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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Mary Jo Keller,

Plaintiff,

vs.

United States of America,

Defendant.

No. CV-11-02345-PHX-PGR

ORDER

Pending before the Court is Defendant United States' Motion for Summary Judgment (Doc. 58), wherein the United States seeks to have this action dismissed as time-barred. Having considered the parties' memoranda in light of the relevant evidence of record, the Court finds that there is no genuine dispute as to any material fact and that the United States is entitled judgment in its favor as a matter of law pursuant to Fed.R.Civ.P. 56.¹

¹

Although the plaintiff has requested oral argument, the Court concludes that no oral argument is necessary because the parties have had an adequate opportunity to provide the Court with evidence and legal memoranda and oral argument would not aid the decisional process. Partridge v. Reich, 141 F.3d 920, 926 (9th Cir.1998).

The Court notes that it discusses herein only those arguments raised by the parties that the Court deems necessary for the resolution of the instant motion.

1 Background

2 This Federal Tort Claims Act case, commenced on August 26, 2011, arises
3 from an automobile accident in Maricopa County, Arizona on September 7, 2007 in
4 which Amanda Keller, the daughter of plaintiff Mary Jo Keller (“Keller”), was killed
5 when her vehicle crossed the median of Interstate 10 through an allegedly defective
6 three-cable median barrier and collided with an oncoming vehicle.

7 The Court initially dismissed this action for lack of subject matter jurisdiction
8 on July 18, 2012, on the ground that it was time-barred because Keller did not
9 present her administrative claims required by the FTCA to the Federal Highway
10 Administration (“FHWA”) until December 16, 2010, which was some fifteen months
11 after the expiration of two-year statute of limitations of 28 U.S.C. § 2401(b).² Section
12 2401(b) provides in relevant part that “[a] tort claim against the United States shall
13 be forever barred unless it is presented in writing to the appropriate Federal agency
14 within two years after such claim accrues[.]” The Court concluded as a matter of law
15 in its initial dismissal opinion that Keller’s claim accrued on September 7, 2007, the
16 date of the accident, that the limitations period expired two years later, and that the
17 then-existing Ninth Circuit precedent, which held that the limitations period was
18 jurisdictional, barred the Court from considering Keller’s contention that the
19 limitations period should be equitably tolled.

20 During the pendency of Keller’s appeal, the Ninth Circuit held that the
21 limitation periods of § 2401(b) were not jurisdictional and were subject to equitable
22 tolling. Kwai Fun Wong v. Beebe, 732 F.3d 1030 (9th Cir.2013) (en banc). The

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24 Keller filed two administrative claims with the FHWA: one on behalf of
25 herself as Amanda’s surviving mother, and one in her capacity as the personal
26 representative of Amanda’s estate. In her Second Amended Complaint, Keller
dropped her previous claims on behalf of the estate.

1 Supreme Court affirmed that holding. United States v. Kwai Fun Wong, 135 S.Ct.
2 1625 (2015). As a result, the Ninth Circuit reversed the Court's judgment of
3 dismissal and remanded this action to allow the Court to consider Keller's equitable
4 tolling argument.

5 The post-remand Second Amended Complaint ("SAC") (Doc. 54), which Keller
6 brings pursuant to the FTCA solely in her capacity as Amanda Keller's surviving
7 mother for purposes of Arizona's Wrongful Death Act, A.R.S. § 12-611 *et seq.*,
8 alleges two claims. Count One is a claim for Negligence, which alleges that the
9 United States negligently failed to comply with its own policies and federal law
10 mandating that safety barriers installed on National Highway System ("NHS")
11 roadways undergo crash testing and approval pursuant to the National Cooperative
12 Highway Research Project Report 350. Count Two is a claim for Negligence Per Se,
13 which alleges that the United States violated its own federally mandated safety rules
14 and regulations by failing to install a crashworthy, appropriately tested, NCHRP
15 Report 350 compliant median barrier.

16 Keller further alleges in the SAC that the FTCA's limitations period was
17 equitably tolled as of September 7, 2007, the date of the fatal accident, and therefore
18 did not commence running, "because misrepresentations by the Defendant caused
19 Plaintiff to let the filing period lapse." Keller asserts in the SAC that the limitations
20 period was tolled from Amanda Keller's death through April 28, 2009, the date on
21 which Keller learned through the deposition of FHWA employee Richard Powers
22 that the cable median barrier at issue was not Report 350 compliant and that the
23 United States had negligently accepted the non-crash-tested cable median barrier
24 design.

