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

DIVISION ONE
FILED: 10-19-2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

HOLLY LEVINE, as parent and natural guardian of KAITLIN RANDALL, aka Kaitlin Gamble, a minor, Plaintiff/Appellant, v. PARKER UNIFIED SCHOOL DISTRICT, an Arizona political subdivision; TAYLOR REISE and JANE DOE REISE, individually and as husband and wife; NATALIE VAN HOOSE and JOHN DOE VAN HOOSE, individually and as husband and wife, Defendants/Appellees.	1 CA-CV 10-0029 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in La Paz County

Cause No. CV200900108

The Honorable Michael J. Burke, Judge

AFFIRMED

Wachtel, Biehn & Malm — Lake Havasu City
By Kenneth E. Moyer
Attorneys for Plaintiff/Appellant

Burch & Cracchiolo, P.A. — Phoenix
By Daryl Manhart
and Theodore A. Julian, Jr.
and Jessica Conaway

Attorneys for Defendants/Appellees

T H U M M A, Judge

¶1 Plaintiff/appellant Holly Levine, as parent and natural guardian of Kaitlin Randall, appeals from the trial court's decision that her action against defendants/appellees Parker Unified School District, Taylor Reise, and Natalie Van Hoose is barred for failure to properly serve a timely notice of claim in accordance with Arizona Revised Statutes ("A.R.S.") section 12-821.01 (2003). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On or about October 29, 2008, Kaitlin Randall, a minor, was injured at her elementary school. An attorney for Holly Levine, Kaitlin's mother, sent four identical claim letters. Three letters, dated February 26, 2009, were sent to Taylor Reise, a teacher; Lori Bachmann, the school principal; and Janice Shelton, who was believed to be the La Paz County school superintendent. The fourth letter, dated March 2, 2009, was sent to Kevin Uden, Parker Unified School District superintendent. Each letter stated it constituted a notice of claim pursuant to A.R.S. § 12-821 (2003) for Kaitlin's injuries.

¶3 On July 2, 2009, Levine, as parent and natural guardian of Kaitlin, filed suit against the Parker Unified School District, Taylor Reise, and school nurse Natalie Van

Hoose (collectively "defendants"). The complaint alleged that Kaitlin sustained injuries as a result of Reise's and Van Hoose's negligence and sought damages.

¶4 Defendants moved to dismiss, claiming Levine failed to file and serve a proper notice of claim pursuant to A.R.S. § 12-821.01 on all members of the Parker Unified School District School Board within 180 days of Kaitlin's injuries. Defendants argued the notice was required to be served on the chief executive officer of the public entity, which would be the entire school board, and on each public employee sued. They noted that although Reise was served, Van Hoose was not, and no attempt was made to serve the school board members.

¶5 In response, Levine argued service on the entire school board would not have been required if the board delegated to the school superintendent the authority to accept service. She asserted no evidence showed that such a delegation had not been made, and so dismissal would be improper. She also requested additional time to conduct limited discovery to determine the authority of the superintendent to accept service.

¶6 Levine further argued defendants should be estopped from claiming the superintendent was not the proper party on whom to serve the notice of claim. Levine explained that, in response to her inquiry, she had received a letter from the Arizona School Risk Retention Trust Inc. ("Risk Retention

Trust”) dated November 24, 2008, along with a notice of claim form and instructions. The instructions directed the claimant to send the completed form to “the School District’s Superintendent, or the Clerk or other recording officer of the School District’s Governing Board, and any of the School District’s employees against whom a claim is being made, within 180 days of the date [the] claim accrued.” Although noting the Risk Retention Trust had received information about the claim by telephone on November 24, 2008, the letter advised Levine to comply with A.R.S. § 12-821.01 and file a notice of claim prior to any claim being allowed against the School District. The letter also directed Levine to Rule 4.1(i) of the Arizona Rules of Civil Procedure, explaining that service of the notice of claim had to be made “upon the School District by delivering a copy of the Notice of Claim to the Chief Executive Officer, the Secretary, Clerk, or Recording Officer thereof” and on any employees named in the claim.

¶7 In reply, defendants argued no evidence suggested the school board had designated anyone else to accept service. Defendants argued any action by the Risk Retention Trust should not estop defendants from asserting Levine failed to properly serve the notice of claim on all members of the school board. They also argued no evidence showed Levine relied on the information in the letter or its instructions.

¶8 In dismissing the complaint, the trial court found Levine had failed to properly serve the notice because she had not served each member of the school board and no evidence showed that the school board had designated the superintendent to accept service. The court's ruling did not specifically address Levine's request for additional time to conduct discovery; that request was therefore deemed denied. *See State v. Hill*, 174 Ariz. 313, 323, 848 P.2d 1375, 1385 (1993). From this decision, Levine timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

¶9 Where, on a motion to dismiss, the court is presented with and does not exclude matters outside the pleadings, the motion is treated as a motion for summary judgment. Ariz. R. Civ. P. 12(b)(6); *Jones v. Cochise Cnty.*, 218 Ariz. 372, 375, ¶ 7, 187 P.3d 97, 100 (App. 2008). We determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We view the facts and the inferences to be drawn from those facts in the light most favorable to Levine. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).

