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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CLAYTON L. JEFFERSON, a Minor, etc., Plaintiff and Appellant, v. COUNTY OF KERN et al., Defendants and Respondents.	F036017 (Super. Ct. No. 238468) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Kern County. Jon E. Stuebbe, Judge.

Cheong, Denove, Rowell, Antablin & Bennett, Mary M. Bennett, John D. Rowell and Alicia S. Curran for Plaintiff and Appellant.

B. C. Barmann, Sr., County Counsel, and Robert D. Woods, Chief Deputy County Counsel, for Defendants and Respondents.

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Plaintiff and appellant Clayton L. Jefferson (Clayton), a minor, by and through his guardian ad litem Darlene Jefferson, appeals from the trial court's judgment in favor of defendants and respondents, County of Kern (County) and Geoffrey M. Miller, M.D. (Dr. Miller) (collectively respondents), entered after a one-day court trial in which the trial court found Clayton had failed to comply with the claim presentation requirements of the California Tort Claims Act (Gov. Code, § 810 et seq.).[1] The trial court determined, in a bifurcated trial of the special defense at respondents' request under Code of Civil Procedure section 597, that Clayton's medical malpractice and fraud causes of action were barred because they had accrued more than one year prior to his submission to the County of an application for leave to present a late claim.[2] Clayton's request that the special defense be tried before a jury was denied by the trial court.

DISCUSSION

I.

On October 26, 1998, Clayton's attorney sent the County a notice, on Clayton's behalf, of Clayton's intent to pursue a claim against the County, which the County received on November 2, 1998. The notice stated that the events in question arose during medical treatment provided to Clayton at a County medical facility "for a period beginning on or about July 1997 through and including March 1998," and that Clayton "did not discovery [*sic*] the injury and its negligent cause until June of 1998."

By letter dated November 5, 1998, the County gave notice that Clayton's claim was being returned as untimely "because it was not presented within six (6) months after

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[1] All further statutory references are to the Government Code unless otherwise noted.

[2] Code of Civil Procedure section 597 states in pertinent part: "When the answer pleads that the action is barred by the statute of limitations, … or sets up any other defense not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution thereof, the court may, either upon its own motion or upon the motion of any party, proceed to the trial of the special defense or defenses before the trial of any other issue in the case …."

the event or occurrence as required by law," and "no action was taken on your claim." The letter listed the date of incident as March 1998. The County's letter further advised Clayton that his "only recourse at this time is to apply without delay to the Clerk of the Kern County Board of Supervisors for leave to file a late claim," and referred him to sections 911.4 to 912.2.

On January 8, 1999, Clayton's attorney submitted an application for leave to present a late claim to the County, which was accompanied by a document providing the information required by section 910 identical to one submitted on October 26, 1998. The application stated that Clayton's "parent did not discovery [*sic*] the injury and its negligent cause until in or about June 1998," and that if the County contended the claim was untimely, "the failure to present this claim within the six-month period specified by Government Code §911.2 is that claimant was a minor during all of the six month period specified by §9..12 [*sic*] …." A declaration by Darlene Jefferson accompanied the application.

By letter dated January 19, 1999, the County advised Clayton's attorney as follows:

> "NOTICE IS HEREBY GIVEN that the claim you submitted to the clerk of the Kern County Board of Supervisors on 11-2-98 was not acted upon by the Board. The claim is deemed rejected on its merits. The County reserves the right to reject the claim as late if discovery discloses that the claimant knew or should have known of the alleged occurrence prior to the date of occurrence noted in the claim."

The letter listed the date of incident as June 1998. The County further informed Clayton that he had "only six (6) months from the date this notice was deposited in the mail to file a court action on this claim. (See Gov. Code § 945.6.)"

On March 22, 1999, Clayton filed his complaint in the trial court.

II.

A.

Under the Tort Claims Act, a plaintiff may not maintain an action for damages against a public entity unless a written claim has first been presented to the defendant and rejected. (§§ 905, 945.4.) Claims for personal injuries must be presented within six months after accrual of the cause of action. (§ 911.2; *Christopher P. v. Mojave Unified School Dist.* (1993) 19 Cal.App.4th 165, 168-169.) If a claim is presented after the statutory time limit has expired, the public entity may give written notice that the claim was late and return it without further action. The notice must also advise the claimant that his or her "only recourse" is to apply for leave to present a late claim. Failure to give such notice waives all untimeliness defenses. (§ 911.3.)[3]

An application for leave to present a late claim must be presented within a reasonable time, not to exceed one year after accrual of the cause of action. (§ 911.4.) The public entity must grant or deny the application within 45 days after it is presented or it is deemed denied. (§ 911.6.) The application must be granted if it was timely filed and the injured party was a minor during the six-month period set by section 911.2. (*Hernandez v. County of Los Angeles* (1986) 42 Cal.3d 1020, 1030; see also *Christopher P. v. Mojave Unified School Dist.*, *supra*, 19 Cal.App.4th at p. 169; *Williams v. Mariposa County Unified Sch. Dist.* (1978) 82 Cal.App.3d 843, 849.)

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[3] Section 911.3, subdivision (a) prescribes the form of the notice as follows: "'The claim you presented to the (insert title of board or officer) on (indicate date) is being returned because it was not presented within six months after the event or occurrence as required by law. See Sections 901 and 911.2 of the Government Code. Because the claim was not presented within the time allowed by law, no action was taken on the claim. [¶] Your only recourse at this time is to apply without delay to (name of public entity) for leave to present a late claim. See Sections 911.4 to 912.2, inclusive, and Section 946.6 of the Government Code. Under some circumstances, leave to present a late claim will be granted. See Section 911.6 of the Government Code. [¶] You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.'"