25 Keller is represented in this action by attorney John Leader, who has litigated
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1 various state and federal lawsuits on behalf of plaintiffs alleging negligence related
2 to the design of the three-cable median barrier at issue here.

3 Discussion

4 The United States argues that it is entitled to summary judgment on the
5 equitable tolling issue because the undisputed facts demonstrate that Keller, through
6 her attorney, had sufficient knowledge of its involvement with the design of the cable
7 median barrier to have timely filed an administrative claim with the FHWA within two
8 years of Amanda Keller's death.

9 Keller argues that the United States' summary judgment motion should be
10 denied because her administrative claims were timely filed with the FHWA for
11 purposes of § 2401(b), or alternatively that at the very least there is a disputed issue
12 of fact concerning the timeliness of her administrative claims. Underlying Keller's
13 liability claim is her contention that the United States negligently accepted incorrect
14 crash-testing information to fulfill its own crash-testing requirement for the median
15 cable barriers. The gist of Keller's position is that the limitations period should be
16 equitably tolled through April 29, 2009 because the United States concealed until
17 that date the material fact that a FHWA memorandum in September 2005, which
18 stated that the design of the median cable barrier was Report 350 compliant and
19 therefore crash-tested, was a misrepresentation inasmuch as the report was
20 mistakenly based on test results for roadside barriers, a different type of barrier from
21 the non-tested median cable barriers. Keller contends in her response that prior to
22 the United States' alleged negligence being discovered during the April 29, 2009
23 deposition, her attorney "believed not that the FHWA negligently confused crash test
24 reports, but that the State of Arizona misrepresented crash test compliance to the
25 FHWA as part of Arizona's funding request."
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1 There are no disputed issues of fact here. The parties' disagreements stem
2 the legal interpretation of the undisputed facts.

3 A. Date of Accrual

4 Reading the SAC and Keller's response together, it is not absolutely clear to
5 the Court whether Keller is contending that her claims did not accrue until April 29,
6 2009, or whether they accrued on December 7, 2007 but the two-year limitations
7 period did not commence running thereafter until April 29, 2009. To the extent that
8 Keller is arguing the former, the Court affirms its earlier determination that her claims
9 accrued on the date of Amanda Keller's fatal accident. Federal law, not Arizona law,
10 governs the date of accrual for purposes of § 2401(b), Landreth v. United States,
11 850 F.2d 532, 533 (9th Cir.1988), and under that law negligence-related claims
12 accrue when the plaintiff knows of her injury and the immediate physical cause of the
13 injury. Hensley v. Unites States, 531 F.3d 1052, 1057 (9th Cir.2008); Dyniewicz v.
14 United States, 742 F.2d 484, 486 (9th Cir.1984). There is no dispute that the fact of
15 Amanda Keller's death and the immediate physical cause of her death, *i.e.* that the
16 vehicle in which she was an occupant crossed the roadway median through a cable
17 barrier and crashed into an oncoming vehicle, were known on the date of the
18 accident. For accrual purposes, it is irrelevant that Keller may then have been
19 ignorant of the United States' alleged negligence involving the crashworthiness of
20 the cable barrier. United States v. Kubrick, 444 U.S. 111, 123 (1979) ("We thus
21 cannot hold that Congress intended that 'accrual' of a [FTCA] claim must await
22 awareness by the plaintiff that his injury was negligently inflicted."); Hensley, at 1057
23 ("The plaintiffs' ignorance of the involvement of the United States employees is
24 irrelevant to determining when their [FTCA] claim accrues.") (Internal quotation
25 marks omitted.); Dyniewicz, at 486-87 (Case involved a FTCA-based wrongful death
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1 action brought in part by the personal representative of the estates of two decedents
2 who were killed when a flood swept their car off a highway in Hawaii; the plaintiffs
3 learned more than two years after the accident that the negligence of National Park
4 Service rangers might have been a cause of the accident. In affirming the dismissal
5 of the case as time-barred because the administrative claim was not submitted
6 within two years of accrual, the court concluded that for accrual purposes the
7 plaintiffs knew both the fact of injury and its immediate physical cause, the flooded
8 highway, at the time of the discovery of the decedents' bodies, and the plaintiffs'
9 ignorance at that time of the involvement of federal employees was irrelevant since
10 "[d]iscovery of the cause of one's injury ... does not mean knowing who is
11 responsible for it.")

