

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Sup. Ct. 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 06/28/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BEN BALTZER, Individually and in) No. 1 CA-SA 12-0123
his Official Capacity as a Police)
Officer for the City of Phoenix;)
and CITY OF PHOENIX, an Arizona) DEPARTMENT A
Municipal Corporation,)
)
)
Petitioners,) Maricopa County
) Superior Court
v.) No. CV2011-017187
)
THE HONORABLE HUGH HEGYI, Judge) **DECISION ORDER**
of the SUPERIOR COURT OF THE)
STATE OF ARIZONA, in and for the)
County of MARICOPA,)
)
)
Respondent Judge,)
)
EARLENE EASON and BRADLEY)
PROCTOR, as Surviving Parents of)
Justin Ryan Bradley Proctor,)
Deceased,)
)
)
Real Parties in Interest.)
)
_____)

This special action was considered by Presiding Judge Ann A. Scott Timmer and Judges Patricia K. Norris and Donn Kessler during a regularly scheduled conference held on June 26, 2012. After consideration, and for the reasons that follow,

IT IS ORDERED that the Court of Appeals, in the exercise of its discretion, accepts jurisdiction of this special action

Maricopa County
Superior Court
No. CV2011-017187

because petitioners do not have an equally speedy remedy by appeal to decide whether the trial court correctly denied their motion to dismiss the complaint filed by the real-parties-in-interest ("Parents") against petitioner Ben Baltzer. Ariz. R.P. Spec. Act. 1(a).

IT IS FURTHER ORDERED denying relief without prejudice to petitioners re-urging dismissal of the complaint against Officer Baltzer based on lack of compliance with Arizona Revised Statutes ("A.R.S.") section 12-821.01 (West 2012)¹ when the record is further developed concerning Parents' ability to identify Officer Baltzer within the time frame set forth in that statute.

As all parties agree, Parents were required to serve Officer Baltzer with a notice of claim pursuant to § 12-821.01(A). *Simon v. Maricopa Med. Ctr.*, 225 Ariz. 55, 61, ¶ 20, 234 P.3d 623, 629 (App. 2010). Compliance with § 12-821.01(A), however, is subject to equitable defenses. *Pritchard v. State*, 163 Ariz. 427, 432, 788 P.2d 1178, 1183 (1990) (holding procedural requirement of the predecessor to § 12-821.01(A) is "subject to waiver, estoppel and equitable tolling"); see also *Little v. State*, 225 Ariz. 466, 471, ¶ 16, 240 P.3d 861, 866

¹ Absent material revisions after the relevant date, we cite a statute's current version.

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(App. 2010) (same); *Jones v. Cochise Cnty.*, 218 Ariz. 372, 379, ¶ 22, 187 P.3d 97, 104 (App. 2008) (same). Parents presented evidence to the trial court that they were unable to learn the identity of the officer involved in the shooting at issue until after expiration of the notice-of-claim deadline because the City of Phoenix failed to timely produce the police report that revealed Officer Baltzer's identity.² Petitioners contend Parents could have discovered the officer's identity with due diligence prior to expiration of the notice-of-claim time limit. Based on the current record, we cannot say whether Parents have an equitable defense to their failure to comply with § 12-821.01(A). This issue should be resolved by the trial court after further development of the record.

/s/
Ann A. Scott Timmer, Presiding Judge

² As petitioners assert, Parents did not precisely raise this issue to the trial court. Regardless, we have discretion to address an issue raised for the first time on special action review. See *State v. Aleman*, 210 Ariz. 232, 240, ¶ 24, 109 P.3d 571, 579 (App. 2005) ("[W]aiver is a procedural concept that courts do not rigidly employ in mechanical fashion."). We exercise that discretion here because the issue is significant, it involves a procedural bar to addressing the merits of a claim, it closely aligns to the issue raised to the trial court, and we do not perceive any undue prejudice to petitioners by our consideration of the issue.