¶10 A person wishing to assert a claim against a public entity or public employee must file a notice of claim "with the

person or persons authorized to accept service for the public entity or public employee as set forth in the Arizona rules of civil procedure within one hundred eighty days after the cause of action accrues." A.R.S. § 12-821.01(A). The notice must be served "by delivering a copy of the summons and of the pleading to the chief executive officer, the secretary, clerk, or recording officer thereof." Ariz. R. Civ. P. 4.1(i). Where a school district is the defendant, the party to be served is the entire governing board; service on the school superintendent is not sufficient compliance with the statute. *Batty v. Glendale Union High Sch. Dist. No. 205*, 221 Ariz. 592, 595, ¶ 11, 212 P.3d 930, 933 (App. 2009). Claims that do not comply with these requirements are barred. A.R.S. § 12-821.01(A); *Jones*, 218 Ariz. at 374-75, ¶ 6, 187 P.3d at 99-100. Actual notice and substantial compliance do not excuse the failure to file timely notice. *Falcon ex rel. Sandoval v. Maricopa Cnty.*, 213 Ariz. 525, 527, ¶ 10, 144 P.3d 1254, 1256 (2006).

¶11 Levine argues defendants should be equitably estopped from claiming service on the superintendant was insufficient based on the letter, form, and instructions sent to her by the Risk Retention Trust. To establish equitable estoppel against the State, a party must show that "the State performed an affirmative act, inconsistent with a claim later relied upon, with 'some considerable degree of formalism under the

circumstances,'" typically by taking action in writing. *Open Primary Elections Now v. Bayless*, 193 Ariz. 43, 47, ¶ 14, 969 P.2d 649, 653 (1998). The party also must demonstrate "actual and reasonable reliance upon the State's act." *Id.* at ¶ 15.

¶12 Even assuming the letter, form, and instructions were such an act, Levine has not demonstrated she actually relied on the representation. The record contains no evidence that she completed and sent the form to anyone.[1] The instructions directed her to send a notice of claim to all defendants, which she failed to do. The record also contains no affidavit or showing from either Levine or her counsel avowing reliance on the communication from Risk Retention Trust. Because Levine did not demonstrate reliance on the representation, the trial court properly found equitable estoppel did not apply.

¶13 Levine further argues the trial court erred in denying her request to conduct discovery to determine whether the school district had delegated to the superintendent the authority to accept service of a notice of claim. *See Batty*, 221 Ariz. at 596, ¶ 15, 212 P.3d at 934 (recognizing possibility a school governing board could delegate to a superintendent its authority to accept service). Defendants argue Levine's request did not

[1]The record does include a copy of the form with the "Claimant Information" section completed, but no information regarding the incident or the amount for which the claim could be settled is included on the form. The record contains no evidence that the form was mailed to anyone.

comply with the requirements of Rule 56(f) of the Arizona Rules of Civil Procedure, and, in any event, the information she seeks is available through public records and so was not beyond her control. *See Lewis v. Oliver*, 178 Ariz. 330, 338, 873 P.2d 668, 676 (App. 1993) (setting forth requirements to comply with Rule 56(f)).

¶14 Levine did not comply with the requirements of Rule 56(f). She offered no affidavit and did not explain where the evidence was, how she would obtain it, or how long it would take to obtain such evidence.[2] We find no abuse of discretion in the denial of Levine's request to conduct discovery.

---

[2]In addition, as noted by defendants, the school district is a "public body" required by statute to maintain records of its actions and decisions; those records are available for public inspection. *See* A.R.S. §§ 39-121 (2001), 39-121.01 (Supp. 2009), 41-1350 (2004). As such, the information Levine sought should have been otherwise available to her.

CONCLUSION

¶15 Because the record contains no evidence Levine relied on the representation that the notice of claim should be served on the superintendent, equitable estoppel does not apply. We further hold the trial court did not abuse its discretion in denying Levine's request for additional time to conduct discovery. Accordingly, the judgment is affirmed.

/s/
____
SAMUEL A. THUMMA, Judge*

CONCURRING:

/s/
____
LAWRENCE F. WINTHROP, Presiding Judge

/s/
____
PATRICK IRVINE, Judge

*Pursuant to Article 6, Section 3 of the Arizona Constitution, the Arizona Supreme Court designated the Honorable Samuel A. Thumma, Judge of the Arizona Superior Court, to sit in this matter.