If a late claim application is denied, section 946.6 authorizes the claimant to petition the court, within six months, for an order relieving the claimant from the claims presentation requirements.[4] The claimant must be specifically advised of this right by the public entity when it denies the application. (§§ 911.8, 946.6.)[5]

If a late claim application is granted, the claim is deemed to have been presented as of the day of the grant and the public entity must act on the claim by either rejecting it, allowing it in full, allowing it in part and rejecting the balance, compromising it if the liability or amount due is in dispute, or doing nothing and thereby allowing the claim to be denied by operation of law. (§§ 912.2, 912.4, 912.6.) If the claim is denied, written notice must be given which advises the claimant he or she has six months from the date of the notice to file a court action on the claim. (§ 913.)[6]

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4 A petition filed pursuant to section 946.6 is not an "action" but a "special proceeding." (*County of Sacramento v. Superior Court* (1974) 42 Cal.App.3d 135, 140; Code Civ. Proc., §§ 21-23.) The relief sought in the petition is not permission to present a late claim but an order relieving the claimant from the requirement that a claim be presented and rejected before a lawsuit may be filed. (§ 946.6, subd. (a).) In this special proceeding, the court is required to grant the petition if the evidence shows the late claim application was made within a reasonable time not to exceed one year after accrual of the cause of action, the application was denied or deemed denied, and one of the four enumerated grounds for relief is met—in this case, that the injured person was a minor during the six-month claims presentation period. (§ 946.6, subd. (c)(2); *County of Los Angeles v. Superior Court* (2001) 91 Cal.App.4th 1303, 1313-1314.) There is no right to a jury trial in a section 946.6 proceeding. (*County of Sacramento v. Superior Court*, *supra*, at pp. 138-141.)

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

6 Section 913, subdivision (b) prescribes the form of notice as follows: "'WARNING [¶] Subject to certain exceptions, you have only six (6) months from the date this notice was personally delivered or deposited in the mail to file a court action on

B.

We first resolve, against him, Clayton's contention that respondents waived the right to contest the date of accrual of Clayton's causes of action because, in responding to his application for leave to present a late claim, the County denied the claim itself and failed to notify him of his right to petition the court for an order relieving him from the claim filing requirements.[7]

The authorities Clayton cites—*Harvey v. City of Holtville* (1967) 252 Cal.App.2d 595, *Denham v. County of Los Angeles* (1968) 259 Cal.App.2d 860, and *McLaughlin v. Superior Court* (1972) 29 Cal.App.3d 35—did not involve the concept of waiver but instead applied the related, but substantially different, concept of estoppel. (*El Dorado Irrigation Dist. v. Superior Court* (1979) 98 Cal.App.3d 57, 60.) In *Harvey*, in response to the plaintiff's application to present a late claim, the public entity notified the plaintiff that the claim was denied, which the plaintiff contended led her to file a civil lawsuit rather than a petition for leave to present a late claim within the then relevant time period.[8] (*Harvey v. City of Holtville*, *supra*, 252 Cal.App.2d at pp. 596-597.) The court

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this claim. See Government Code Section 945.6. [¶] You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.'"

[7] The standard of review on this issue is well settled: "Generally, the determination of either waiver or estoppel is a question of fact, and the trier of fact's finding is binding on the appellate court. [Citations.] When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling. [Citations.]" (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 319.) Here, the essential facts are undisputed, from which only one inference may reasonably be drawn.

[8] Prior to 1965, the procedure for obtaining a judicial determination following a public entity's rejection of an application for leave to present a late claim required filing a petition in court for leave to present a late claim to the public entity, rather than for relief from the claim presentation requirements, within 20 days after the public entity denied the application. (7 Cal. Law Revision Com. Rep. (1965) p. 401, reprinted in 32A pt. 1 West's Ann. Gov. Code (1995 ed.) foll. § 945.6, p. 33.)

found that, while the plaintiff was barred from petitioning the court for relief due to her failure to file the petition within the required time, she should be given the opportunity to plead and prove the elements of estoppel in the civil action, in which the public entity took the position she had not alleged the timely presentation of a claim. (*Id.* at pp. 596-598.) The court explained:

> "In a proper case a public entity may be estopped to assert the failure of a claimant to present a claim, or to present it within time, to avoid liability upon a cause of action conditioned upon the prescribed presentation of a claim. [Citations.] Where a claimant, in reliance upon the representation of an authorized employee of the public entity that his application to file a late claim has been granted and his claim denied, loses his right to petition the court for leave to make a late presentation, the public entity will be estopped to assert it did not grant his application. [Citation.]" (*Harvey v. City of Holtville, supra*, 252 Cal.App.2d at p. 598.)

In *Denham*, the County of Los Angeles sent the plaintiff, after the 45-day period to act on the claim had expired, a notice that the claim had been denied. The trial court sustained the county's demurrer to the plaintiff's complaint because the action had been commenced more than six months after the 45-day period had expired. (*Denham v. County of Los Angeles*, *supra*, 259 Cal.App.2d at pp. 862-864.) In reversing, the Court of Appeal held that the plaintiff had pled adequate facts to support a conclusion the county was equitably estopped from asserting the plaintiff had not filed suit in time. (*Id.* at pp. 866-867.) The court reiterated the four elements necessary to prove equitable estoppel against a public entity:

> "'(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.'" (*Denham v. County of Los Angeles*, *supra*, 259 Cal.App.2d at p. 866.)

The court concluded that all these elements had been established because only the county "knew whether in the application of section 945.6, it would assert reliance upon a rejection of the claim by inaction or a rejection by an affirmative consideration and

denial. Plaintiff was not apprised of what the county's intention in this regard was until the demurrer was interposed to the original complaint." (*Denham v. County of Los Angeles*, *supra*, 259 Cal.App.2d at pp. 866-867.) Citing *Harvey*, the *Denham* court found the county's letter of denial was conduct on which the plaintiff could be found to have reasonably relied because the "plaintiff could reasonably interpret [such conduct] to be a manifestation of an intent to waive defendant's right to stand upon a rejection by operation of law and to rely upon its affirmative order of rejection . . . in its future dealings with plaintiff." (*Denham v. County of Los Angeles*, *supra*, at p. 867.)

Finally, in *McLaughlin*, the public entity notified the plaintiff, in response to his application for leave to present a late claim, that it "declined to grant [his] request," and advised him he had six months to file a court action on the rejected claim. (*McLaughlin v. Superior Court*, *supra*, 29 Cal.App.3d at p. 38.) The plaintiff then filed suit without first petitioning the court for relief under section 946.6. The trial court denied the defendants' motion for summary judgment on the ground the plaintiff had failed to comply with this statute. (*McLaughlin v. Superior Court*, *supra*, at p. 37.) The Court of Appeal denied the defendants' petition for writ of mandate, finding the plaintiff had alleged facts which justified his failure to petition for judicial relief pursuant to section 946.6. (*McLaughlin v. Superior Court*, *supra*, at p. 40.) The court explained:

> "[The plaintiff] has demonstrated to the satisfaction of this court that the written notice he received from the board misled him into believing that the board had rejected his *claim* rather than his *application for leave to present a claim*. Such notice erroneously included a warning required to be given under section 913 when a *claim* is rejected. Plaintiff contends that he acted in reliance upon that notice, to his injury. [¶] Estoppel may be allowed in factual situations where claimants have been misled by governmental agents with respect to the procedural and time requirements of the claims statute. [Citations.] [¶] In light of the established judicial policy that actions should be decided on their merits and our Supreme Court's command that claims statutes should be liberally construed [citation], we hold that defendants are estopped from asserting plaintiff's noncompliance with the statutes relating to the presentation of claims." (*McLaughlin v. Superior Court*, *supra*, 29 Cal.App.3d at p. 40.)

