt of the motion to withdraw that N&B had stopped working on the case.

Juror disqualification; failure to deliberate; requirements for excusal: *Shanks v. Dept of Transportation* (2017) __ Cal.App.5th __ (Second Dist., Div. 6.)

While riding his motorcycle Gary Shanks was killed in a head-on collision with another motorcyclist on a State Highway. In the trial of his wrongful-death action the plaintiffs showed that the State had failed to post proper warning signs on the curve where the accident occurred. The verdict was for the plaintiffs by a 12-0 or 11-1 margin on all issues except apportionment of fault, which was decided 9-3. The jury apportioned 90% of the fault to the State, and 10% to the other cyclist. At the start of deliberations, a juror complained that another juror was not deliberating. Unbeknownst to the complaining juror, the plaintiffs had complained to the court that the accused juror had been sleeping during the plaintiff's closing argument. The court conducted an inquiry, interviewing the complaining juror, who then said another juror would corroborate her view. The court called in the other juror, asked if any juror was not properly deliberating, and the second juror identified the accused juror. At that point the trial court excused the accused juror, without examining her, or any other jurors. The State had asked for the court to interview the jury foreperson, but had not actually objected to the dismissal of the juror or suggested that the court interview her or obtain additional information. Reversed, in part.

The court held that the trial court abused its discretion in excusing the accused juror without interviewing her or the other jurors. In its view, the State's failure to object was excused because it would have been "futile" to do so. And the State was prejudiced by having the juror excused because she had indicated that she was favorable to the state before she was excused. Because her dismissal could not have affected any other decisions in light of the 12-0 and 11-1 votes, the new trial would be limited to apportionment of fault.



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