12 B. Equitable Tolling of the Limitations Period

13 As a result of the accrual date, Keller's FTCA action is time-barred absent the
14 propriety of staying the limitations period pursuant to the doctrine of equitable tolling
15 from the date of the accident until two years prior to December 16, 2010, the date
16 Keller filed her administrative claims. As the party seeking equitable tolling, Keller
17 bears the burden of establishing two elements: (1) that she pursued her rights
18 diligently, and (2) that some extraordinary circumstances prevented her from timely
19 filing her administrative claims. Kwai Fun Wong v. Beebe, 732 F.2d at 1052.
20 Although Keller states in her response that she is seeking equitable tolling based on
21 concealment and not on due diligence and that "[d]ue diligence' is not relevant" to
22 her equitable tolling claim, she is mistaken as a matter of law. As the Supreme
23 Court has made clear, both elements must be met for equitable tolling to occur:
24 "[W]e have treated the two requirements as distinct elements in practice, too,
25 rejecting requests for equitable tolling where a litigant failed to satisfy one without
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1 addressing whether he satisfied the other.” Menominee Indian Tribe of Wisconsin
2 v. United States, 136 S.Ct. 750, 756 (2016). The Court concludes as a matter of law
3 that Keller has not met either element of the equitable tolling doctrine.

4 (1) Due Diligence

5 The United States argues, and the Court concurs, that Keller has failed to
6 establish the propriety of equitable tolling in part because the undisputed facts
7 establish that Keller was not sufficiently diligent in filing her administrative claims.
8 The gist of Keller’s negligence claims in her SAC is that the United States breached
9 its duty to have a crash-tested median barrier in place on the date of Amanda
10 Keller’s accident. Although the diligence required for equitable tolling is “reasonable
11 diligence” and not maximum feasible diligence,” Holland v. Florida, 560 U.S. 631,
12 653 (2010), Keller unreasonably delayed filing her administrative claims. This is so
13 because her attorney John Leader, based on other cases he had litigated involving
14 the same cable median barrier, had sufficient knowledge of the United States’
15 possible involvement in the approval of the cable median barrier and that the barrier
16 may not have been crash-tested long before the expiration of the two-year limitations
17 period in this action. As a matter of law, Keller is considered to have notice of all
18 facts known to her attorney. Link v. Wabash Railroad Co., 370 U.S. 626, 634 (1962)
19 (Supreme Court noted that in our system of representative litigation, “each party is
20 deemed bound by the acts of his lawyer-agent and is considered to have notice of
21 all facts, notice of which can be charged upon the attorney.”) (Internal quotation
22 marks omitted); Ringgold Corp. v. Worrall, 880 F.2d 1138, 1141-42 (9th Cir.1989)
23 (Parties “are considered to have notice of all facts known to their lawyer.”).

24 There is no dispute about the following facts. John Leader represented the
25 plaintiff in the state court case of DeVries v. State of Arizona, a wrongful death case
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1 involving the same type of cable median barrier at issue here. In the trial of the
2 DeVries action, which ended sometime prior to November 2006, conflicting
3 testimony was presented regarding the FHWA's approval of the three-cable median
4 barrier design and whether it was Report 350 compliant.³ As a result of that
5 testimony, Leader wrote a letter to the counsel for the FHWA on November 7, 2006,
6 ten months before Amanda Keller's accident, wherein he requested documents
7 pertaining to FHWA's position concerning whether the three-cable median barrier
8 was deemed to be in compliance with the crash-testing requirement of Report 350
9 and whether it had been approved for use on NHS roads. Leader noted in that letter
10 that "it is my understanding that to this day, this design has never passed Report 350
11 testing."

12 Keller wrote another letter to the FHWA's counsel on January 8, 2007, eight
13 months before Amanda Keller's accident, wherein he, noting conflicting crash-testing
14 information he had received through cases he had litigated, again requested
15 documents from the FHWA regarding its position regarding Report 350 crash-testing
16 of median and roadside barriers.