Clayton contends these authorities compel a finding that respondents are estopped from asserting Clayton's claim was untimely because the County's January 13, 1999, notice stated the claim had been denied on its merits, and the warning advised him to file suit within six months rather than to petition the court for relief from the claims presentation requirements. Clayton asserts this form of notice would lead a reasonable person to conclude that the late claim application had been accepted by the County but that the claim had been rejected on its merits. Based on the representations in the notice, Clayton says he did not file a petition in court for an order relieving him from the claims presentation requirements.

The distinction between this case and the authorities on which Clayton relies is that, here, the County is not asserting Clayton should have complied with the petition procedure of section 946.6. Instead, the County asserts it advised Clayton it was reserving its right to later "reject the claim as late" if discovery disclosed that the accrual dates of Clayton's causes of action were different than those identified in his claim. In effect, the County said it was conditionally accepting Clayton's late claim. Respondents confirm this was the County's intent in providing the notice it did—it granted Clayton's late claim application based on the representations contained in the application and rejected the claim on the merits, all the while reserving its right to challenge the timeliness of the claim if discovery disclosed the accrual dates were other than the date Clayton selected.

Consequently, Clayton has not demonstrated at least one of the elements necessary to establish equitable estoppel—his prejudicial reliance upon the County's notice. Clayton did not suffer any actual detriment as a result of the notice because the County concedes it accepted the late claim application, albeit conditionally. Therefore, Clayton was never required to petition the court for relief from the claims presentation requirements; the relief he requested—that he be allowed to present a claim more than six months after it had accrued—had been granted, making such a petition unnecessary. (See § 946.6, subd. (a) [petition may be made to relieve petitioner from the claim presentation

requirements where an application for leave to present a claim is denied or deemed to be denied].) The issue then became, in Clayton's subsequent lawsuit, the actual accrual date of Clayton's causes of action.

By accepting the late claim application and reserving the right to challenge the accrual date, the County represented that, assuming the accrual date stated in the application—June 1998—was accurate, there was no other reason to deny Clayton's application. This did not bar the County, in Clayton's lawsuit, from attempting to prove that his late claim application was untimely on the basis of facts disclosed during discovery which may establish an accrual date other than the one stated in Clayton's application.

Moreover, the County was legally entitled to reserve its right to challenge the accrual date proposed by Clayton. The only authority Clayton cites to support his contention the County had no such right is section 911.6, subdivision (a), which provides that the public entity must either accept or deny the late claim application and, if it wishes to test the timing of the filing, it must deny the late claim application and allow the claimant to petition for relief from the claim presentation requirements. There is nothing in this statute about precluding a reservation of rights such as the one the County retained in this case.

The validity of the County's reservation is supported by *Scott v. County of Los Angeles* (1977) 73 Cal.App.3d 476, which held that, when a claim is timely on its face, the public entity's rejection of the claim must be treated as an outright denial and not simply as the refusal to accept a late claim, and such denial must be accompanied by the warning described in section 913, subdivision (b) to the effect that the claimant has six months to file a court action on the claim. (*Scott v. County of Los Angeles*, *supra*, at p. 484.) The *Scott* court explained:

> "The procedure for granting relief to a claimant from the strictures of the time limits provided in the claims statutes is remedial in nature and must be liberally interpreted in favor of the claimant. [¶] That procedure, thus, cannot be viewed as giving the governmental entity the power to determine

> for itself factual questions related to the statute of limitations nor does it give the power to the governmental entity, by the manner in which it treats the claim, i.e., by rejecting it as untimely rather than on its merits, to deny to a claimant his or her right to a jury trial on disputed factual issues." (*Scott v. County of Los Angeles, supra*, 73 Cal.App.3d at pp. 481-482; see also *Mandjik v. Eden Township Hospital Dist.* (1992) 4 Cal.App.4th 1488, 1500 [public entity not permitted to make factual determinations relating to timeliness of a claim; to permit public entity to do so would be to deny claimants their right to a jury trial on disputed factual issues].)

Though *Scott* and *Mandjik* both involved determinations about whether an original claim was timely, their consistent rationale—that a claimant cannot be forced by the public entity "into a proceeding in which the court in a pretrial proceeding will make a binding determination of the critical issues of when the cause of action accrued and whether the statute of limitations was tolled—issues which are normally factual questions for a jury," applies with equal force to an application for leave to present a late claim. (See *Scott v. County of Los Angeles*, *supra*, 73 Cal.App.3d at p. 481.)

Accordingly, if a claim reflects facts which, if true, would make the late claim application timely and the public entity does not dispute that the application was filed within the required "reasonable time," the public entity has no choice, if it wishes to contest the accuracy of the accrual date selected by the claimant, but to do what the County did here—accept the application, deny the claim, and reserve the entity's rights.[9] Nothing in the claims statutes or the interpretive case authority suggests that the claimant has the right to effectively dictate the accrual date to the public entity.[10]

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9 Because the County did reserve the right to challenge the accrual date in its January 1999 notice, we do not address respondents' contention that it was not required to include such a reservation in its notice in order to preserve this right.

10 In some cases, the determination whether the application was made within a reasonable time will also require the trial court in a petition proceeding to determine the actual accrual date, but this is not always the case. As the Court of Appeal explained in *Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 711-712:

> "[S]ince the right to trial by jury does not extend to a claim-relief proceeding [citations], the trial court may make factual determinations

Here, the application showed it was timely on its face, based on the asserted June 1998 discovery and accrual, since the application was submitted less than one year after that date. Therefore, the County was within its rights to accept the application based on the representations made in it and reserve the right to challenge the accrual date in Clayton's subsequent lawsuit on the claim. (*Mandjik v. Eden Township Hospital Dist.*, *supra*, 4 Cal.App.4th at p. 1504, fn. 12.)

