

ARIZONA COURT OF APPEALS

DIVISION TWO

JOHNNIE LITTLE, for herself as natural
mother of Shawntinice Polk, and on
behalf of all beneficiaries, if any,

Plaintiff-Appellant,

v.

STATE OF ARIZONA,

Defendant-Appellee.

No. 2 CA-CV 2010-0079

Pima County Superior Court

No. C20085379

ANSWERING BRIEF

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TABLE OF CONTENTS

| | |
|--|-----|
| TABLE OF CITATIONS | iii |
| STATEMENT OF THE CASE..... | 1 |
| STATEMENT OF FACTS | 1 |
| I. Polk Dies in Tucson..... | 1 |
| II. Little Authorizes Television Reporter Johnson to Investigate Polk’s Death for Her. | 2 |
| III. Johnson Conducts Little’s Investigation with the Help of Attorneys. | 2 |
| IV. Johnson Reviews the Records, Consults with Medical Experts, and Files the BOMEX complaint on Little’s Behalf on July 1, 2007..... | 10 |
| V. Attorney Dyer Reviews the Medical Records and on September 13, 2007, Espouses to Little Theories of Negligence Consistent with the BOMEX complaint..... | 13 |
| VI. BOMEX Rules on February 7, 2008, and Little Finally Files Her Notice of Claim on May 15, 2008..... | 14 |
| VII. Little Files Suit. | 16 |
| ISSUE PRESENTED FOR REVIEW | 17 |
| ARGUMENT | 18 |
| I. The Superior Court Properly Granted Summary Judgment, Correctly Concluding that Little Did Not File a Timely Notice of Claim. | 18 |
| A. Standard of Review. | 18 |
| B. Little Had to File a Timely Notice of Claim. | 18 |
| C. Little’s BOMEX complaint, Which Johnson Filed for Her on July 1, 2007, Demonstrated the Necessary Knowledge to Trigger Accrual. | 20 |
| 1. Johnson obtained expert advice from four doctors before filing the BOMEX complaint..... | 21 |

| | | |
|-----|---|---------------------------|
| D. | Because Johnson Acted as Little’s Agent, His Knowledge Is Attributed to Her; Accrual Was Not Delayed Until She Personally Knew the Facts. | 23 |
| 1. | Johnson’s ignorance of the law is irrelevant. | 26 |
| 2. | Johnson was no mere volunteer. | 26 |
| 3. | No attorney contradicted Johnson’s facts and theories. | 29 |
| E. | Even if Johnson Was Not Little’s Agent, the Cause of Action Still Accrued When He Filed the BOMEX Action Because It Demonstrates What She Reasonably Should Have Known Then. | 31 |
| F. | The State Is Not Estopped to Assert the Notice-of-Claim Defense. | 32 |
| 1. | There is no serious argument that the State waived the defense or induced Little not to file a notice of claim or that extraordinary circumstances prevented her from filing her notice of claim. | 33 |
| 2. | The attorneys’ actions do not excuse Little from timely filing her notice of claim. | 35 |
| II. | Little Forfeits All Arguments Not Raised and Adequately Argued in Her Opening Brief. | 37 |
| | CONCLUSION. | 37 |
| | CERTIFICATE OF COMPLIANCE. | 38 |
| | CERTIFICATE OF SERVICE. | 38 |
| | APPENDIX. | <i>follows main brief</i> |

| No. | R.A. No. | Document |
|-----|-----------|---|
| 1. | 54, Ex. B | “BOMEX complaint” — Len Johnson’s Complaint against Dr. Porter, filed with the Arizona Medical Board on behalf of Johnnie Little. |
| 2. | 54, Ex. D | Notice of Claim |
| 3. | 2 | Complaint |

TABLE OF CITATIONS

| | <u>Page</u> |
|---|-------------|
| <u>Cases</u> | |
| <i>A Tumbling-T Ranches v. Flood Control Dist.</i> , 222 Ariz. 515, 217 P.3d 1220 (App. 2009)..... | 33 |
| <i>Ace Auto. Prods., Inc. v. Van Duyne</i> , 156 Ariz. 140, 750 P.2d 898 (App. 1987)..... | 37 |
| <i>Acton v. Morrison</i> , 62 Ariz. 139, 155 P.2d 782 (1945)..... | 35 |
| <i>Aetna Loan Co. v. Apache Trailer Sales</i> , 1 Ariz. App. 322, 402 P.2d 580 (1965)..... | 24 |
| <i>Agency of Natural Res. v. Towns</i> , 168 Vt. 449, 724 A.2d 1022 (1998)..... | 24, 25 |
| <i>Anderson v. Serv. Merch. Co.</i> , 240 Neb. 873, 485 N.W.2d 170 (1992)..... | 25 |
| <i>Bach v. Winfield-Foley Fire Prot. Dist.</i> , 257 S.W.3d 605 (Mo. 2008) | 27 |
| <i>Barlage v. Valentine</i> , 210 Ariz. 270, 110 P.3d 371 (App. 2005)..... | 24 |
| <i>Bond v. Cartwright Little League, Inc.</i> , 112 Ariz. 9, 536 P.2d 697 (1975)..... | 26, 27 |
| <i>Canyon State Cannery v. Hooks</i> , 74 Ariz. 70, 243 P.2d 1023 (1952)..... | 24 |
| <i>Corral v. Fid. Bankers Life Ins. Co.</i> , 129 Ariz. 323, 630 P.2d 1055 (App. 1981)..... | 29 |
| <i>Cote v. A.J. Bayless Mkts.</i> , 128 Ariz. 438, 626 P.2d 602 (App. 1981)..... | 29 |

| | |
|---|----|
| <i>Deer Valley Unified Sch. Dist. No. 97 v. Houser</i> , 214 Ariz. 293, 152 P.3d 490 (2007)..... | 36 |
| <i>Estate of Milliman, In re.</i> , 101 Ariz. 54, 415 P.2d 877 (1966)..... | 24 |
| <i>Gorton v. Doty</i> , 57 Idaho 792, 69 P.2d 136 (1937)..... | 28 |
| <i>Groh v. Shelton</i> , 428 S.W.2d 911 (Mo. App. 1968) | 27 |
| <i>Gulf Ins. Co. v. Grisham</i> , 126 Ariz. 123, 613 P.2d 283 (1980)..... | 27 |
| <i>Gustafson v. Rajkovich</i> , 76 Ariz. 280, 263 P.2d 540 (1953)..... | 24 |
| <i>Hernandez v. State</i> , 201 Ariz. 336, 35 P.3d 97 (App. 2001)..... | 37 |
| <i>Hernandez v. State</i> , 203 Ariz. 196, 52 P.3d 765 (2002)..... | 37 |
| <i>Ins. Co. of N. Am. v. Superior Court</i> , 162 Ariz. 499, 784 P.2d 705 (App. 1989)..... | 26 |
| <i>Ins. Co. of N. Am. v. Superior Court</i> , 166 Ariz. 82, 800 P.2d 585 (1990)..... | 26 |
| <i>Jones v. Cochise County</i> , 218 Ariz. 372, 187 P.3d 97 (App. 2008)..... | 33 |
| <i>Macris v. Sculptured Software, Inc.</i> , 24 P.3d 984 (Utah 2001)..... | 24 |
| <i>Manley v. Ticor Title Ins. Co. of Calif.</i> , 168 Ariz. 568, 816 P.2d 225 (1991)..... | 24 |
| <i>Mason v. Tucker & Assocs.</i> , 25 Idaho 429, 871 P.2d 846 (App. 1994)..... | 35 |

| | |
|---|------------|
| <i>Maycock v. Asilomar Dev., Inc.</i> , 207 Ariz. 495, 88 P.3d 565 (App. 2004)..... | 18 |
| <i>Mayer v. Ford</i> , 12 So.2d 618 (La. App. 1943)..... | 25 |
| <i>Mohave Elec. Co-op. v. Byers</i> , 189 Ariz. 292, 942 P.2d 451 (App. 1997)..... | 24 |
| <i>Nationwide Res. Corp. v. Massabni</i> , 134 Ariz. 557, 658 P.2d 210 (App. 1982)..... | 33 |
| <i>Nichols v. Ach</i> , 233 Neb. 634, 447 N.W.2d 220 (1989)..... | 25 |
| <i>Orme Sch. v. Reeves</i> , 198 Ariz. 301, 802 P.2d 1000 (1990)..... | 32 |
| <i>Pritchard v. State</i> , 163 Ariz. 427, 788 P.2d 1178 (1990)..... | 36 |
| <i>Ruesga v. Kindred Nursing Ctrs.</i> , 215 Ariz. 589, 161 P.3d 1253 (App. 2007)..... | 29 |
| <i>Se. Ariz. Med. Ctr. v. AHCCCS Admin.</i> , 188 Ariz. 276, 935 P.2d 854 (App. 1996)..... | 23 |
| <i>Solomon v. Design Dev., Inc.</i> , 143 Vt. 128, 465 A.2d 234 (1983)..... | 25 |
| <i>State v. Mabery Ranch Co.</i> , 216 Ariz. 233, 165 P.3d 211 (App. 2007)..... | 18, 25 |
| <i>Thornton v. Budge</i> , 74 Idaho 103, 257 P.2d 238 (1953)..... | 27, 28 |
| <i>U.S. Fid. & Guar. Co. v. San Diego State Bank</i> , 155 S.W.2d 411 (Tex. Civ. App. 1941)..... | 24 |
| <i>Walk v. Ring</i> , 202 Ariz. 310, 44 P.3d 990 (2002)..... | 21, 32, 35 |

Statutes

A.R.S. § 12-821.01.....36
A.R.S. § 12-821.01(A)..... 18, 30
A.R.S. § 12-821.01(B)..... 17, 19, 20, 23, 31
A.R.S. § 12-2101(B).....1
Former A.R.S. § 12-821(1).....36

Rules

Ariz. R. Civ. App. P. 9(a)1
Ariz. R. Civ. App. P. 13(a)(6).....33
Ariz. R. Civ. App. P. 14.....38
Ariz. R. Civ. P. 56(c)(1).....18

Other Authorities

3 C.J.S. *Agency* § 26225

STATEMENT OF THE CASE

¶ 1. The Opening Brief accurately describes the nature of the case and the disposition below. The superior court granted summary judgment to the State in a signed Minute Entry Order that it entered on February 16, 2010. (R.A. 78.) Little filed a Notice of Appeal on March 4, 2010. (R.A. 80.) The superior court later entered a Judgment for the State for \$1,746.70 in costs. (R.A. 88.)

¶ 2. Little's Notice of Appeal was timely under Arizona Rule of Civil Appellate Procedure 9(a). This Court has jurisdiction over the appeal from the final Judgment under A.R.S. § 12-2101(B).

STATEMENT OF FACTS

I. Polk Dies in Tucson.

¶ 3. Shawntinice Polk, a basketball player for the University of Arizona ("UA"), died on September 26, 2005, of a pulmonary embolism due to deep venous thrombosis. (R.A. 54, ¶¶ 1-3.) Polk collapsed in the training room at UA's basketball arena. (R.A. 54, ¶ 2.) Paramedics transported her to the emergency room at University Medical Center (UMC), but attempts to revive her were unsuccessful. (*Id.*, ¶ 6.)

¶ 4. Polk had received primary medical care from UA team doctor Donald Porter from January 26, 2004, through September 23, 2005. (*Id.*, ¶ 7.) He provided

care through the UA's Campus Health Service (CHS). (*Id.*) CHS provides health-care services to UA students and to some UA faculty and staff. (*Id.*, ¶ 8.)