17 Leader wrote another letter to the FHWA's counsel on May 17, 2007, four
18 months before Amanda Keller's accident, wherein he requested the deposition of a
19 FHWA employee to determine whether the FHWA had deemed the three-cable
20 median barrier design to be crashworthy and approved for use on the NHS. Leader
21 stated in that letter that he represented the plaintiffs in four state court negligence
22 actions involving the same three-cable median barrier, that it was the state's position

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24 There is no dispute that in the trial of the DeVries case, Douglas Head,
25 a retired FHWA employee, testified that the state's design of the three-cable median
26 barrier was not Report 350 compliant and had not been approved for use on NHS
roads.

1 in those actions that the FHWA had deemed the cable barrier to be Report 350
2 crashworthy and appropriate for use on NHS roads, but that he, based on conflicting
3 evidence, believed that the FHWA had not at any time deemed the barrier to be
4 crashworthy.

5 On December 19, 2007, three months after Amanda Keller's accident, Leader
6 filed a FTCA administrative claim with the FHWA on behalf of another client, Mark
7 Melvin, who was injured in a cross-median crash on State Route 51 on December
8 21, 2005. Leader stated in that administrative claim that the three-cable median
9 barrier that failed in Melvin's case had "allowed over 200 cross median collisions of
10 Valley freeways." He further stated that there had been several other lawsuits
11 against the state involving the same median barrier design, and that "[i]n defending
12 these allegations, the State makes several claims that the FHWA has endorsed the
13 subject design and that it (the State) relied on these alleged endorsements. If the
14 State's allegations ... are true, the United States is partially at fault for the
15 functionally inadequate barrier that was and is present on many State freeways, and
16 partially at fault for Mr. Melvin's injuries." Leader concluded by reiterating in the
17 administrative claim that the state's allegations, if true, "give rise to a negligent
18 highway design claim against the United States."

19 On September 10, 2008, one year prior to the deadline for Keller to file her
20 administrative claims in this action, Leader filed an FTCA action in this Court on
21 behalf of Mark Melvin, Melvin v. United States, CV-08-01666-PHX-SRB. That
22 complaint alleged in part that the United States was negligent in deeming the three-
23 cable median barrier to be Report 350 compliant and approving it for use on NHS
24 roads.

25 Moreover, another Judge of this Court has determined that as early as
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1 November 2006, ten months before Amanda Keller died, John Leader had sufficient
2 knowledge of the United States' role with the three-cable median barrier to bar the
3 use of equitable tolling to stay the FTCA's limitations period. In Booth v. United
4 States, CV-11-00901-PHX-SPL, a wrongful death action brought by Leader involving
5 a cross-median accident on Interstate 10 involving the same three-cable median
6 barrier as here, Judge Steven Logan granted summary judgment for the United
7 States on the plaintiff's equitable tolling claim. In so doing, Judge Logan determined
8 that the plaintiff, due to his attorney Leader's knowledge from other cases he had
9 litigated, "knew no later than November 7, 2006 that FHWA had exposure to liability.
10 He knew that there was conflicting testimony about the approval of the ADOT 3-wire
11 median design and its compliance with Report 350."

12 It is clear to the Court that Keller has failed to establish that she met the
13 diligence element of the equitable tolling doctrine because the evidence establishes
14 that Keller, through the information her attorney possessed, could have timely filed
15 her administrative claims within two years of Amanda Keller's death and that her
16 delay in filing them until more than three years after her claim accrued was
17 unreasonable.⁴

18 (2) Extraordinary Circumstances

19 The second element of the equitable tolling doctrine, which is the one Keller
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22 Although Keller states in her SAC that "[u]pon information and belief,
23 Plaintiff Keller was unaware of the Melvin proceedings until around the time Keller's
24 own Administrative Claim was presented [which was on December 16, 2010,]" this
25 is disingenuous. The Court does not know exactly when Keller hired John Leader
26 to represent her, but it was indisputably prior to June 11, 2008, which is when
Leader filed a state court action on Keller's behalf stemming from Amanda Keller's
fatal accident. Whatever accident-related information Leader possessed at the time
Keller employed him is imputed to her.