In addition, Clayton suffered no injury by virtue of the fact that the January 19, 1999, notice reflects the County's reservation of "the right to reject the *claim* as late" rather than the reservation of the right to reject the *application* as late. Since the County accepted the application, Clayton was never required to petition for relief from the claim presentation requirements. The fact the County advised Clayton it was challenging the accrual date he asserted was sufficient to apprise him it was in dispute.

We agree with Clayton that the timeliness standard is different when the issue, on the one hand, is whether an original claim was filed within six months of accrual and, on the other, whether a late claim application was filed within one year of accrual. Here, however, this difference is irrelevant because the only issue the County reserved was that of the accrual date of Clayton's claim. If Clayton proves his claim accrued either six months prior to October 26, 1998, the date of filing of the original claim, or one year prior to January 8, 1999, the date of submission of the late claim application, he will have

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> relating either to timeliness of a claim or to substantial compliance with the claim presentation requirements. Of course, this is not to say that the question of timely filing *must* be determined in a claim-relief proceeding or that the court in all cases may make factual determinations regarding compliance with the claim presentation requirements. We can envision certain cases, such as where the date of the accrual of the cause of action is disputed, where the related issue of timeliness of the claim should be postponed, upon appropriate demand by a petitioner, to a determination by the jury as in cases involving private defendants."

fulfilled the requirements of the claims statutes.[11] In either case, the issue is the date of accrual of Clayton's causes of action, a question the existence of which he should have been aware as a result of the County's reservation in its January 19, 1999, notice. Thus, the fact the County did not specifically mention the application in its notice does not create an estoppel, particularly where Clayton has not shown injury.

Finally, the County is estopped from asserting in this action that Clayton failed to comply with the petition procedure of section 946.6.[12] The County is also estopped from asserting, as it did below and as it reprises on this appeal, that any delay by Clayton in applying for late claim relief was unreasonable. By the County's acceptance of Clayton's late claim application, Clayton was not made aware the County intended to contest this point. (§ 946.6, subd. (c).) Since the notice was silent regarding whether the County contended Clayton had unreasonably delayed in submitting the application, Clayton could legitimately interpret and rely upon the County's notice as a manifestation of the

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11 We reject respondents' contention that Clayton "may be considered to have conceded his original claim of October, 1998 was late" because he filed a late claim application rather than filing a lawsuit, and therefore the issue is whether his claims accrued within one year of submission of his late claim application. In *Toscano v. Los Angeles* (1979) 92 Cal.App.3d 775, the case on which respondents rely, the court held that the trial court had no authority in a section 946.6 proceeding to decide the issue of whether the plaintiffs' claim was timely filed, i.e., filed within 100 days (as the statute then provided) of discovery of their fraud claim, but instead that a plaintiff claiming timely filing should file a complaint and prove timely filing in the civil action. (92 Cal.App.3d at p. 783.) The court stated that "[a]n argument that one filed a timely claim is inconsistent with a petition for relief under section 946.6, since such petition necessarily follows the denial of an application for leave to file a late claim." (*Ibid.*) We do not take this statement to mean that, because a claimant has filed a late claim application, he or she has somehow waived the right to show timely filing of the claim itself. Moreover, Clayton here did follow the procedure recommended in *Toscano*; he filed the complaint in this action, rather than a petition for relief under section 946.6, and alleged that he had presented a timely claim for damages on or about November 2, 1998, which the County denied on January 19, 1999.

12 The County, though, maintains it is not advancing such contention.

County's intent to relinquish its right to contest Clayton's compliance with the "reasonable time" aspect of the statute.

III.

Clayton is correct that he was erroneously denied a jury trial (Cal. Const., art. I, § 16) on the issue of the dates of accrual of his causes of action.[13]

"The date of the accrual of a cause of action for the purpose of computing the time limit of the Government Code claims (§ 900 et seq.) is the same as for the statute of limitations which would otherwise be applicable. (… § 901.)" (*Wozniak v. Peninsula Hospital* (1969) 1 Cal.App.3d 716, 722.) In a suit for medical malpractice, the one-year statute of limitations commences to run when the plaintiff "discovers, or through the use of reasonable diligence should have discovered, [his or her] injury."[14] (Code Civ. Proc., § 340.5.)[15] The term "injury" means both the plaintiff's physical condition and its negligent cause; thus, once a plaintiff knows, or by reasonable diligence should have known, he or she has been harmed through professional negligence, the one-year limitations period begins to run. (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 896.) "When

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[13] "The constitutional right to a jury trial is the right as it existed at common law, when the state Constitution was first adopted [in 1850]." (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 75; *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 286-287.) Denial of the right is reversible per se. (*Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698.)

[14] "A negligence action for damages is an action at law and is encompassed by the constitutional jury guaranty." (*Windsor Square Homeowners Assn. v. Citation Homes* (1997) 54 Cal.App.4th 547, 551; *Chiesur v. Superior Court* (1946) 76 Cal.App.2d 198, 202-203.)

[15] Code of Civil Procedure section 340.5 contains two periods of limitation—a three-year period that begins to run from the "date of the injury," and a one-year period that commences when the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury. Both of these limitation periods must be met. (*Rose v. Fife* (1989) 207 Cal.App.3d 760, 767-768.) The three-year period is not an issue in this case, because both Clayton's original claim and his late claim application were presented, and his lawsuit was filed, within three years of his surgery in July 1997.

the person who is injured is a minor, as here, the parents' knowledge or lack of knowledge is controlling. [Citation.]" (*Wozniak v. Peninsula Hospital*, *supra*, 1 Cal.App.3d at p. 723; accord, *Whitfield v. Roth* (1974) 10 Cal.3d 874, 885; *County of Los Angeles v. Superior Court*, *supra*, 91 Cal.App.4th at p. 1309.)

Many cases have acknowledged, if they have not directly held, that the date of accrual of a cause of action is subject to jury determination when the issue is raised in connection with a tort claim. In *Wozniak*, the trial court granted summary judgment in favor of the defendant hospital on the ground the minor plaintiff had not filed a claim within the then-prevailing 100 days of section 911.2. The Court of Appeal reversed, concluding that "a triable issue of fact exists as to the time of the accrual of [the plaintiff's] cause of action." (*Wozniak v. Peninsula Hospital*, *supra*, 1 Cal.App.3d at p. 724.) The court explained:

> "The question of when there has been a belated discovery of the cause of action, especially in malpractice cases, is essentially a question of fact. The facts and circumstances of the medical treatment rendered a patient are within the exclusive knowledge of the hospital and the attending physicians. It is difficult to understand how an injured person could discover the cause of the injury until he has obtained that information. [Citations.] It is only where reasonable minds can draw but one conclusion from the evidence that the question becomes a matter of law. [Citations.]" (*Wozniak v. Peninsula Hospital*, *supra*, 1 Cal.App.3d at p. 725.)