II. Little Authorizes Television Reporter Johnson to Investigate Polk's Death for Her.

¶ 5. Polk's mother, California resident Johnnie Little, went to her daughter's memorial service in Tucson, where she met Len Johnson. (*Id.*, ¶¶ 11-12; R.A. 2, ¶ 1.) Johnson, a local television reporter, was making a documentary film about Polk's death. (R.A. 54, ¶¶ 11-12.) Little authorized Johnson to investigate for her the circumstances surrounding Polk's death, including obtaining medical records; Johnson did so on her behalf and with her knowledge and permission. (*Id.*, ¶¶ 12-15.) She placed no limits on his authority to act for her in the investigation. (*Id.*, ¶ 18.) Later—after Johnson had completed most of the investigation—Little signed an agreement to pay him 10% of any recovery she might receive. (*Id.*, ¶ 14.) Johnson taped or filmed many of the steps of his investigation, and he prepared progress notes. (*E.g.*, Johnson Deposition [R.A. 54, Exhibit G¹] at 15–16, 91, 94-95, 111, 113, 115, 175.)

III. Johnson Conducts Little's Investigation with the Help of Attorneys.

¶ 6. Acting for Little and with her authorization, Johnson conducted the agreed investigation with the help of two attorneys. (R.A. 54, ¶¶ 13, 16, 20, 26-28,

¹ Johnson's Deposition transcript is in two volumes that are consecutively paginated. Both are contained in Exhibit G to R.A. 54.

33, 35-45, 60-63, 67-71, 94-103.) But Johnson took some missteps. In the beginning; he was unaware of the difference between UMC and CHS, and he did not know that he would have to contact different entities to obtain all of Polk's medical records. (*Id.*, Exhibit G at 39.) CHS is not part of UMC; it is part of UA. (*Id.*, ¶ 47.) UA and UMC are separately owned and operated legal entities; each maintains its own separate patient records. (*Id.*, ¶ 48.) UMC is a private, nonprofit hospital staffed in part by UA Medical School faculty who train UA residents, interns, and fellows there. (*Id.*, ¶ 49.)

¶ 7. Around December 2005, Johnson contacted Tucson attorney Michael Meehan for help in getting Polk's medical records. (*Id.*, ¶¶ 20, 35, 42, 43.) Johnson claims that he told Meehan that Little had sent an authorization to the Medical Records Division (MRD) of CHS asking for Polk's *CHS* records, and that he and Little had both made several phone calls to MRD, without success. (*Id.*, ¶ 44.) The MRD maintains student medical records that are made and kept in the ordinary course of CHS's business. (*Id.*, ¶ 73.) Each student's medical records are kept in a file folder known as a "chart." (*Id.*) The records include lab reports and x-ray reports, but the actual x-ray films are kept in a different location of CHS, not at MRD. (*Id.*)

¶ 8. Johnson claims that Meehan said at that time that Johnson had to "get those records," and "keep on with campus health, file the form" and "if you don't

hear back, call me within a few weeks.” (*Id.*, ¶ 36.) But he does not remember if Meehan specified CHS or UMC records: “I don’t clearly remember if he designated UMC versus campus health.” (*Id.*, ¶ 37.) Johnson believes that he probably mentioned “campus health” to Meehan or he said “the university and campus health”—he recalls using the term “the university” a lot in the early stages. (*Id.*, ¶ 39.) Later, he testified that he does not remember if he used the words, “campus health.” (*Id.*) Johnson now knows that UMC is not CHS, which he learned from Meehan in January or February 2006. (*Id.*, ¶ 40.)

¶ 9. On December 16, 2005, Meehan wrote to Little, confirming that she had asked him to “look into the possible Medical Malpractice of the *University Medical Center*” with respect to Polk’s death. (*Id.*, ¶¶ 21, 45 [emphasis added].) Meehan enclosed a medical-records release for Polk’s UMC records—it did not refer to CHS records—which Little signed and returned. (*Id.*, ¶¶ 22, 46.)

¶ 10. Johnson obtained a CHS medical authorization form from UA’s website, mailed it to Little, and instructed her how to fill it out, which she did. (*Id.*, ¶ 26.) He believes that Little sent the authorization directly to the MRD in early December 2005. (*Id.*, ¶ 27.) The authorization allegedly requested all of Polk’s medical records, but Johnson does not know “if we were specific or knew enough to designate UMC or Campus Health [records].” (*Id.*, ¶ 28.)

¶ 11. Little does not recall when she personally first attempted to obtain Polk's medical records from UA, or even if it was in 2005, nor does she remember if Johnson spoke with her about getting medical records in 2005. (*Id.*, ¶¶ 29-30.) She recalls having received CHS medical-authorization forms from Johnson but does not recall when; although she sent them to UA, she cannot recall the year. (*Id.*, ¶ 31.) She remembers having sent more than one authorization to CHS and having kept copies, but she lost the copies. (*Id.*, ¶ 32.) Johnson, too, stated that he once had a copy of the authorization, but he could not produce it. (*Id.*, ¶ 33.)

¶ 12. Johnson stated that in December 2005, he contacted Liz in MRD. (*Id.*, ¶ 41.) Liz is evidently Elizabeth Morales. (*Id.*, ¶ 41 n.1.) (This brief will call her "Morales.") Morales has been in charge of all medical records requests MRD since 1999; her duties include processing requests for CHS medical records and communicating face-to-face and/or telephonically with persons seeking to obtain such records. (*Id.*, ¶ 72.) Morales allegedly confirmed that the authorization had been received and was properly filled out. (*Id.*, ¶ 41.) But CHS records do not reflect receipt of a medical-records release by or on behalf of Little until November 29, 2006, a year later than Johnson claimed. (*Id.*) The MRD has no record of having received a medical-records authorization from either Little or Johnson during this time-frame; Polk's CHS chart reflects that the first time that MRD received a request for her records from anyone was on November 29, 2006. (*Id.*, ¶ 34.)

¶ 13. On January 2, 2006, Meehan enlisted the Bogutz & Gordon law firm to help obtain Polk's medical records. (*Id.*, ¶ 50.) On February 2, 2006, the firm filed a petition in superior court in which Little nominated it as special administrator for Polk's estate "to demand, by subpoena or otherwise, the Decedent's medical records and other records pertinent to her death; to receive such records; and to possess such records." (*Id.*, ¶ 51.) The petition was granted on February 3, 2006. (*Id.*, ¶ 52.) On February 3, 2006, Bogutz & Gordon signed a medical release authorizing UMC to provide Polk's medical records to Meehan. (*Id.*, ¶ 53.) On February 6, 2006, Meehan sent the release to UMC. (*Id.*, ¶ 54.) With the exception of a release for the autopsy report, Meehan submitted no other releases to Bogutz & Gordon, and Bogutz & Gordon signed no other medical-records releases. (*Id.*, ¶ 55.) Meehan did not obtain, or attempt to obtain, any other medical records pertaining to Polk, including CHS records. (*Id.*, ¶ 56.) With Bugutz & Gordon having completed its sole task, the superior court then discharged it. (*Id.*, ¶ 57.) At no time did MRD ever receive a request for Polk's CHS records from the firm, from Meehan, or from anyone claiming to act on their behalf. (*Id.*, ¶ 74.)

¶ 14. On March 6, 2006, Meehan sent a letter to Little returning the medical records that he had obtained for her and declining to represent her (*Id.*, ¶ 25 & Ex-

hibit H.I²), but not because he thought that Little had no case. He wrote: “No determination on whether or not you have a valid claim has been made, nor is any opinion or advice offered in that regard.” (R.A. 54, Exhibit H.I.)

¶ 15. Around July and August 2006, Johnson made four follow-up telephone calls to MRD, and Morales told him that MRD was “in the process” of sending the records to Little.³ (*Id.*, ¶ 58.) According to Johnson, at this point he still had not gotten any response to the authorization that Little had allegedly sent to MRD in December 2005. (*Id.*, ¶ 59.) Although Morales assertedly said that MRD was in the process of getting the records to Little, Johnson never asked to speak with her supervisor, even though he claims that Morales had acknowledged receipt of the medical authorization seven months back in December 2005 and again during the July-August 2006 time period. (*Id.*, ¶ 61.) His stated reason was that he feared losing his job at the television station because there was “a lot pressure on the media to not get those records and air them.” (*Id.*, ¶ 62.) He did not recommend to Little that *she* go over Liz’s head. (*Id.*) Johnson claims that he asked UA Athletic Director Jim Livengood for help in getting the medical records, even

² This reference is to the letter that is Exhibit I to the Stipulation re: Michael Meehan, Esq, which is Exhibit H to the Statement of Facts, R.A. 54. Further references to exhibits that are attached to other exhibits will follow this pattern.

³ Although Johnson had recorded multiple phone calls in this case, he did not produce any documentation or other record memorializing these four alleged telephone conversations with Morales. (*Id.*, ¶ 60.)

though Livengood was the very person who, Johnson says, “adamantly called the television station and expressed his desire not to air comments by the family regarding the death” and put pressure on the media not to get Polk’s records and air them. (*Id.*, ¶ 63.)

¶ 16. Between September and December 2006, Johnson paused his investigation so that he could attend to his wife, who was pregnant with their first child; he therefore bought a fax machine for Little, provided her with CHS medical release forms, and instructed her to file requests for Polk’s CHS records. (*Id.*, ¶ 64.)

¶ 17. On November 29, 2006, MRD received from Little a faxed cover letter and medical authorization; both documents requested that “all medical records for my daughter, Shawntinice Polk” be sent to Johnson, not Little. (*Id.*, ¶ 65.) The next day, Morales faxed both documents to UA’s Office of General Counsel (OGC) to review, which was the standard procedure for all deceased patients. (*Id.*, ¶ 66.) Two weeks later, Johnson called Morales at MRD to see if the request had been received and to check on its status. (*Id.*, ¶ 67.) He secretly taped this conversation. (*Id.*, ¶ 68.) Johnson asserts that Morales told him she had to refer this matter to OGC, and that “this happens only in this case.” (*Id.*, ¶ 69.) Morales stated that she explained to Johnson that she had sent the request for Polk’s records to OGC, that she was waiting to hear from it before she could release the records. (*Id.*, ¶ 70.) She added that Johnson asked if OGC reviews records requests in all

cases, or just in Polk's case, and Morales told him that she had to follow this procedure with all deceased patients. (*Id.*) At no point during this recorded conversation is Johnson heard complaining that he or Little had previously sent a release for Polk's campus health records that MRD had failed to respond to. (*Id.*, ¶ 71.)

¶ 18. On December 6, 2006, Morales' supervisor, Kim Kreitner, sent Little a letter explaining that MRD is not allowed to release deceased patients' records to anyone other than a personal representative, administrator, or a certain class of individuals authorized by law to receive them. (*Id.*, ¶ 75.) Kreitner asked Little for clarification about Johnson's legal authority to receive the records. (*Id.*, ¶ 75.) Little did not respond to Kreitner's letter, so Kreitner sent a follow-up on January 10, 2007, by certified mail/return receipt requested, explaining that unless Johnson was a court-appointed representative or an individual otherwise authorized by law to receive the records, MRD could not send the records directly to him. (*Id.*, ¶¶ 76, 77.) Little received this letter on January 20, 2007 (*Id.*, ¶ 77), but she did not respond. (*Id.*, ¶ 78).

¶ 19. On February 27, 2007, Little faxed a medical authorization form to MRD requesting that it send all of Polk's CHS medical records *directly to her*. (*Id.*, ¶ 79.) The next day, Morales mailed all of the records to Little. (*Id.*, ¶ 80.)

IV. Johnson Reviews the Records, Consults with Medical Experts, and Files the BOMEX complaint on Little's Behalf on July 1, 2007.

¶ 20. Johnson reviewed the records that Little had obtained (*see id.*, ¶ 88); he interviewed or consulted with four doctors in the process (*id.*, ¶ 89). His notes for March–April 2007 state:

Family has records that show ample evidence of malpractice, but is hesitant to contact Arizona attorneys while living out of state. Len [Johnson] says he will pick the case up in June and, once again, begins calling attorneys.

(*Id.*, ¶ 88.)