1 focuses on, requires a showing that extraordinary circumstances beyond her control
2 made it impossible for her to file her administrative claims on time notwithstanding
3 her diligence. Menominee Indian Tribe, 136 S.Ct. at 756; Beebe, 732 F.3d at 1052.
4 Keller argues that she has met this element by showing that the United States
5 concealed material facts about its negligence, *i.e.*, facts related to why it deemed the
6 design of the cable barrier to be acceptable. According to Keller, she could not have
7 filed her action until she learned through the Powers deposition in April 2009 that the
8 FHWA's September 2005 memorandum that stated that the cable barrier at issue
9 had been crash-tested had negligently relied on the crash-testing of a different type
10 of barrier and the cable median barrier at issue had not in fact been crash-tested.
11 Keller further argues that she could not have learned of this negligence earlier
12 because the United States, relying on the FHWA's Touhy-related administrative
13 regulations⁵, refused attorney Leader's timely requests in highway barrier-related
14 state negligence cases to depose FHWA's employees such as Powers; Leader
15 commenced those Touhy requests in March 2006.

16 The United States argues, and the Court again concurs, that equitable tolling
17 is also not appropriate under the facts of this action because Keller has not
18 established that extraordinary circumstances made it impossible for her to timely file
19 her administrative claims. First, fraudulent concealment does not even come into
20 play here because Keller had sufficient information prior to the expiration of the
21 limitations period to enable her to timely file her claims.

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24 The Touhy regulations prohibit the unauthorized release of information
25 by current and former federal agency employees and provide a procedure for
26 centralized agency decision-making concerning how the agency will respond to a
subpoena or other request for testimony or documents served on a current or former
agency employee. See 5 U.S.C. § 301.

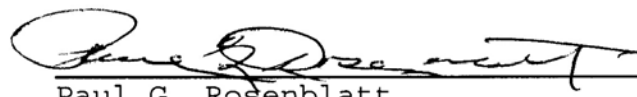
1 Second, the undisputed facts of record do not establish any fraudulent
2 concealment by the United States. Fraudulent concealment requires a showing of
3 affirmative conduct by the United States which would, under the circumstances of
4 this action, lead a reasonable person to believe that she did not have a claim for
5 relief. Gibson v. United States, 781 F.2d 1334, 1345 (9th Cir.1986). The mere fact
6 that the United States knew prior to April 2009 that the cable median barrier had not
7 been crash-tested and that it failed to disclose that knowledge does not, without
8 affirmative misconduct on its part, constitute fraudulent concealment. Dyniewicz v.
9 United States, 742 F.2d at 487 (“If the Government has been negligent, it has no
10 general duty announce that fact to the world at large. There are no grounds for
11 tolling the [FTCA’s] statute of limitations based simply on the Government’s
12 knowledge of its own wrongdoing absent fraudulent concealment[.]”) Furthermore,
13 Keller’s contention that the FHWA concealed, through misrepresentation in its
14 September 2005 memorandum, that the cable barrier was not Report 350 compliant
15 is not evidence of actual concealment sufficient to toll the limitations period given
16 attorney Leader’s knowledge prior to Amanda Keller’s death that the cable median
17 barrier may not have been crash-tested.

18 The fact that the United States, in accordance with applicable agency Touhy
19 regulations, refused to make FHWA employees available for deposition for three
20 years prior to April 2009 in cases in which the United States was not a party also
21 does not as a matter of law constitute affirmative misconduct. The United States had
22 the lawful right to prevent FHWA employees from testifying in state cases. See
23 United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951) (Supreme Court held that
24 a Department of Justice employee could not be held in contempt for refusing to
25 comply with a subpoena duces tecum in an action in which the United States was
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1 not a party when his compliance had been prohibited by an order of a superior acting
2 pursuant to valid federal regulations governing the release of official documents.);
3 5 U.S.C. § 301; 49 C.F.R. Part 9. Keller does not cite to a single case permitting
4 equitable tolling based on concealment when a federal agency properly invokes its
5 Touhy regulations and the Court is not aware of any. Therefore,

6 IT IS ORDERED that Defendant United States' Motion for Summary Judgment
7 (Doc. 58) is granted and that this action is dismissed as time-barred. The Clerk of
8 the Court shall enter judgment accordingly.

9 DATED this 29th day of August, 2017.

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12 Paul G. Rosenblatt
United States District Judge

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