The court found the trial court had erred in granting the defendant's motion for summary judgment because reasonable minds could differ about when the plaintiff's parents knew or should have known about the hospital's alleged negligence. (*Wozniak v. Peninsula Hospital*, *supra*, 1 Cal.App.3d at pp. 724-726.) The court made clear it was not deciding the date when the plaintiff's cause of action accrued "but only that the issue exists and is to be determined by the trier of fact." (*Id.* at p. 726; see also *Romo v. Estate of Bennett* (1979) 97 Cal.App.3d 304, 307.)

We think the court's use of the term "trier of fact" is significant, for it reflects an assumption that the determination of the date of accrual is not reserved for the court

alone. The term "trier of fact" is used interchangeably to refer to a judge or jury and recognizes the factual, rather than the strictly legal, character of the inquiry. (*Cornette v. Department of Transportation, supra,* 26 Cal.4th at p. 75.)

In *Dujardin v. Ventura County Gen. Hosp.* (1977) 69 Cal.App.3d 350, the trial court sustained the defendants' demurrer without leave to amend on the ground the plaintiffs, a husband and wife and their minor child, had failed to file a claim within the required 100 days. The appellate court reversed, explaining that "[b]ecause the question of belated discovery depends on the facts and circumstances surrounding the negligent act and the subsequent events leading to discovery, the issue is ordinarily one of fact for a court *or jury* to decide." (*Dujardin v. Ventura County Gen. Hosp., supra,* 69 Cal.App.3d at p. 356, italics added.) The court decided that, because the plaintiffs' complaint sufficiently pled belated discovery, the issue could not be settled as a matter of law and the plaintiffs' "should have the opportunity to present their proof to the trier of fact." (*Id.* at p. 359.)

In addition, many courts in cases involving section 946.6 have likewise affirmed, if they have not held, that there is a right to a jury determination of the date of accrual under the tort claim statutes. (See *Mandjik v. Eden Township Hospital Dist., supra,* 4 Cal.App.4th at pp. 1500, 1504, fn. 12 [to permit public entity to make factual determinations relating to timeliness of a claim would deny claimant his or her right to a jury trial on disputed factual issues, and whether plaintiff will be able to prove his or her allegation of delayed accrual is a factual issue]; *Santee v. Santa Clara County Office of Education, supra,* 220 Cal.App.3d at pp. 711-712 ["We can envision certain cases, such as where the date of the accrual of the cause of action is disputed, where the related issue of timeliness of the claim should be postponed, upon appropriate demand by a petitioner, to a determination by the jury as in cases involving private defendants."]; *Ngo v. County of Los Angeles* (1989) 207 Cal.App.3d 946, 950 ["Were petitioners proceeding against a nongovernmental defendant, the issue of the statute of limitations would, of course, be a jury question [citations]; and so long as there exists any triable issue of fact as to whether

there was timely compliance with the claims statute, both issues would be jury questions in an action against the County."]; and *Scott v. County of Los Angeles*, *supra*, 73 Cal.App.3d at pp. 481-482 [public entity cannot deny to claimant his or her right to jury trial on disputed factual issues by rejecting claim as untimely rather than on its merits where the claim is timely on its face].[16])

The fact that "[t]he Claim Statute did not exist in 1850" does not mean that "there is no inherent right to a jury trial against a public entity unless that right is found in a statute," as respondents maintain. Respondents have misconstrued *County of Sacramento v. Superior Court*, *supra*, 42 Cal.App.3d 135, where the court held there is no right to a jury trial in a section 946.6 proceeding because the statute (1) contemplates findings by

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16 Respondents contend the statement in *Scott* is dicta because the county there chose to defend the action on the basis of the statute of limitations rather than the Tort Claims Act. This characterization of *Scott* is inaccurate. The plaintiff in *Scott*, after the county had rejected her original claim as untimely, submitted a second claim which the county treated as an application to file a late claim and rejected. The plaintiff then filed both a complaint and a petition for relief pursuant to section 946.6. On appeal from the trial court's denial of the plaintiff's section 946.6 petition, the Court of Appeal found the plaintiff could proceed with her action, despite the denial of her petition, because the county had no right to reject the original claim as untimely; according to the court, the allegations in the claim, if true, would have tolled the running of the statute of limitations and postponed the date of accrual of the cause of action. (*Scott v. County of Los Angeles*, *supra*, 73 Cal.App.3d at pp. 481-482, 484.) Recognizing that, when the cause of action accrued and whether the statute of limitations was tolled were issues critical to both the plaintiff's due compliance with the claims statutes and the plaintiff's success on her malpractice complaint, the court reasoned that, in such situations, the public entity must accept the claim as timely and reject it on its merits, and to do otherwise would "deny to a claimant his or her right to a jury trial on disputed factual issues." (*Id.* at pp. 481-482.) Because the four-year statute of limitations then in effect for malpractice actions would have run on the plaintiff's claim in 1974 unless it was otherwise tolled, the court pointed out that the plaintiff would first have to prove at trial that the limitations period had been so tolled in order for her tort claim to be as timely, and, if it was not so tolled, the date of discovery of her injury was irrelevant. (*Scott v. County of Los Angeles*, *supra*, at p. 484.) Although the statute of limitations was the primary concern in *Scott*, the rationale which requires a public entity to accept a claim timely on its face applies equally when the only concern is compliance with the claims statute and implicates equally the claimant's right to a jury trial.

the court, not a jury; (2) had no counterpart in 1850; and (3) describes a "special proceeding," not a common law action. (*County of Sacramento v. Superior Court*, *supra*, at pp. 139-140.) The court did not hold, as respondents assert, that there is no right to a jury trial against a public entity unless that right is found in a statute. Instead, the court applied the rule that there is no right to a jury trial in a special proceeding, such as one under section 946.6, unless the right is extended by statute. (*County of Sacramento v. Superior Court*, *supra*, at p. 140; see *Vallejo etc. R.R. Co. v. Reed Orchard Co.* (1915) 169 Cal. 545, 556.)