¶ 21. From his investigation, Johnson prepared a BOMEX⁴ Complaint, which he filed on July 1, 2007, asserting that Dr. Donald E. Porter, the UA basketball team physician, had been medically negligent in his care of Polk, accusing him of having failed to investigate indicators that Polk had blood clots. (*Id.*, ¶¶ 90-91, 93; *id.*, Exhibit B [attached as Appendix 1].) Little authorized Johnson to prepare and file the BOMEX complaint. (*Id.*, ¶ 93; *id.* Exhibit F (Little Deposition) at 16.)

The complaint stated:

This filing is authorized and urged by Polk's mother, Johnnie Little, who is working with myself, journalist Len Johnson, who has been investigating the case. I am writing in conjunction with and on behalf of the mother.

⁴ The Arizona Medical Board was formerly the Board of Medical Examiners: "BOMEX." Like the Opening Brief, this brief will call it BOMEX.

We have concluded that while clots are not always easily detected, the warning signs and symptoms in this case are too numerous and obvious to ignore and that Dr. Donald Porter fell below the standard of care when treating this patient.

(Appendix 1 at 1.)

¶ 22. The complaint alleged that “Dr. Porter fell below the standard of care when treating this patient.” (*Id.*, ¶ 93; Appendix 1 at 1.) He had originally planned to name other persons as respondents in the complaint, including other persons listed in the Complaint in this action:

- doctors who had treated Polk
- the team trainer
- the team physician
- the people who saw Polk during the last week of her life
- the University Medical staff
- Jim Livengood, the UA athletic director
- Dr. Nesbit, a non-UA physician who had operated on Polk’s knee.

(R.A. 59, ¶ 12.) Johnson named only Porter because BOMEX told him to name only one respondent. (*Id.*)

¶ 23. The complaint theorized that persons associated with UA felt pressure to keep Polk playing for the basketball team and had acted accordingly. (Appendix 1 at 2.) It cataloged and criticized Dr. Porter’s treatment of Polk and the alleged holes in his diagnoses and treatment. (*Id.* at 1–2, 3–4, 5.) For example, it stated:

On 8/23/04, Dr. Porter did lab work to screen for sickle cell. Blacks and especially black athletes are prone to sickle cell, which is a clot mechanism and indicator. We feel this indicates that despite Polk's asthma, Dr. Porter is aware of the danger of clots.

(*Id.* at 1.) It accused university physicians, especially Dr. Porter of having missed various warning signs for blood clots. (*Id.*, passim, especially at 6–7.) It summarized as follows:

In summary, we state that Dr. Donald Porter should have diagnosed a clot, or at the very least, something other than the continual diagnoses of “mild to moderate asthma.” He overlooked five documented blood clot indicators and/or symptoms in the death of Shawntinice Polk. . . .

The five clot indicators are:

- 1) Obesity
- 2) Being on birth control
- 3) Inactivity after surgery
- 4) High red blood cell counts
- 5) Chronic coughing up blood

Possible supporting clot indicators include:

- 1) Tightness in chest
- 2) Ineffectiveness of high levels of prednisone for asthma
 - a) reinforced by ordering of x-ray and lab reports a week before death
- 3) Black athlete prone to sickle cell

(*Id.* at 6–7.) Finally, the complaint accused team personnel and doctor Clarke of delaying life-saving treatment on the morning that Polk collapsed and later died.

(*Id.* at 1, 5–6.)

¶ 24. Little later authorized Johnson to appear at the BOMEX hearing and testify against Dr. Porter. (R.A. 54, Exhibit F (Little Deposition) at 17.) But she claims not to have read the BOMEX complaint or to have known its contents at that time. (R.A. 59, ¶ 5.)

V. Attorney Dyer Reviews the Medical Records and on September 13, 2007, Espouses to Little Theories of Negligence Consistent with the BOMEX complaint.

¶ 25. On August 28, 2007, attorney James H. Dyer—acting on Little’s behalf—requested some of Polk’s records from Campus Health Services. (*Id.*, ¶ 94.) CHS provided the requested records the next day. (*Id.*, ¶ 95.) About a week later, Dyer requested all of Polk’s records from CHS (*Id.*, ¶ 96), which provided them about a week after that (*Id.*, ¶ 97).

¶ 26. In a letter to Little dated September 13, 2007, Dyer discussed her potential case against the State. (*Id.*, ¶ 98 and Exhibit L:C.) He eliminated the aftereffects of Polk’s knee surgery as a potential cause of the fatal embolism. (Exhibit L:C at 1–2.) He then discussed factors that echoed those raised in the BOMEX complaint, reiterating the BOMEX complaint’s theory of the misdiagnosed blood clots. (*Id.* at 1–2.) He summarized the investigation that he had conducted:

I believe that you are also aware that I have conducted a great deal of medical research concerning the circumstances of Shawntinice’s death.

. . . .

I also learned that birth control pills can cause blood clots and pulmonary embolism. The information I have indicates that Shawntinice was taking this medication, and there is definitely a risk of pulmonary embolism associated with birth control pills. It has been suggested to me that the development of Shawntinice's blood clot was more likely related to the birth control pills than it was related to the knee surgery.

I am sure you also know that I sent the chest x-rays that were taken on January 6, 2005 and September 19, 2005, to Dr. Peter Julien at Cedars-Sinai Medical Center for review. Dr. Julien performed a blind-review of the x-rays (he was provided with no written information at all), and read the September 19, 2005 x-ray as showing enlargement of the pulmonary arteries. This finding might come from several different causes, and one of the causes is the presence of pulmonary embolism. . . .

(Id.)

Dyer had told Johnson "there is indeed a case for malpractice." (*Id.*, ¶ 101.) But Dyer declined to take Little's case, not because he thought it lacked merit but because he believed that she had already missed her filing deadlines. (R.A. 54, Exhibit L:C at 1, 2.)

VI. BOMEX Rules on February 7, 2008, and Little Finally Files Her Notice of Claim on May 15, 2008.

¶ 27. BOMEX issued its ruling against Dr. Porter on February 7, 2008.

(Id., ¶ 10.) BOMEX ruled that, in light of Polk's respiratory complaints predating September 26, 2005, Dr. Porter's care constituted unprofessional conduct in violation of statutory law. (*Id.*) It reprimanded Dr. Porter for his failure to consider

and pursue a diagnosis of pulmonary embolus, his failure to perform an adequate examination, and his failure to measure Polk's vital signs, including pulse oximetry. (*Id.*, ¶ 10.)

¶ 28. Over two months later, on May 15, 2008, Little filed her Notice of Claim. (*Id.*, ¶ 4; *id.* Exhibit D [attached as Appendix 2].) With far less detail, it fairly echoed the BOMEX complaint. It asserted:

Shawntinice's death was the result of pulmonary thromboembolism due to deep venous thrombosis. These conditions were preventable because they were discoverable and treatable.

The negligent failure of University employees, both lay and expert, to discover or treat the conditions that caused Shawntinice's death as well as their failure to get prompt treatment for Shawntinice when she suffered serious symptoms immediately before her death are the facts supporting this claim.

(Appendix 2 at 2–3.) It repeated the assertion that Polk was treated unfairly to keep her playing for the UA basketball team, leading university personnel—coaches, trainers, and Dr. Porter—to ignore or discount her health problems. (*Id.* at 30–31.) It repeated the assertion that she received less-than-prompt care when she collapsed on the morning of her death: “On the day of her death, the coaches and trainers as well as University employees Dr. Ed Clarke and Dr. Stephen Paul negligently delayed arranging for Shawntinice to receive prompt and proper treatment which would have saved her life.” (*Id.* at 31.) It noted that BOMEX had reprimanded Dr. Porter for having failed to promptly investigate Polk's symptoms

“which would have led to the diagnosis and treatment of the conditions that killed her.” (*Id.* at 40.) It alleged that BOMEX had found that Dr. Porter had been negligent and that his negligence had caused Polk’s death. (*Id.* at 39.) It demanded \$2 million to settle for the conduct of Dr. Porter, and \$1 million to settle for the “the negligence of all other State employees who were with Shawntinice during the hours before her death, including but not limited to coaching and training staff members and Drs. Ed Clarke and Stephen Paul.” (*Id.* at 59–60.)

¶ 29. The Notice of Claim was filed 319 days after Johnson filed the BOMEX complaint and 245 days after attorney Dyer’s letter to Little.

VII. Little Files Suit.

¶ 30. Little then filed this suit. Her Complaint follows the lead of the BOMEX complaint and, to a lesser extent, the Notice of Claim. (R.A. 2 [attached as Appendix 3].) It alleged:

Shawntinice died as a result of pulmonary thromboembolism due to deep venous thrombosis.

On February 7, 2008, the Arizona State Medical Board decided Dr. Porter’s medical care of Shawntinice Polk constituted unprofessional conduct . . . and decided to issue a Letter of Reprimand for Dr. Porter’s failure to consider and pursue a diagnosis of pulmonary embolus, for failing to perform an adequate exam and for failing to measure vitals, including pulse oximetry, in view of Shawntinice’s complaints of respirator symptoms.

Dr. Campbell's [sic] negligence was a cause of the death of Shawntinice and Dr. Campbell's [sic] negligence was the direct and proximate cause of Plaintiff Little's damages.

Shawntinice's death was also caused, in part, by the negligence of Dr. Ed Clarke and Dr. Stephen Paul due to their failure to promptly provide or arrange for appropriate medical care when advised of Shawntinice's medical condition, signs and symptoms on September 26, 2005.

Upon information and belief, Plaintiff Little alleges that Shawntinice's death was caused, in part, by the negligence of coaches and trainers of the University of Arizona Women's Basketball Program, whose negligence generally consisted of permitting, encouraging and directing Shawntinice to play basketball in practice and in games, knowing that such strenuous physical activity was obviously detrimental to her health and whose negligence specifically consisted of permitting, encouraging and directing her to practice on the day of her death, failing to recognize that Shawntinice's signs and symptoms constituted a medical emergency and failing to promptly obtain medical care.

(*Id.* at 2–3, ¶¶ 7–11.)

ISSUE PRESENTED FOR REVIEW

¶ 31. Under A.R.S. § 12-821.01(B), a cause of action accrues when the plaintiff knows or reasonably should know who caused her damage and how. Johnson—specifically authorized to act for Little—investigated her possible cause of action and obtained medical opinions, leading to an administrative complaint accusing the State's agents of responsibility for Little's daughter's death. Did the superior court properly rule that Little's cause of action had accrued at that time?

ARGUMENT

I. The Superior Court Properly Granted Summary Judgment, Correctly Concluding that Little Did Not File a Timely Notice of Claim.

A. Standard of Review.

¶ 32. This Court reviews the grant of summary judgment de novo; it views the facts, and the reasonable inferences to be taken from them, in the light most favorable to the party opposing the motion. *State v. Mabery Ranch Co.*, 216 Ariz. 233, 239, ¶ 23, 165 P.3d 211, 217 (App. 2007). It determines whether the trial court properly applied the law to the undisputed facts, *Maycock v. Asilomar Dev., Inc.*, 207 Ariz. 495, 498, ¶ 14, 88 P.3d 565, 568 (App. 2004), to determine whether the movant was entitled to judgment as a matter of law, Ariz. R. Civ. P. 56(c)(1).

B. Little Had to File a Timely Notice of Claim.

¶ 33. Persons who wish to file suit against a public entity or public employee must file a timely notice of claim: “Persons who have claims against a public entity or a public employee shall file claims . . . within one hundred eighty days after the cause of action accrues.” A.R.S. § 12-821.01(A). For notices of claim, the definition of “accrual” mimics the common-law discovery rule for statutes of limitations. The test is both subjective and objective: accrual occurs with actual knowledge of the pertinent facts as well with knowledge that the claimant reasonably should have gained:

For purposes of this section, a cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage.

A.R.S. § 12-821.01(B).