If respondents' argument prevailed, there would be few if any actions against public entities where a jury trial would be permitted, because the Tort Claims Act did not exist in 1850. This is clearly not the case. (See, e.g., *Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1670 [negligence claims against state tried to jury]; *Alexander v. State of California ex rel. Dept. of Transportation* (1984) 159 Cal.App.3d 890 [dangerous condition of public property tried to jury]; *Meyer v. City of Oakland* (1980) 107 Cal.App.3d 770 [negligence claim tried to jury]; *Bakity v. County of Riverside* (1970) 12 Cal.App.3d 24 [dangerous condition of public property tried to jury].)

Moreover, the right to a jury trial does not entirely depend upon the existence of a particular right of action in 1850. (*Asare v. Hartford Fire Ins. Co.* (1991) 1 Cal.App.4th 856, 867.) Rather, it exists when a current case is of the same "class" or "nature" as one which existed in 1850. (*People v. One 1941 Chevrolet Coupe*, *supra*, 37 Cal.2d at pp. 299-300.)

> "'It is suggested that the statute was enacted since the adoption of the Constitution, and for that reason is not within the guaranty of trial by jury. The constitutional right of trial by jury is not to be narrowly construed. It is not limited strictly to those cases in which it existed before the adoption of the Constitution but is extended to cases of *like nature* as may afterwards arise. It embraces cases of the *same class* thereafter arising…. The introduction of a new subject into a class renders it amenable to its general rules, not to its exceptions.'" (*Ibid.*, fns. omitted, italics added.)

Thus, whether a jury trial is required depends upon the "'gist of the action.' If the 'gist' is legal, as opposed to equitable, [the Supreme Court has] recognized a right to jury trial. [Citations.]" (*McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 379-380, fn. omitted.) "Generally, where the legal remedy of damages is full and adequate and can do complete justice between the parties, no equitable remedy is available. [Citations.] Accordingly in such cases the right to a jury trial exists. [Citation.]" (*Asare v. Hartford Fire Ins. Co.*, *supra*, 1 Cal.App.4th at p. 867.)

The "gist" of the issue about when a cause of action for damages accrued is legal, because it is determinative of the plaintiff's right to bring such a cause of action at law. The fact the issue arises in the context of the claims statutes rather than in the context of the statute of limitations, and the fact that the defendant is a public entity rather than a private person or entity, are not distinctions that make a difference. The nature of the inquiry and the purpose of the inquiry are the same—a determination about whether the action at law for damages may proceed. (See *County of Kern v. Superior Court* (1978) 82 Cal.App.3d 396, 401 [although the claims defense and the statute of limitations defense are different, both arise out of a common factual question: When did real party discover (or in the exercise of due diligence should have discovered) the malpractice?]; *Gonzales v. Nork* (1978) 20 Cal.3d 500, 506 [defendant had constitutional right to jury trial when medical malpractice and fraud case commenced; issues in case involved special defenses of release and statute of limitations]; *Estate of Fincher* (1981) 119 Cal.App.3d 343, 351 [right to a jury trial on legal issue of statute of limitations defense, unless there is no conflict in the evidence].)

Moreover, the fact that section 946.6 does not provide for a jury trial does not mean the claimant is not entitled to a jury trial on the issue of when his or her claim accrued. The Legislature's decision to deny a jury trial in one type of proceeding does not manifest an intent to deny it in another type of proceeding. By enacting section 901, the Legislature directed the courts to apply the statute of limitations corresponding to the cause of action asserted—in this case, Code of Civil Procedure section 340.5. The

determination about when a cause of action has accrued for purposes of this statute is a proper subject for a jury when the facts are in dispute. (*Taylor v. Wright* (1945) 69 Cal.App.2d 371, 384; *Pacific Improvement Co. v. Maxwell* (1915) 26 Cal.App. 265, 271; *Heilbron v. Heinlen* (1887) 72 Cal. 376; *Reed v. Swift* (1873) 45 Cal. 255.) We presume the Legislature knew when it enacted section 901 that the right to a jury trial existed with respect to the issue of accrual. (*Yoffie v. Marine Hospital Dist.* (1987) 193 Cal.App.3d 743, 748 [Legislature is presumed to know existing law at the time it enacts a statute].) Because the Legislature in section 901 did not limit the issue to court determination as it did in section 946.6, we may conclude it did not intend to change existing law applicable when the action is not a special proceeding under the latter statute.

In a supplemental letter brief respondents cite *Santa Ana Unified School Dist. v. Orange County Development Agency* (2001) 90 Cal.App.4th 404, 410, and *Downen's, Inc. v. City of Hawaiian Gardens Redevelopment Agency* (2001) 86 Cal.App.4th 856, 860, to support the proposition that "legislative intent should be respected, even if the language of the [Tort Claims Act] does not with perfect specificity address the availability of a jury trial on the issue." We find these cases distinguishable, as each involved the construction of a statute that was reasonably susceptible to two conflicting interpretations, which is not the situation here. More importantly, neither concerned the right to a jury trial.

The case respondents cited at oral argument, *Martell v. Antelope Valley Hospital Medical Center* (1998) 67 Cal.App.4th 978, does not change our analysis. In *Martell*, the minor plaintiff's parents presented the public entity defendant with a timely claim for medical malpractice in August 1989, which the defendant rejected in October 1989. In February 1990, the parents and minor filed a complaint for medical malpractice, which they voluntarily dismissed in May 1992 because the minor's young age prevented the full extent of his injuries from being completely known. In February 1997, the plaintiffs filed a second complaint. The trial court granted the defendant's motion for summary judgment, brought on the ground that the plaintiffs had failed to comply with the

requirement of section 945.6 that a complaint be filed within six months of rejection of the tort claim. (67 Cal.App.4th at p. 980.)

The Court of Appeal affirmed. The court held that the six-month statute of limitations of section 945.6 prevails over the general statutes of limitations and therefore bars the plaintiffs' complaint. (*Martell v. Antelope Valley Hospital Medical Center, supra,* 67 Cal.App.4th at pp. 981-982.) The court rejected the plaintiffs' contention that effect must be given to both Government Code section 945.6 and Code of Civil Procedure section 340.5, which gives minors under the age of six until their eighth birthday to file suit. The court noted that Government Code section 945.6 existed when the Legislature enacted Code of Civil Procedure section 340.5 in 1975, and, therefore, the Legislature must be presumed to have known about the six-month filing period for complaints against public entities. The court concluded that, from the Legislature's failure to make an exception in Code of Civil Procedure section 340.5 for malpractice claims against public entities, it could infer the Legislature intended minors to be bound by Government Code section 945.6's six-month limit. (67 Cal.App.4th at p. 983.)