¶ 34. As the following discussion demonstrates, Little's cause of action accrued by July 1, 2007, when Johnson filed the BOMEX complaint, under both the subjective and objective parts of the test. This is true because Johnson was Little's agent, and his knowledge is irrefutably attributed to her. It is also true because Johnson's investigation divulged the facts that demonstrate when Little reasonably should have discovered the underlying cause of her damage.

¶ 35. The very latest date it could have accrued was September 13, 2007, when attorney Dyer wrote his detailed letter to Little, reiterating the work and theories that Johnson had espoused in the BOMEX complaint. (R.A. 54, ¶ 98 & Exhibit L.)

¶ 36. Little's Notice of Claim was too late whichever date is used. The Notice of Claim was filed 319 days after the BOMEX complaint's filing and 245 days after attorney Dyer's letter.

C. Little’s BOMEX complaint, Which Johnson Filed for Her on July 1, 2007, Demonstrated the Necessary Knowledge to Trigger Accrual.

¶ 37. As a result of his investigation, Johnson formulated theories of the State’s liability for Polk’s death that he gathered in the BOMEX complaint. The information contained in the BOMEX complaint is the rough equivalent of both Little’s Notice of Claim and her Complaint; in fact, the BOMEX complaint is far more detailed than the other two. (*Compare* Appendix 1 *with* Appendixes 2 and 3.) All three assert the same underlying facts and theories.

¶ 38. The BOMEX complaint demonstrates unequivocally that Johnson knew the facts establishing “the cause, source, act, event, instrumentality or condition which caused or contributed to the damage,” as A.R.S. § 12-821.01(B) sets forth. He accused Dr. Porter of negligently having failed to diagnose Polk’s underlying conditions that led to the formation of blood clots, leading to the thromboembolism that killed her. (Appendix 1 at 1, 4, 6–7.) He accused UA basketball personnel of pressuring Polk to continue playing despite her health problems. (*Id.* at 2.) And he accused Dr. Clarke of delaying treatment on the morning she died.. (*Id.* at 1, 5–6.) These claims form the basis of the Complaint. (Appendix 3, *passim.*) They unequivocally show the knowledge necessary to trigger accrual of the cause of action under A.R.S. § 12-821.01(B). In short, if the cause of action had

belonged to Johnson, it had accrued by the time he filed the BOMEX complaint, on July 1, 2007.

1. Johnson obtained expert advice from four doctors before filing the BOMEX complaint.

¶ 39. Little argues that the information contained in the BOMEX complaint lacked necessary medical expertise. (Opening Brief at 19–22.) She is wrong.

¶ 40. In claims where the alleged negligence is not of a type easily recognizable to a lay person, the cause of action’s accrual may depend on expert advice alerting the claimant to the defendant’s negligence. *E.g.*, *Walk v. Ring*, 202 Ariz. 310, 315, ¶¶ 20, 22, 44 P.3d 990, 995 (2002); *id.* at 317 n.5, 44 P.3d at 997 n.5. Little—through her agent, Johnson—had all the expert help he needed by the time he filed the BOMEX complaint. Her contrary argument ignores the record.

¶ 41. Johnson consulted with emergency-room physician Daniel Beskind concerning the events of the day Polk died, including the emergency treatment given her. (BOMEX complaint [Appendix 1] at 5–6; Johnson Deposition [R.A. 54, Ex. G] at 160.)

¶ 42. Johnson consulted with Dr. Jake Redekop, an orthopedic surgeon, who “went through the records pretty thoroughly” (R.A. 54, Ex. G at 174) and was “very helpful” to him (*id.* at 96). He quoted Dr. Redekop in the BOMEX complaint: “My goodness, she’s at least 40 pounds overweight, more really[;] that’s a big risk for blood clots.” (Appendix 1 at 3; *see also id.* at 4 [again referring to

excess weight].) Dr. Redekop also “cite[d] coughing up blood as a clot symptom.” (*Id.*, at 4.) He also commented on the high dosage of Polk’s prescription for prednisone. (*Id.* at 5.)

¶ 43. Johnson consulted with Dr. Scott Slagis, another orthopedic surgeon. (R.A. 54, Ex. G at 96; Appendix 1 at 2.) Dr. Slagis told him that Polk’s knees were in very bad shape and that he “discourages trying to repair something that damaged with hopes of enduring major stress on the knee.” (Appendix 1 at 2.) Dr. Slagis also agreed with Dr. Redekop that coughing up blood is a clot symptom. (*Id.*, at 4; R.A. 54, Ex. G at 174.) Drs. Redekop and Slagis explained to Johnson why Polk’s obesity was a possible blood-clotting factor. (R.A. 54, Ex. G at 176.)

¶ 44. And Johnson consulted with Dr. Eric Peters, a county medical examiner. (R.A. 54, Ex. G at 96.) The BOMEX complaint quotes Dr. Peters: “Being on the pill predisposes one for clots.” (Appendix 1 at 3.) Dr. Peters also advised Johnson that “by-products of [Polk’s most recent] surgery, namely inactivity, can cause clots that lead to death.” (*Id.*, at 4.) Like Drs. Redekop and Slagis, Dr. Peters also told Johnson of the link between obesity and blood clots. (R.A. 54, Ex. G at 176.)

¶ 45. In her Facts section, Little acknowledges that Johnson consulted with the four doctors before filing the BOMEX complaint. (Opening Brief at 6.) She ignores these facts in her Argument section.

¶ 46. In sum, Johnson consulted extensively with medical professionals and, with their help, derived the theory that Dr. Porter had negligently failed to diagnose Polk's blood clots, which he presented in the BOMEX complaint. Little's contrary contention ignores the factual record. There was no lack of medical knowledge underpinning Little's work and theories.

¶ 47. Johnson's knowledge establishes the accrual date for Little's cause of action under two separate theories. First, Little appointed Johnson as her agent for the specific purpose of investigating Polk's death, and under the law of agency, his knowledge is her knowledge, triggering accrual under the subjective part of A.R.S. § 12-821.01(B). Second, Johnson's investigation demonstrates when Little reasonably should have learned the pertinent facts, triggering accrual under the objective part of the statute.

D. Because Johnson Acted as Little's Agent, His Knowledge Is Attributed to Her; Accrual Was Not Delayed Until She Personally Knew the Facts.

¶ 48. Shortly after Polk's death, Little engaged Johnson as her agent, authorizing him to investigate on her behalf the circumstances surrounding the death. (R.A. 54, ¶¶ 12-15, 18.) An agent is one who acts on behalf of another. *See Ariz. Med. Ctr. v. AHCCCS Admin.*, 188 Ariz. 276, 282, 935 P.2d 854, 860 (App. 1996). An express agency is created when the principal "has delegated authority to the supposed agent by oral or written words which authorize him to do a certain act, or

series of acts.’ ” *Aetna Loan Co. v. Apache Trailer Sales*, 1 Ariz. App. 322, 324, 402 P.2d 580, 582 (1965) (quoting *Canyon State Cannery v. Hooks*, 74 Ariz. 70, 72, 243 P.2d 1023, 1024 (1952)).

¶ 49. “ ‘The law of agency is based on the principle [that] one acting by another is acting for himself.’ ” *Barlage v. Valentine*, 210 Ariz. 270, 275, 110 P.3d 371, 376 (App. 2005) (quoting *Gustafson v. Rajkovich*, 76 Ariz. 280, 284, 263 P.2d 540, 543 (1953)). Thus, knowledge that the agent acquires during the course of the agency is ascribed to the principal. *Manley v. Ticor Title Ins. Co. of Calif.*, 168 Ariz. 568, 572, 816 P.2d 225, 229 (1991); *In re Estate of Milliman*, 101 Ariz. 54, 65, 415 P.2d 877, 888 (1966). This rule applies to determining when a cause of action has accrued: the agent’s knowledge is the principal’s. *Macris v. Sculptured Software, Inc.*, 24 P.3d 984, 990 (Utah 2001); *Agency of Natural Res. v. Towns*, 168 Vt. 449, 453, 724 A.2d 1022, 1025 (1998); *Mayer v. Ford*, 12 So.2d 618, 622 (La. App. 1943); *U.S. Fid. & Guar. Co. v. San Diego State Bank*, 155 S.W.2d 411, 413 (Tex. Civ. App. 1941); *see also Mohave Elec. Co-op. v. Byers*, 189 Ariz. 292, 310-11, 942 P.2d 451, 469-70 (App. 1997) (noting that there is an exception to the general rule when the agent is acting adversely to the principal).

¶ 50. Contrary to Little’s argument (Opening Brief at 34), an agent’s knowledge is imputed to his principal through the law of agency, not evidence. It is not

a presumption that can be overcome with contrary evidence. The agent's knowledge is imputed whether or not he actually passes the facts on to the principal:

“[I]t is a well settled general rule . . . that a principal is affected with constructive knowledge, regardless of his actual knowledge, of all material facts of which his agent receives notice or acquires knowledge while acting in the course of his employment and within the scope of his authority, although the agent does not in fact inform his principal thereof.”

Mayer v. Ford, 12 So.2d 618, 622 (La. App. 1943) (quoting 3 C.J.S. *Agency* § 262 at 194); accord *Agency of Natural Res. v. Towns*, 168 Vt. at 453, 724 A.2d at 1024; *Solomon v. Design Dev., Inc.*, 143 Vt. 128, 131, 465 A.2d 234, 236 (1983); see also *Nichols v. Ach*, 233 Neb. 634, 636, 447 N.W.2d 220, 223 (1989) (knowledge of agent is conclusively presumed to be the knowledge of the principal), *overruled on other grounds*, *Anderson v. Serv. Merch. Co.*, 240 Neb. 873, 876, 485 N.W.2d 170, 173 (1992).

¶ 51. Because the law of agency imputes Johnson's knowledge to Little regardless of her purported ignorance of those facts, Little's extended argument that she had to personally *know* and actually *believe* the underlying facts (Opening Brief at 27–47), is simply out of place. None of her cited cases has any relevance to a cause of action's accrual based on the knowledge of an agent.

¶ 52. For summary-judgment purposes, this Court must view the facts in the light most favorable to Little. *Mabery Ranch*, 216 Ariz. at 239, ¶ 23, 165 P.3d at 217. It therefore must assume the highly dubious proposition that Johnson told

Little nothing of what he discovered from investigating her daughter's death. It must also assume that he told her nothing about the contents of the BOMEX complaint, even though she specifically authorized him to file it on her behalf. (R.A. 54, ¶ 93.) Under the law of agency, Little's claimed ignorance does not matter: she is charged with Johnson's knowledge just the same.

1. Johnson's ignorance of the law is irrelevant.

¶ 53. Little tries to hide behind Johnson's evident misunderstanding that the facts in the BOMEX complaint could cause the accrual of her cause of action. (Opening Brief at 42.) Whether Johnson did or did not understand the law is irrelevant:

The discovery rule applies to the facts which give rise to the cause of action, not to the legal significance of such facts. If the law were otherwise, the statute would not begin to run until a plaintiff consults an attorney who recognizes that there is a cause of action.

Ins. Co. of N. Am. v. Superior Court, 162 Ariz. 499, 502, 784 P.2d 705, 708 (App. 1989), *vacated on other grounds* 166 Ariz. 82, 800 P.2d 585 (1990).

2. Johnson was no mere volunteer.

¶ 54. Little's argument that there was no agency and that Johnson was a mere volunteer ignores the facts. (Opening Brief at 39–40.) To begin with, the case upon which she relies, *Bond v. Cartwright Little League, Inc.*, 112 Ariz. 9, 536 P.2d 697 (1975), has no bearing here. The issue there was not whether an

agent's knowledge should be ascribed to a principal but was instead the extent of the duty that the defendant owed to the plaintiff. *Id.* at 14, 536 P.2d at 702. *Bond* has nothing to do with attributing an agent's knowledge to his principal for statute-of-limitations or similar purposes.

¶ 55. In any event, Johnson was Little's agent even without an agreement to pay compensation. An express agency is created when "the principal has delegated authority by oral or written words which authorize him to do a certain act or series of acts." *Gulf Ins. Co. v. Grisham*, 126 Ariz. 123, 126, 613 P.2d 283, 286 (1980). "Payment of, or an agreement to pay, compensation to the agent is not an essential to creation or existence of the relation, and agency may be a wholly gratuitous undertaking." *Groh v. Shelton*, 428 S.W.2d 911, 916 (Mo. App. 1968) (citations and footnotes omitted); accord *Bach v. Winfield-Foley Fire Prot. Dist.*, 257 S.W.3d 605, 608 (Mo. 2008) ("Neither a contract nor an express appointment and acceptance is necessary, but consent may be manifested and the relationship may be created by words and conduct.") (citing *Groh*); *Thornton v. Budge*, 74 Idaho 103, 106, 257 P.2d 238, 240 (1953).

The relationship of "principal and agent" need not necessarily involve some matter of business, but, where one undertakes to transact some business or manage some affair for another by authority and on account of such other person, the relationship arises, irrespective of [the] existence of a contract or receipt of compensation by either party.

Thornton, 74 Idaho at 106, 257 P.2d at 240 (quoting the syllabus of *Gorton v. Doty*, 57 Idaho 792, 69 P.2d 136 (1937)).

¶ 56. Johnson was no mere interloper. Little expressly authorized him to undertake her investigation, and she relied completely on him for it. Other than helping Johnson obtain Polk’s medical records, there is no evidence that Little did anything to investigate Polk’s death.

¶ 57. Furthermore, the facts do not support Johnson’s insinuation that Johnson received no benefit from the investigation: Johnson not only acted with Little’s express authority, he received consideration for the agency. He was working on a documentary program that he planned to produce concerning Polk’s death and the State’s response to it. (R.A. 54, ¶¶ 11–12; *id.*, Exhibit F (Little Deposition) at 24; Johnson Deposition at 12.) He taped or filmed many of the steps of his investigation, and he prepared notes. (*E.g.*, R.A. 54, Exhibit G at 15–16, 91, 94–95, 111, 113, 115, 175.) Johnson benefited from the agency because it gave him access to records pertinent to his project, access that he would not have had if Little had not appointed him her agent.

¶ 58. Finally, Little eventually agreed to pay Johnson a finder’s fee: he obtained her agreement to pay him 10% of what she might recover. (R.A. 54, ¶ 14.)

¶ 59. In general, “ ‘[t]he question of whether an agency existed is one of fact.’ ” *Ruesga v. Kindred Nursing Ctrs.*, 215 Ariz. 589, 595, ¶ 21, 161 P.3d 1253,

1259 (App. 2007) (quoting *Corral v. Fid. Bankers Life Ins. Co.*, 129 Ariz. 323, 326, 630 P.2d 1055, 1058 (App. 1981)). But it “ ‘is a question of law for the court when the material facts from which it is to be inferred are not in dispute.’ ” *Id.* (quoting *Cote v. A.J. Bayless Mkts.*, 128 Ariz. 438, 444, 626 P.2d 602, 608 (App. 1981)). Both Johnson and Little testified unequivocally to having agreed that the former would act on the latter’s behalf in investigating Polk’s death. As a matter of law, therefore, Johnson was Little’s agent and his knowledge was Little’s knowledge. The argument that Johnson was a mere interloper ignores the facts and law.

3. No attorney contradicted Johnson’s facts and theories.

¶ 60. Little insinuates that she was free to disregard Johnson’s work because two attorneys who worked on her case refused to sue the State for her, from which she could conclude that she did not have a cause of action. (Opening Brief at 25–26.) Little cites no law to support her tacit assertion that one agent’s non-expert opinion could somehow erase the expert knowledge obtained by a different agent. But no matter, the facts flatly contradict her anyway. Neither attorney ever opined to Little that there was no case for negligence.

¶ 61. Meehan specifically informed Little that he had *not* determined whether she had a viable cause of action: “No determination on whether or not you have a valid claim has been made, nor is any opinion or advice offered in that regard.” (R.A. 54, Exhibit H.I.)

¶ 62. Nor did Dyer tell Little that she did not have a meritorious case. Indeed, Dyer had told Johnson—her agent—that “there is indeed a case for malpractice.” (R.A. 54, ¶ 101.) His reasons for declining to represent Little had nothing to do with the merits; rather, he told Little that he believed that it was too late both under the notice-of-claim statute and the statute of limitations:

As you know, I have been doing a tremendous amount of work trying to figure out a way to get around the claim letter requirement and the statute of limitations in this case. I have done a lot of research, and I have spoken with you, Len Johnson, and Mike Meehan to try to determine if there is any evidence we can use to overcome these two *very* huge problems.

Unfortunately, Johnnie, I have not been able to find what I believe to be adequate documentation to overcome the 180-day claim letter requirement imposed by Arizona Revised Statutes Section 12-821.01(A), or the one-year statute of limitations for claims against a public entity (in this case, the State of Arizona/University of Arizona Campus Health Service). . . .

In any event, we are not going to be able to represent you with regard to your potential medical malpractice/wrongful death claim involving the death of Shawntinice. I believe that all of the statutes of limitations have already run in this case, but if you desire to pursue this claim further, I would recommend that you *immediately* seek other counsel.

. . . .

. . . I wish that there was some reasonable chance of overcoming the two statutes of limitations that have passed, but I do not see a way to get by them.

(R.A. 54, Exhibit L:C at 1, 2.)

¶ 63. Little cites no other facts that could detract from the work that Johnson did for her and the knowledge that he gained for her.

E. Even if Johnson Was Not Little’s Agent, the Cause of Action Still Accrued When He Filed the BOMEX Action Because It Demonstrates What She Reasonably Should Have Known Then.

¶ 64. Little spends much of her Opening Brief trying to run away from her relationship with the man on whom she depended to conduct her investigation into her daughter’s death. Her arguments hold no water, but even if they did, it would not change the result. Johnson’s investigation—incompetent and slow as it may have been—provides the yard stick, and Little does not measure up.

¶ 65. Actual knowledge is not necessary for accrual of a cause of action. Accrual occurs “when the damaged party realizes he or she has been damaged and knows *or reasonably should know* the cause, source, act, event, instrumentality or condition which caused or contributed to the damage.” A.R.S. § 12-821.01(B) (emphasis added). The emphasized part of the statute establishes an objective standard. Johnson’s investigation may not have been a model of efficiency and speed. But to his credit, he eventually succeeded: he got all the necessary records and spoke with the medial experts, who gave him the knowledge necessary to properly interpret the records and formulate Little’s theories of liability.

¶ 66. Johnson’s work therefore provides the yardstick by which to measure Little’s performance or her nonperformance. Other than assist Johnson in obtain-

ing Polk's medical records, Little did nothing. The only steps she took were in aid of Johnson's work, and yet she failed demand to know the results of that investigation. This is not inaction, it is willful blindness.

¶ 67. A reasonable person in her shoes would not have blinded herself. She would have investigated or, having authorized someone else to do so, she would have demanded and received the results of that investigation. Johnson's performance demonstrates that a reasonable person in Little's position would have discovered the necessary facts when Johnson did.

¶ 68. The reasonableness of efforts to investigate a cause of action are normally a fact question for the jury. *Walk v. Ring*, 202 Ariz. 310, 316, ¶ 23, 44 P.3d 990, 996 (2002). But the plaintiff cannot avoid summary judgment "if the facts produced in support of the claim . . . have so little probative value . . . that reasonable people could not agree with the conclusion advanced by the proponent of the claim." *Orme Sch. v. Reeves*, 198 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). No jury could reasonably conclude that Little was sufficiently diligent if, as she claims, she failed or refused to talk to Johnson and learn the facts that he had discovered, after having authorized and directed him to investigate for her.

F. The State Is Not Estopped to Assert the Notice-of-Claim Defense.

¶ 69. Little insinuates that the State is estopped to assert the notice-of-claim statute as a defense. (Opening Brief at 43 et seq.) Her argument has no merit.

1. There is no serious argument that the State waived the defense or induced Little not to file a notice of claim or that extraordinary circumstances prevented her from filing her notice of claim.

¶ 70. Little cites *Jones v. Cochise County*, 218 Ariz. 372, 379, ¶ 27, 187 P.3d 97, 104 (App. 2008), in which this Court held that the government waives the notice-of-claim defense if it first substantially litigates other issues. She does not develop her argument and does not cite any record facts showing that the State was guilty of any such conduct. She has therefore forfeited any argument that the State waived the defense. *See, e.g., A Tumbling-T Ranches v. Flood Control Dist.*, 222 Ariz. 515, 529, ¶ 34, 217 P.3d 1220, 1234 (App. 2009) (if litigant has not bothered to cite the record in support of argument, court of appeals need not search it to substantiate the argument); *Nationwide Res. Corp. v. Massabni*, 134 Ariz. 557, 565, 658 P.2d 210, 218 (App. 1982) (court of appeals need not consider argument that litigant does not adequately argue); Ariz. R. Civ. App. P. 13(a)(6) (“An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.”).

¶ 71. Little also cites *McCloud v. State*, 217 Ariz. 82, 170 P.3d 691 (App. 2007), stating that “equitable estoppel [may apply] where the State induced the plaintiff to forego litigation by offering settlement until the statute of limitations ran, then refused to settle.” (Opening Brief at 43.) She also cites it stating that the

statute of limitations may be tolled when extraordinary circumstances have prevented the plaintiff's attorney from taking timely action. (*Id.*) But, again, she makes no argument and cites nothing in the record facts supporting either of these notions. She has forfeited these arguments.

¶ 72. Little appears to assert estoppel based on the allegation that the State opened a claim file shortly after Polk's death and because Dr. Porter never communicated with Little regarding his treatment of Polk. (Opening Brief at 44–47.) But like her previous arguments, she offers no reason why these facts should estop the State, and none are apparent. Her inadequate briefing leads to the forfeiture of this argument.

¶ 73. Little also insinuates that the State somehow delayed her investigatory efforts by not properly providing Polk's medical records when requested. (Opening Brief at 45.) She once again cites no facts to support this accusation. The State has meticulously cataloged all of the missteps that Little and her agents took in their bungled investigation. (*See* Statement of Facts, *supra*, at 2–10.) It has also shown how it promptly produced the necessary records once it received properly authorized requests. (*Id.* at 10.) Little has not come close to showing that the State was guilty of stonewalling her investigation.

¶ 74. But even if the State had impeded Little's investigation, Little's notice of claim was still too late. Under the discovery rule, the statute of limitations is

tolled while the defendant fraudulently conceals from the plaintiff the necessary information to trigger accrual. *Walk v. Ring*, 202 Ariz. at 319, 44 P.3d at 999. The tolling lasts only while the plaintiff remains ignorant; it ends when she learns the pertinent facts. *See id.* (“ ‘Fraud practiced to conceal a cause of action will prevent the running of the statute of limitations until its discovery.’ ” [quoting *Acton v. Morrison*, 62 Ariz. 139, 144, 155 P.2d 782, 784 (1945)]).

The application of equitable estoppel to preclude a statute of limitation defense may be made only for so long as the plaintiff did not know and could not discover the truth. The one relying upon the acts of the party who is to be estopped must be excusably ignorant of the true facts.

Mason v. Tucker & Assocs., 25 Idaho 429, 433, 871 P.2d 846, 850 (App. 1994) (citations omitted). Little received Polk’s records shortly after she finally provided a proper release. (R.A. 54, ¶ 79.) Johnson’s review of those files led him to prepare the BOMEX complaint, which he filed on July 1, 2007. (Appendix 1; R.A. 54, ¶¶ 90–91, 93.) Any tolling had ended by that time because Little and her agents were no longer in the dark then.

2. The attorneys’ actions do not excuse Little from timely filing her notice of claim.

¶ 75. Little argues that accrual of her cause of action should be tolled because of the actions of the attorneys who were hired as part of the investigation. (Opening Brief at 47–50.) The law is squarely against her.