Martell has no application here, where the question is whether the Legislature specifically barred a jury trial on the issue of the accrual date of the applicable limitations period. If anything, *Martell* supports our conclusion that, since the Legislature knew when it enacted section 901 that a right to jury trial existed at common law with respect to the issue of accrual, the Legislature's failure to expressly rewrite the common law right when it enacted section 901 compels us to infer the Legislature intended that right to subsist when the action is against a public entity.

Next, Code of Civil Procedure section 597, which permits the separate trial of specified defenses, does not describe a special proceeding. The Supreme Court recently rejected a similar argument that the litigation of the Tort Claims Act's design immunity defense is a special proceeding not requiring a jury trial:

> "Judicial remedies are either actions or special proceedings. (Code Civ. Proc., § 21.) An action 'is an ordinary proceeding in a court of justice by

> which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.' (Code Civ. Proc., § 22.) 'Every other remedy is a special proceeding.' (Code Civ. Proc., § 23.) Caltrans does not attempt to explain why the defense of design immunity should be considered a special proceeding, except to say that '[a] special proceeding may be commenced independently of the pending action.' This does not advance Caltrans's case because, as plaintiffs point out, '[t]he bifurcated trial of the changed conditions exception to the design immunity defense was not "commenced independently of the pending action" —it was part and parcel of the pending action.' In conclusion, Caltrans is simply wrong about design immunity being a special proceeding; it is an affirmative defense in an action brought under Government Code section 835 to, in the words of Code of Civil Procedure section 22, 'redress … a wrong.'" (*Cornette v. Department of Transportation*, *supra*, 26 Cal.4th at p. 76.)

Here, respondents also do not attempt to explain why a proceeding under Code of Civil Procedure section 597 should be considered a special proceeding. Though they cite *County of Sacramento v. Superior Court*, *supra*, 42 Cal.App.3d 135, that case held that section 946.6 describes a special proceeding; it did not consider whether a separate trial under Code of Civil Procedure section 597 is a special proceeding.

The words "special proceeding" have

> "reference only to such proceedings as may be commenced independently of a pending action by petition or motion upon notice in order to obtain special relief. And, generally speaking, a special proceeding is confined to the type of case which was not, under the common law or equity practice, either an action at law or a suit in equity. [Citations.]" (*Church v. County of Humboldt* (1967) 248 Cal.App.2d 855, 858, fn. 3.)

In contrast to section 946.6, a separate trial of limited issues under Code of Civil Procedure section 597 is not a special proceeding because it is not brought independently of the pending action. Instead, it is a part of the pending action itself, convened for the express purpose of trying some but not all of the issues in that action, and unless the resolution of a segregated issue is determinative of the entire action, no final or appealable judgment will result from the bifurcated proceeding. In this case, the action is

one for medical malpractice brought, in the words of Code of Civil Procedure section 22, to "redress … a wrong."

We find nothing persuasive in the fact that Clayton would not have had the right to a jury trial if the County had denied the late claim application and required Clayton to proceed by petition under section 946.6. While it is true a jury is not authorized in a section 946.6 special proceeding, it does not follow that a jury trial is not authorized in a civil action that is not a special proceeding. The fallacy of respondents' argument is highlighted by their corollary assertion that Clayton is not entitled to a jury trial because he would not have been entitled to a jury trial had the County demurred or brought a motion for summary judgment, for directed verdict, or for nonsuit in Clayton's lawsuit.[17] By logical extension of this reasoning, no party would ever get a jury trial in any civil action on any issue, because these procedural means of resolving legal issues short of decision by the finder of fact are available in every civil action. (See, e.g., *Wozniak v. Peninsula Hospital*, *supra*, 1 Cal.App.3d at p. 725 [accrual of claim, while generally an issue of fact, becomes an issue of law only where reasonable minds can draw but one conclusion from the evidence].)

Nothing in *Reyes v. County of Los Angeles* (1988) 197 Cal.App.3d 584 helps respondents. *Reyes* held that a court may decide the issue of accrual in a section 946.6 proceeding; *Reyes* did not hold that a party is not entitled to a jury trial on the issue of accrual in a civil medical malpractice action. The plaintiffs in *Reyes* asserted that the

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17 The County appears to assume the issue of accrual in this case is, on the facts, not subject to dispute and is therefore subject to resolution as a matter of law by one or more methods provided in the Code of Civil Procedure. Whether or not there is a justiciable dispute of material fact is not before us, and, in any event, the point is irrelevant to the right to a jury trial. We know of no authority, and the County has cited none, which so much as suggests obliquely that the right to jury trial depends upon the probative value of the evidence possessed by the party demanding the jury. That the relevant evidence may ultimately result in the issue being taken from the jury and decided as a matter of law by the court has no bearing on the question whether a jury trial is permitted in the event the matter is decided by a trier of fact.

nonjury setting of the hearing on the petition for relief under section 946.6 deprived them of their right to a jury determination of the factual issue of accrual. The court rejected the argument, stating it was the plaintiffs, not the defendant, who sought a court determination of the date of accrual by filing a petition for relief, and, having chosen that forum, the plaintiffs could not complain of the loss of a jury. (*Reyes v. County of Los Angeles*, *supra*, at p. 595.)[18] By parity of reasoning here, the County, having chosen to accept Clayton's late claim application, relegated the determination of the accrual issue to the inevitable civil action. Having chosen to direct Clayton into the forum where he had a right to a jury trial, the County cannot now complain because Clayton is exercising that right.

Similarly, *Windsor Square Homeowners Assn. v. Citation Homes*, *supra*, 54 Cal.App.4th 547 is not controlling. In *Windsor*, the court stated that "in a statute of limitations defense, the court would seem to be to us in a better position to determine when a cause of action accrued than a jury, even though there are factual underpinnings to this finding." (*Id.* at p. 558.) This is gratuitous dicta, well beyond the issue addressed by *Windsor Square*, which was whether the facts relevant to a defense of res judicata are to be tried to the court. (*Id.* at pp. 550, 557.) The court's explanation for its conclusion that such factual issues are to be tried without a jury demonstrates why *Windsor Square* is distinguishable.

> "The issues [underlying the applicability of the res judicata defense] are often mixed fact-law determinations, involving, for instance, the assertion of jurisdiction, a decision better made by the court alone. Ordinarily, the facts that need to be determined are fairly simple—for example, what the complaint alleges in the first action versus what the complaint alleges in the second action. The pleadings must be studied to determine what claims were or could have been raised, who were the parties sued, whether the party against whom the bar is asserted was in privity with a party to the

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18 If anything, *Reyes* supports the proposition that the right to jury trial on the issue of accrual exists when it is raised in a civil action at law, as opposed to a section 946.6 special proceeding.