¶ 76. The notice-of-claim statute that existed before 1994 allowed a claimant relief if the failure to file a timely notice of claim was attributable to the claimant's attorney:

Any claim which is not filed within twelve months after the cause of action accrues is barred and no action may be maintained except upon a showing of excusable neglect if the action is brought within the otherwise applicable period of limitations, provided that if there is no excusable neglect, and if the absence of excusable neglect is because of the conduct of the claimant's attorney, then the action shall proceed, and the public entity and public employee shall have a right of indemnity against the claimant's attorney for any liability assessed in the action.

Former A.R.S. § 12-821(1), as quoted in *Pritchard v. State*, 163 Ariz. 427, 431, 788 P.2d 1178, 1182 (1990). But that is no longer the law.

¶ 77. In 1994, the Legislature repealed the former notice-of-claim statute, enacting the current one, A.R.S. § 12-821.01, in its place. *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 298, ¶ 19, 152 P.3d 490, 495 (2007). The current statute has no provision excusing the failure to timely file a notice of claim. The statutory change clearly evinces the Legislature's intent not to allow the exception that Little argues here. If she believes that her former attorneys are responsible for her failure to timely file her notice of claim, then she may sue them, but her action against the State is still barred.

II. Little Forfeits All Arguments Not Raised and Adequately Argued in Her Opening Brief.

¶ 78. Little claims not to be abandoning arguments that she made below, even though she might not raise them in this Court. (Opening Brief at 13.) She cannot preserve arguments this way. Any argument not raised in the opening brief is lost. *Hernandez v. State*, 201 Ariz. 336, 338 n.1, 35 P.3d 97, 99 n.1 (App. 2001), *vacated on other grounds*, 203 Ariz. 196, 52 P.3d 765 (2002). “It is not incumbent upon the court to develop an argument for a party.” *Ace Auto. Prods., Inc. v. Van Dyne*, 156 Ariz. 140, 143, 750 P.2d 898, 901 (App. 1987). The Court should reject Little’s attempt to resolve the case based on arguments that she has not properly raised.

CONCLUSION

¶ 79. This Court should affirm the Judgment.

Respectfully submitted this 20th day of July, 2010.

Terry Goddard
Attorney General

s/ Daniel P. Schaack
Daniel P. Schaack
Assistant Attorney General
Attorneys for Defendant-Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that the attached brief uses proportionally spaced type of 14 points or more, is double-spaced using a roman font, and contains 9,221 words.

Dated this 20th day of July, 2010.

s/ Daniel P. Schaack
Daniel P. Schaack
Assistant Attorney General

CERTIFICATE OF SERVICE

Original e-Filed this 20th day of July, 2010, with:

Arizona Court of Appeals
Division Two
State Office Building
400 W. Congress
Tucson, AZ 85701

And two copies mailed the same day to:

John G. Stompoly, Esq.
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Tucson AZ 85718
Attorneys for Plaintiff–Appellant

s/ Mary Beke
836838
LMS08-0263 / G08-20350

APPENDIX

| No. | R.A. No. | Document |
|------------|-----------------|---|
| 1. | 54, Ex. B | “BOMEX complaint” — Len Johnson’s Complaint against Dr. Porter, filed with the Arizona Medical Board on behalf of Johnnie Little. |
| 2. | 54, Ex. D | Notice of Claim |
| 3. | 2 | Complaint |

Appendix 1

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Complaint Filed
with AZ Medical Board
(actual full version filed
online 7/1/07)

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Shawntinice Polk was a star player for the University of Arizona women's basketball team who died of a large saddle embolism, or clot, in the lungs on September 26, 2005.

Despite displaying all the symptoms of a dying person in the training room at McKale Center at the University of Arizona that Monday morning--unable to breathe, crackling lungs, flailing arms--it took 30 minutes to get her to the UMC emergency room, just two blocks away. Before paramedics were called, a campus doctor was summoned to the training room. Dr. Ed Clarke chose to bike across campus to McKale, instead of calling 9-1-1.

This was the last in a string of misdiagnoses and poor decisions on the part of Dr. Donald E. Porter and campus health, along with surgeon Jon K. Nisbet at University Orthopedic Specialists. Porter is the team physician responsible for Polk's treatment and the target of the complaint. Purposeful and illegal delays in getting medical records to the family are the reason for the lag time between the death and this filing. At the date of this filing, x-rays and lab tests ordered by Porter six days before Polk's death, on 09/19/05, have been deemed "frozen" by Campus Health. The family was never consulted before Polk's surgeries.

This filing is authorized and urged by Polk's mother, Johnnie Little, who is working with myself, journalist Len Johnson, who has been investigating the case. I am writing in conjunction with and on behalf of the mother.

We have concluded that while clots are not always easily detected, the warning signs and symptoms in this case are too numerous and obvious to ignore and that Dr. Donald Porter fell below the standard of care when treating this patient.

In addition to the clot that killed her, SHAWNTINICE SUNDAY POLK HAD A LENGTHY AND TROUBLED MEDICAL HISTORY WHILE AT UA, including two concussions, multiple knee surgeries, coughing up blood and high fevers, asthma, repeated shortness of breath and dizziness, low back pain, ovarian cysts, non-gynecological severe abdominal pain, obesity, iron deficiencies and high red blood cell counts, among other problems.

BRIEF FOUNDATION FOR ORDER OF EVENTS:

On 8/23/04, Dr. Porter did lab work to screen for sickle cell. Blacks and especially black athletes are prone to sickle cell, which is a clot mechanism and indicator. We feel this indicates that despite Polk's asthma, Dr. Porter is aware of the danger of clots. The results of this test are not made known in the medical records.

There are conflicting reports and ironies throughout Polk's records. Between that August 2004 visit and Polk's second knee surgery in April 2005, she was treated by Campus Health for migraines, oozing discharge from an arm lesion, strep, chronic cough,

repeated shortness of breath and difficulty breathing, and is clearly unhealthy. Yet on Jan. 22, 2005, (Campus Health record) Dr. B Heming observes that she is "a healthy female in no apparent distress", despite recording symptoms of vomiting and "feeling like she had to warm up a bit to get her breathing going," along with another assessment of "difficulty breathing."

On a follow-up three days later, Dr. Porter notes that she "feels she's almost choking...worse with activity." (Campus Health record January 25, 2005).

Yet she remained playing basketball, having led her team to first place in the Pac-10. Chest x-rays had been ordered in the previous months that did not show clots, but did show "vascular crossings or cavitary lesions."

This snippet from a long history of chronic sickness is to demonstrate that when THE star athlete is scheduled to have surgery in order to be ready for the upcoming senior season, there is very little in this case that attempted to stop it. She was already a three-time All Pac-10 player and Kodak honorable mention All-American. Not playing her senior year at Arizona probably would have had little impact on her strong chances of playing in the WNBA. There was a great deal of pressure for Shawntinice Polk to be on the court the next season, and her absence since has created two losing seasons.

On March 21, 2005, immediately after her highly successful junior season, Polk had fluid drained from her left knee in preparation for her upcoming surgery in April. On that visit, orthopedic surgeon Jon K. Nisbet noted "she has what may be chondral defects" in both knees.

After reading Nisbet's records after Polk's death, Tucson orthopedic surgeon Scott Slagis said Polk's knee was in awful condition before the April surgery. "Her knee was shot...she had the knee of a 70-year-old." Slagis said he discourages trying to repair something that damaged with hopes of enduring major stress on the knee.

Nisbet has a past with the medical board. Before becoming Polk's surgeon, he operated on the wrong hip of a Christine Tarpley. He received a letter of reprimand from the board.

Subsequent interviews with Tarpley have revealed that she was so concerned about Nisbet continually citing the wrong hip as needing surgery, in both written and oral communication, that she circled her right hip with a pen and wrote "it's this hip and not the other." Nisbet went into the left hip, operated, told an awakening Tarpley that he "fixed the problem" and then hired a private investigator to follow Tarpley for over a year to try to prove that she wasn't limping. Tarpley was limping and finally settled out of court. She never had the right hip fixed. "That man (the investigator) came to my house. I was scared." Nisbet is also on record at the Pima County Courthouse after settling out of court with a Samuel C. Black. Nisbet hit Black with his car while Black was riding his bike in front of a Tucson car wash.

While the focus of this complaint is to cite evidence of predisposition and symptoms of clotting and that the deceased patient clearly demonstrated them, we feel a brief foundation should be laid.

ORDER OF EVENTS:

Between the March 21 knee draining and the April surgery, Polk had her usual illnesses. Three days of vomiting (March 28, 2005 Campus Health record signed by Porter) a viral illness (March 31 CH record, signed by Porter), both of which required iv fluids, and on April 8, 2005 more of the classic "problems with asthma." 10 days later she made her visit to Nisbet's office for her knee prep consultation in which Nisbet noted a "possible meniscus tear."

Polk was still chronically obese. After the April 21 surgery, she saw a campus health obgyn visit for cramping (Campus Health record, May 17). We feel this is an important record, because three clot dispositions or symptoms are in line and evident at this point.

1) Obesity-- "My goodness, she's at least 40 pounds overweight, more really, that's a big risk for clots."--Dr, Redekop, upon review of the records in May 2007. Redekop, by the way, does not have a history of malpractice or any letters of reprimand from the medical board.

2) She was given another 3-month renewal for her birth control pill. "Being on the pill predisposes one for clots." Eric Peters, Pima County Medical Examiner who examined Polk.

3) Inactivity after surgery. "She was inactive after surgery, part of a perfect storm that coupled with obesity and birth control, could easily have been overlooked by doctors because of how used they'd gotten to asthma." It's doubtful the cramping helped increase activity after surgery, either.

On July 17, three months after the knee surgery and three months before her death, Polk was assaulted by eight girls at a Tucson night club. She was kicked in the head and body and suffered her second concussion. Many of her old symptoms manifested in addition to the head trauma, including shortness of breath, abdominal pain, nausea and vomiting. (Southwest Ambulance record, UMC).

That afternoon, Nisbet administered an MRI to Polk and recorded an "H" next to Polk's red blood cell count, for high. Nisbet gives no further written attention to the high RBC.

4) High red blood cell counts are a known clot indicator.

In Porter's follow-up assessments on July 18 and 21, he notes scalp swelling, hemoglobin at 11.9, balance problems, trouble falling asleep, dizziness, but no high red blood cell count. On July 25 (Campus Health record July 25, 2005), Porter writes "her

indices are low and her red blood cell count is actually high...will just observe for the time being."

In the same 7/25/05 visit, a week after her concussion, Porter concludes that Polk's concussion is resolved and that Polk is to increase her cardiovascular activities and "begin weights on Wednesday."

On August 8, 2005, two weeks after Porter's decree to begin weights and more cardio, Polk is back in the doctor's office with more sickness. This time she is seen by Dr. Ed Clarke, the same doctor who biked across campus to check Polk out the day she died, instead of calling 911. In Campus Health record clinic note 570759650 08/08/2005, Polk is complaining that she is tired and short of breath. Clarke notes a "viral-like syndrome" and that Polk felt "chest tightness" while doing cardio that morning. After noting the complaint of chest tightness, he cites "history of asthma."

While the 8/25/2005 chest tightness isn't listed in this complaint as an obvious clot indicator or symptom, it should have raised a flag after the recent surgery, as clots are known to travel to the lungs. And even though medical examiner Peters ruled out the April surgery as the primary cause of the clot due to the six-month period before death, he does acknowledge that by-products of that surgery, namely inactivity, can cause clots that lead to death.

It should also be noted that Clarke pointed out good hydration and "no weight loss" as positive signs of Polk's condition on the 8/25/05 visit. Polk was later described by Redekop as "way, way overweight."

On 09/02/05, a little over three weeks before her death, Polk's weight is recorded by campus health as 230 lbs, although it was listed as 40 pounds heavier a month earlier and at the time of her death, 24 days later. Polk is described as having late cycle spotting and clots and as having "significant cramps", and wants to try something besides the birth control pills she is taking.

On 09/19/05, a week before her death, Porter notes that Polk is "coughing up blood" and has been sick for two weeks. She is also vomiting and listed as having an upper respiratory infection. A huge pulmonary embolis--we guess you could call that an infection. (Campus Health record clinic note P3320-43, 09/19/05.) Orthopedic surgeons Slagis and Redekop both cite coughing up blood as a clot symptom and it is the 5th clot indicator that we feel demonstrates that Porter fell below the standard of care.

5) Coughing up blood (hemoptysis)

This is the visit that prompted Porter to order the x-ray and lab reports that are now deemed "frozen"--no family access--by the medical records division of campus health. It should be noted that the records were promised to the family after repeated written requests on the proper forms, but then described as frozen last week. Liz is the person in the medical records division who told this to the mother, Johnnie Little. Last spring, campus health delayed sending campus health medical records to the mother and

when I, Len Johnson, called Liz to ask why, she said it only happens "in this case" and that she had been instructed to refer me to Vicki Gotkin, campus attorney. A few minutes later, Gotkin told me that she had no idea why Liz would have said that and that she couldn't help anyone with the records. This conversation was recorded on video tape.

On 09/22/05, four days before her death, Polk visited Dr. Ed Clarke after "three weeks" of being sick. On this visit, Polk is experiencing shortness of breath and is again COUGHING UP BLOOD.

Clarke lists the lab results from earlier in the week as pending and notes "poor air movement" in the lungs. He pulls Polk from basketball practice. He notes that the 09/19/05 lab tests from earlier in the week are "pending." He notes 60 mg daily dosage of prednisone--a level Redekop describes as high--and diagnoses "mild to moderate asthma."

While not as urgent as chest tightening, the fact that high levels of prednisone are not helping the asthma indicates to us that asthma cannot be viewed as a mask to the clot. The fact that Porter ordered lab tests and x-rays indicates that he realized that fact. The lab tests and x-rays from 09/19/05 were never used in her treatment or diagnoses. Like chest tightness, the ineffectiveness of asthma treatment could be seen as a clot indicator itself, but we are choosing to list direct and obvious, widely recognized clot symptoms and indicators in this complaint.

Porter signed off on this mild to moderate asthma assessment by Clarke and said he agreed with it, but Porter's signature was dated 11/01/2005--over a month after Polk's death.

On 09/23/05, Polk complained to teammates that she was very sick and had been going to doctors to "try to figure it out." She was three days from death. It was a Friday.

She saw Porter that day. He noted that she had WORKED OUT and was short of breath. He listed her as "ok now" and wrote that Polk was to "continue current regimen."

Teammate Che Oh spent the entire Sunday--Polk's last day--with Polk at Polk's apartment. She said in an on-camera interview that Polk was extremely sick and throwing up "all day long." She quoted Polk as saying that whatever the doctors had given her wasn't working.

Why Polk was back at her locker in front of the training room the next day instead of in medical care is mystifying. But she was, and at 8:30 a.m., she experienced major chest pain and complained of being "unable to breath." She got into the training room and was flailing her arms and in "visible distress." (UMC record zzzcncl12614418, 09/26/05, Dr. Beskind, er physician).

Trainer Randy Cohen was the first to see her. He tried to have her "control her breathing." He called Clarke. Clarke biked over. Clarke described the trip as a "few minutes."

Dr. Daniel Beskind, UMC ER physician who attempted to revive a clinically dead Polk, called the bike trip five minutes. To settle this, I biked across campus from Campus Health to McKale as fast as I could on a day with school not in session, unlike the day Polk died. It took me 3:15. That time does not include prep time--gathering bags, getting out the door--or the time into McKale and down the tunnel. I believe Beskind. Five minutes is realistic.

CPR was initiated. At 8:49, according to Beskind's UMC records, 911 WAS CALLED...19 MINUTES AFTER THE FIRST OBSERVATIONS THAT SHE COULDN'T BREATHE.

At 8:55 a.m., Polk passed out. Her pulses were "not palpable." Paramedics arrived three to four minutes later. It took them six minutes to get her to ER. In total, 35 minutes had lapsed between the time Polk displayed symptoms of dying to the campus health training room and the time she died. Dr. Porter is not found in this day's records.

Beskind wrote that he tried to diagnose an array of possible conditions. He also noted that "per training room physician reports, patient's past medical history was notable for asthma but otherwise healthy". In other words, the doctor(s) at campus said Polk had asthma, and nothing else. *Health*

Beskind later said in an on-camera interview that there was only so much anyone could do with the time that elapsed in the training room and that the Polk case "made me so depressed I almost quit ER."

In summary, we state that Dr. Donald Porter should have diagnosed a clot, or at the very least, something other than the continual diagnoses of "mild to moderate asthma." He overlooked five documented blood clot indicators and/or symptoms in the death of Shawntinice Polk. The University of Arizona has deliberately and unlawfully withheld medical records from the family.

The five clot indicators are:

- 1) Obesity
- 2) Being on birth control
- 3) Inactivity after surgery
- 4) High red blood cell counts
- 5) Chronic coughing up blood

Possible supporting clot indicators include:

- 1) Tightness in chest
- 2) Ineffectiveness of high levels of prednisone for asthma
 - a) reinforced by ordering of x-ray and lab reports

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a week before death
3) Black athlete prone to sickle cell

My name is Len Johnson and I can provide documents and interviews needed. I can be reached in Tucson at 520-299-4348, or by email at info@lenjproductions.com.

Appendix 2

**NOTICE OF CLAIM
AGAINST THE STATE OF ARIZONA**

BEST COPY

Claim must be filed in accordance with A.R.S. § 12-821.
Please type or print legibly. Press hard when completing information.
All blanks MUST be completed.

CLAIMANT INFORMATION

Claimant's Name: JOHNNIE LITTLE
C/O her attorney
Address: JOHN G. STOMPOLY City TUCSON State AZ Zip 85718
3567 E. Sunrise Dr, #133
Phone # (Home): Stompoly Work: 520-628-8300 Date of Birth: See attached

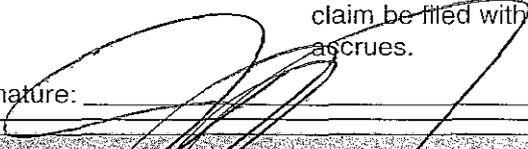
FACTS

| | | |
|--|---|---|
| DATE OF OCCURRENCE <u>See attached</u> , 20__ | TIME OF OCCURRENCE <u>See attached</u> am/pm | LOCATION OF OCCURRENCE <u>See attached</u> |
|--|---|---|

Identify the circumstances under which the damage or injuries were sustained, the cause thereof and the nature and extent of the damages and/or injuries. List the State agency if known. You may attach additional pages if necessary.

See attached

Amount of Claim \$3,000,000.00 In order for a claim to be valid, ARS 12-821.01(A) requires the claimant to include a specific amount for which the claim can be settled. The statute requires the claim be filed with the State of Arizona within **180 days** after the cause of action accrues.

Claimant Signature:  Date: 5-15-08

Mail as follows:

| | | | |
|-----------|---|---------|---|
| Original: | Office of the Attorney General 1275 W. Washington Phoenix, AZ 85007 | Canary: | Risk Management 100 N. 15th Ave., Suite 301 Phoenix, AZ 85007 |
|-----------|---|---------|---|

NOTE: All supporting documents (Estimates, Bills, etc.) should be included with the canary copy to Risk Management.

Attorney General - White Risk Management - Canary Claimant - Pink

PURPOSE OF DETAILED STATEMENT

The purpose of this statement is to convince the State of Arizona to accept and settle this claim because:

- 1. This Notice of Claim is timely.**
- 2. The claim is valid.**
- 3. The claimant will accept a confidential**

settlement which permits the University of Arizona to avoid tremendous adverse publicity which will result if the claim is litigated.

- 4. Compensating claimant is the right thing to do.**

THE CLAIM

This is a wrongful death claim brought by Ms. Johnnie Little. She is the mother of Shawntinice Polk who was born March 27, 1983, and died September 26, 2005, when she was 22 years of age. At the time of her death, Shawntinice had a life expectancy of 55.9 years. Ms. Little was born December

19, 1955, and at the time of her daughter's death, Ms. Little had a life expectancy of 29.4 years.

Shawntinice was a full time student at the University of Arizona and a star basketball player whose talent had put the team in the top 20 and was expected to take the women's program to the same national prominence as the men's program.

Of course, that lofty goal could only be achieved if the coaches, trainers and doctors made sure Shawntinice kept playing, even if it may not have been in her best interests to do so.

Shawntinice's death was the result of pulmonary thromboembolism due to deep venous thrombosis. These conditions were preventable because they were discoverable and treatable.

The negligent failure of University employees, both lay

and expert, to discover or treat the conditions that caused Shawntinice's death as well as their failure to get prompt treatment for Shawntinice when she suffered serious symptoms immediately before her death are the facts supporting this claim.

THE ISSUES

- 1. Is this Notice of Claim filed timely?**
- 2. If the State contends this Notice of Claim is not filed timely, is that issue a question of fact to be decided by a jury?**
- 3. If the issue of timeliness is for the jury, will the jury likely decide for the claimant, Ms. Little, or for the State?**
- 4. Is Ms. Little's claim valid?**

THE LAW

One of the major divisions in the law is between substantive law and procedural law. Substantive law

consists of the rules which ask and decide whether somebody did something wrong. Procedural law consists of the rules which ask and decide how to prove whether somebody did something wrong.

Part of the substantive law is A.R.S. §12-611 et seq which creates a cause of action for a parent against any person or entity who negligently killed the parent's child. Damages are awarded for the parent's loss of the child's consortium, including love, companionship and anticipated financial support.

People who work for the University are State employees. If you want to pursue a claim based on the negligence of those employees, you have to sue the State.

Historically, the State could not be sued for its negligent conduct. However, such government immunity was abolished in *Stone v. Arizona Highway Commission*, 93 Ariz.

384, 381 P.2d 107 (1963). In the more recent case of *Pritchard v. State*, 163 Ariz. 427, 788 P.2d 1178 (1990), the Supreme Court said:

“Accordingly, the right to sue the state is not a statutory grant, as is the case in several other states; rather, it is a common law rule in Arizona that the government is liable for its tortious conduct and immunity is the exception.”. 163 Ariz. at p. 431.

The most litigated procedural rules affecting claims against the State are:

A.R.S. §12-821.01A which states:

“Persons who have claims against a public entity or a public employee shall file claims . . . within one hundred eighty days after the cause of action accrues.”. (emphasis added)

and A.R.S. §12-821 which states:

“All actions against any public entity or public employee shall be brought within one year after the cause of action accrues”

and not afterward.”. (emphasis added)

and A.R.S. §12-821.01B which states:

“B. For purposes of this section, a cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage.”.
(emphasis added)

Procedural rules are not favored and must be restricted.

In *Allstate Ins. Co. v. O’Toole*, 182 Ariz. 284, 896 P.2d 254

(1995), the Supreme Court held:

“Whenever possible, procedural rules should be interpreted to maximize the likelihood of a decision on the merits.”.
182 Ariz. at p. 287.

Both §12-821.01A, the 180 day rule, and §12-821, the one year rule, are a type of procedural rules called statutes of limitation. As with procedural rules generally, statutes of limitation are not favored and must be restricted. In

***Premium Cigars Intern. v. Farmer-Butler*, 208 Ariz. 557, 96**

P.3d 555 (2004), the Court held:

“In Arizona, a defense based upon the statute of limitations is generally disfavored.”. 208 Ariz. at p. 570.

The above discussion of the law states the general context in which §12-821.01A and B must be construed and applied.