> prior suit, whether the prior adjudication was a judgment on the merits. While all these issues may have factual predicates, they are peculiarly legal determinations." (*Id.* at p. 557.)

Thus, *Windsor Square* did not involve a disputed issue of fact based upon conflicting evidence but rather a disputed issue of law based upon undisputed facts—in other words, a legal issue of the sort which is traditionally the peculiar province of the court. The question here, however, about when a plaintiff knew or should have known about the existence of possible medical malpractice, is the former rather than the latter.

Finally, there appears to be no doubt that a medical malpractice plaintiff has the right to a jury trial on factual issues relevant to the defense, among others, of the date of accrual for purposes of the statute of limitations. (See *Estate of Fincher, supra,* 119 Cal.App.3d at p. 351; *Gonzales v. Nork, supra,* 20 Cal.3d at p. 506; *McComber v. Wells* (1999) 72 Cal.App.4th 512, 521.) Given this predicate, we therefore do not understand the legal rationalization for a rule which would permit that right, granted by constitutional provision, to be effectively defeated by a public entity defendant by the simple expedient of requesting discretionary bifurcation under the authority of a statutory provision, i.e., Code of Civil Procedure section 597. Recent case law indicates the plaintiff cannot be deprived of a rightful jury by this stratagem employed by a non-public entity defendant when the special defense is the statute of limitations.[19] (See *Monarch v. Southern Pacific Transportation Co.* (1999) 70 Cal.App.4th 1197, 1203; *Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1197.) By analogy, the same should be true with respect to the date of accrual under section 901, and we reject any suggestion to the contrary that may be found in *Windsor Square*.[20]

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[19] This is not to say that equitable issues must be tried to a jury when bifurcation is ordered. To the contrary, because there is no right to a jury with respect to equitable issues, they must be decided by the court separately from legal issues. (See *Estate of Fincher, supra,* 119 Cal.App.3d at p. 351.)

[20] The fact that Code of Civil Procedure section 597.5 specifically applies to medical malpractice statute of limitations defenses is of no importance. All this statute does is

In sum, Clayton was entitled to a jury determination of the issue of the date of accrual of his cause of action. The other contentions raised by the parties in their briefs are moot.

DISPOSITION

The judgment is reversed. Appellant is awarded costs on appeal.

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Dibiaso, Acting P.J.

WE CONCUR:

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Vartabedian, J.

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Cornell, J.

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make subject to mandatory bifurcation one special defense otherwise subject to discretionary bifurcation under Code of Civil Procedure section 597.

Filed 5/17/02

IN THE

Court of Appeal of the State of California

IN AND FOR THE

Fifth Appellate District

CLAYTON L. JEFFERSON, a Minor, etc., Plaintiff and Appellant, v. COUNTY OF KERN et al., Defendants and Respondents.	F036017 (Super. Ct. No. 238468)

It appearing that part of the nonpublished opinion filed in the above-entitled matter on the 19th day of April, 2002, as subsequently modified on May 17, 2002, meets the standards for publication specified in California Rules of Court, rule 976(b), it is ordered that the opinion be certified for publication in the Official Reports with the exception of parts I and II of Discussion.

Dibiaso, Acting P.J.

WE CONCUR:

_____

Vartabedian, J.

_____

Cornell, J.

Filed 5/17/02

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CLAYTON L. JEFFERSON, a Minor, etc., Plaintiff and Appellant, v. COUNTY OF KERN et al., Defendants and Respondents.	F036017 (Super. Ct. No. 238468) **ORDER MODIFYING OPINION, CERTIFYING OPINION FOR PARTIAL PUBLICATION [NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion filed herein on April 19, 2002, be modified as follows:

1. The opinion in the above-entitled matter filed on April 19, 2002, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be partially published in the Official Reports and it is so ordered. Therefore, on page 1, replace the notation NOT TO BE PUBLISHED IN OFFICIAL REPORTS with CERTIFIED FOR PARTIAL PUBLICATION* and add the following footnote:

> *Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I. and II. of Discussion.

2. On page 2, before the heading "DISCUSSION," add the following paragraph:

In the unpublished portion of this decision, we conclude that the County is not estopped from challenging the date of accrual of Clayton's causes of action, since the County accepted Clayton's application for leave to present a late claim while expressly reserving its right to challenge the timeliness of the claim if discovery disclosed the accrual dates were other than those stated in the application. In the published portion of this decision, we conclude that Clayton was entitled to a jury trial on the issue of date of accrual of his causes of action. Accordingly, we reverse.

3. On page 15, at the end of the first sentence of the third full paragraph, after the words "under the tort claims statutes," add as footnote 16 the following footnote, which will require renumbering of all subsequent footnotes:

> **16**As we stated in the unpublished portion of the opinion, section 946.6 authorizes a claimant whose late claim application is denied to petition the court for an order relieving the claimant from the claims presentation requirements. Such a petition is a "special proceeding" in which the court is required to grant the petition if the evidence shows the late claim application was made within a reasonable time not to exceed one year after accrual of the cause of action, the application was denied or deemed denied, and one of four enumerated grounds for relief is met. (*County of Sacramento v. Superior Court*, *supra*, 42 Cal.App.3d at p. 140; Code Civ. Proc., §§ 21-23; Gov. Code, § 946.6, subd. (c)(2); *County of Los Angeles v. Superior Court*, *supra*, 91 Cal.App.4th at pp. 1313-1314.)

4. On page 19, at the end of the second sentence of the second full paragraph, after the words "another type of proceeding," add as footnote 18 the following footnote, which will require renumbering of all subsequent footnotes:

> **18**For the purpose of addressing respondents' arguments, we will assume, without deciding, that the Legislature is empowered to deny the right to a jury trial in actions against public entities.

5. On page 25, at the end of the first full paragraph, after the word "latter" add the following:

> (See *Cornette v. Department of Transportation*, *supra*, 26 Cal.4th at pp. 76-77 [making same distinction with respect to design immunity defense].)

6. On page 25, in the second full paragraph, delete footnote 19, which follows the words "statute of limitations." This will require renumbering of all subsequent footnotes.

Except for the modifications set forth, the opinion previously filed remains unchanged.

These modifications do not effect a change in the judgment.

_____
Dibiaso, Acting P.J.

WE CONCUR:

_____
Vartabedian, J.

_____
Cornell, J.