I will next discuss what the Arizona Courts have said about the key word and phrases of §12-821.01 A and B.

The first part of §12-821.01B says a cause of action accrues:

“ . . . when the damaged party realizes he or she has been damaged . . . ”.

In *Long v. City of Glendale*, 208 Ariz. 319, 93 P.3d 519 (2004), the Court considered whether the plaintiff’s “constructive notice” of the defendant’s negligence

(contained in public records) satisfied the language of §12-821.01B that states the cause of action accrues when the damaged party “realizes” he or she has been damaged.

The Court held that constructive notice from public records does not start the statute of limitations because:

“To ‘realize’ something is to ‘comprehend [it] fully or correctly.’ (citation omitted) The requirement that a claimant ‘realize’ he has been damaged is inconsistent with the idea that claimants can be deemed to have notice of a claim as a matter of law regardless of their actual knowledge of the claim. One does not ‘realize’ something because there is a legal presumption that he knows it.”. 208 Ariz. at p. 325. (emphasis added)

Realizing your child has died unexpectedly is not the same as realizing your child died unexpectedly because of someone’s negligence.

This distinction was made clear in *Walk v. Ring*, 202 Ariz. 310, 44 P.3d 990 (2003) when the Supreme Court

distinguished between those cases:

“ . . . in which an unfortunate result would immediately put the plaintiff on notice that the result was not only unfavorable but might be attributable to some fault and should be investigated. (citation omitted) (injury to plaintiff’s hand during tooth extraction).” 202 Ariz. at p. 314.

and those cases:

“ . . . in which factual context does not permit finding, . . . that an unhappy result should be investigated to determine whether it is attributable to fault of those responsible for the patient’s care. Contrary to Defendant’s argument, we do not believe the statute [of limitations] is automatically triggered each time a professional’s services have failed to produce the desired result or may even have brought about an adverse result.” 202 Ariz. at pp. 314-315. (emphasis added)

When Ms. Little was told her daughter had unexpectedly died, she realized she was “damaged”, but had no reason to suspect her daughter’s death was caused by someone’s

negligence.

The second part of A.R.S. §12-821.01B says a cause of action accrues when the damaged party:

“ . . . knows or reasonably should know the cause . . . ”.

The quoted phrase raises the question of whether the damaged person’s knowledge must be subjective (what the person actually knows) or merely objective (what a hypothetical reasonable person would know even if the damaged person does not actually know).

Because of the fiduciary relationship between patient and doctor, in cases against health care professionals, the standard to decide whether a damaged person “knows” the cause of his damage is subjective.

This legal principle was made clear in *Walk v. Ring*, supra, a case against a dentist in which the Supreme Court

said:

“Thus, our cases and those from other jurisdictions that recognize a fiduciary relationship agree that an actual knowledge standard applies to triggering the statute of limitations for a plaintiff who establishes a breach of the fiduciary duty of disclosure.”. 202 Ariz. at p. 319. (emphasis added)

The objective reasonable man standard is a legal presumption binding the claimant, regardless of the claimant’s actual knowledge. That presumption is rejected in cases involving fiduciary relationships.

Arizona has long held there is a fiduciary relationship between physician and patient. *Hales v. Pittman*, 118 Ariz. 305, 309, 576 P.2d 493 (1978).

The above cases make clear that A.R.S. §12-821.01B should be read to mean that a cause of action against any doctor does not accrue, i.e., the 180 day period and the one

year period do not begin to run until the damaged person actually knows, that is, has personal knowledge that he or she has been damaged by the negligence of some doctor. Even this statement is too broad as is made clear in the later discussion of the discovery rule.

There is more. The damaged person does not even have to investigate whether he or she has a claim against a particular doctor until that doctor voluntarily provides to the damaged person all relevant information the doctor knows or should know.

In *Walk v. Ring*, supra, the Supreme Court held:

“In cases in which an adverse outcome is not in itself sufficient to put a reasonable person on notice to investigate whether a known injury is attributable to negligence, patients and clients should not be required to commence investigation of a malpractice action.” 202 Ariz. at p. 318. (emphasis added)

“We long ago held that a patient and a doctor were in a fiduciary relationship ‘calling for frank and truthful information from’ doctor to patient. (citation omitted) ‘Fraud practiced to conceal a cause of action will prevent the running of the statute of limitations until its discovery.’ (citation omitted) If the doctor ‘fraudulently concealed from [his patient] the fact of his negligence,’ the statute of limitations would be tolled.”. 202 Ariz. at p. 319. (emphasis added)

“Moreover, if fraudulent concealment is established, the patient is relieved of the duty of diligent investigation required by the discovery rule and the statute of limitations is tolled ‘until such concealment is discovered, or reasonably should have been discovered.’ (citation omitted) In fraudulent concealment cases, the duty to investigate arises only when the patient ‘discovers or is put upon reasonable notice of the breach of trust.”. 202 Ariz. at p. 319. (emphasis added)

The Court explained:

“ . . . [F]raudulent concealment occurs with nondisclosure of the facts pertaining to negligence. . . . Moreover, our cases do

not limit the duty to disclose to actual knowledge. A doctor must disclose what he 'knew or was chargeable with' knowing." 202 Ariz. at pp. 320. (emphasis added)

The Court made clear that the theory of fraudulent concealment would toll the statute of limitations even if the doctor believed his treatment was proper, stating:

"No doubt Defendant had no intent to deceive, but as we said in Morrison, to establish concealment a patient need only show a 'breach of legal or equitable duty. . . . Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud.'" 202 Ariz. at p. 320. (emphasis added)

The Supreme Court acknowledged that by establishing the rules quoted above:

". . . we allow too many cases on discovery to go to the jury. It is true that in some cases the substantive merits of a claim may influence jurors to favor the plaintiff on the procedural question of discovery and potential barring of the

action by the statute of limitations. This, no doubt, would be prevented by adopting a bright-line rule. But such a rule would also have some unjust effects. For example, it would bar meritorious actions by those who have been reassured by their doctors, those who have no reason to believe they were negligently injured, or those who had no way to ascertain they were injured through some wrongdoing . . .”. 202 Ariz. at p. 318. (emphasis added)

The rule requiring a doctor to voluntarily disclose to the patient all information the patient needs to decide if the doctor’s treatment was negligent applies with even greater force when the doctor is a State employee. In *Hollingsworth v. City of Phoenix*, 164 Ariz. 462, 793 P.2d 1129 (1990), the plaintiff brought a tort action against the City and the Court considered the adequacy of the Notice of Claim measured by the statute which was the predecessor to the current A.R.S. §12-821.01. The Court said:

“The idea is to provide the governmental

agency with information so that it has an opportunity to settle a citizen's claim or to litigate it. It is not a requirement that an explicit offer be made by the citizen. It is simply a method to inform the government that an opportunity to settle is available if it is rational and responsible to do so. The duty of responsibility between a citizen and his government is, after all, reciprocal." 164 Ariz. at p. 466 (emphasis added).

In our case, Ms. Little may not have had a direct professional or fiduciary relationship with any State employees. Her deceased daughter, however, had a fiduciary relationship with the physicians employed by the State who treated Shawntinice.

If Shawntinice had been negligently injured, not killed, by a State doctor, she would have the benefit of the Court decisions quoted above. Ms. Little is entitled to the benefit of the same law. A.R.S. §12-611 states:

"When death of a person is caused by

wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, . . . the person who . . . would have been liable if not death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, . . .”.

A.R.S. §12-612A and B permit a parent to maintain an action for the wrongful death of the child.

In *Aranda v. Cardenas*, 215 Ariz. 210, 159 P.3d 76 (2007), a wrongful death medical negligence case, the Court held:

“The action is subject to defenses that the defendant could have raised against the deceased.”. 215 Ariz. at p. 216.

A.R.S. §12-611 as well as the *Hollingsworth* and *Aranda* decisions make clear that the plaintiff in a wrongful death case has different damages, but the same legal rights as the decedent and is subject to the same defenses which could

have been asserted against the decedent.

Mrs. Little is entitled to the benefit of the professional or fiduciary relationship between Shawntinice and State doctors and other professionals.

I have been discussing A.R.S. §12-821.01B. I will next discuss subsection A which states that persons who have “claims” against the State must file an appropriate notice within 180 days after the “cause of action” accrues. The quoted words have also been construed by the Arizona Courts and those decisions are relevant to the issues discussed in this Notice of Claim.

In *Thornton v. Marsico*, 5 Ariz. App. 299, 425 P.2d 869 (1967), the Court held:

“The use of the word ‘claim’ . . . is broader than the term ‘cause of action’ and indicates an aggregate of operative facts which give rise to rights which are enforceable in court.” 5 Ariz. App. at p.

301 (emphasis added)

In *Melancon v. USAA Cas. Ins. Co.*, 174 Ariz. 344, 849

P.2d 1374 (1992), the Court held:

“A ‘cause of action’ is a single core of operative facts that entitle a person to sustain an action and seek a judicial remedy.” 174 Ariz. p. 347. (emphasis added)

In the *Melancon* case, the Court did not say there had to be enough operative facts to entitle a person to just “file” an action. The Court used the word “sustain” which, according to Webster’s New World Fourth Edition Dictionary, means:

“To keep in existence; keep up; maintain or prolong . . . carry the weight or burden of.”.

Combining *Thornton* and *Melancon* to interpret §12-821.01B, it is obvious that knowing enough general facts to realize you have a cause of action which will survive a motion to dismiss the Complaint does not start the statute of

limitations. The plaintiff must have much more detailed knowledge of a “single core of operative facts” sufficient to require a decision on the merits.

Of course, knowing a single core of operative facts sufficient to require a decision on the merits is different than knowing a single core of operative facts sufficient to support the conclusion that a cause of action has “accrued” which starts the statute of limitations running.

Many Court decisions tell us what a reasonable person must know to conclude a cause of action has accrued and will start the applicable statute of limitations. This is called the discovery rule.

***Mayer v. Good Samaritan Hospital*, 14 Ariz. App. 248, 482 P.2d 497 (1971), was the first decision to talk about the discovery rule and decide that a cause of action accrues, at least in a medical malpractice case, when:**

“ . . . The plaintiff knew or by the exercise of reasonable diligence should have known of the defendants’ conduct and therefore the statute of limitations does not begin to run until that time.”. 14 Ariz. App. at p. 252.

The following decisions have refined the discovery rule and, therefore, the test to determine when a cause of action accrues. *Anson v. American Motors Corp.*, 155 Ariz. 420, 747 P.2d 581 (1987) held that A.R.S. §12-542.2, the statute that said a wrongful death action had to be filed within two years from the date of death, was unconstitutional, then discussed the discovery rule, stating:

“The language of A.R.S. §12-542(2) specifically defines the date a wrongful death action ‘accrues’ for purposes of commencing the limitations period as the date of death. . . . Pursuant to the discovery rule, a cause of action does not ‘accrue’ until a plaintiff discovers or by the exercise of reasonable diligence should have discovered that he or she has been injured by the defendant’s negligent

conduct.”. 155 Ariz. at p. 423. (emphasis added)

“After considering the equities, we hold that the statute of limitations in A.R.S. §12-542(2) is unconstitutional, and apply the discovery rule in wrongful death actions.”. 155 Ariz. at p. 426.

In *Young v. City of Scottsdale*, 193 Ariz. 110, 970 P.2d 942 (1999), overruled on other grounds in *Deer Valley v. Houser*, 214 Ariz. 293, 152 P.3d 490 (2007), the City argued and the Trial Court agreed that A.R.S. §12-821.01 abrogated the discovery rule because subsection B states a cause of action against the State accrues when the injured person knows or should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage. The City pointed out that the statute says nothing about the injured person discovering he or she had been injured by the negligence of a particular person. The

Court of Appeals rejected the City's argument and reversed the Trial Court's decision stating:

“Arizona follows the ‘discovery rule,’ under which a cause of action accrues ‘when the plaintiff discovers or by the exercise of reasonable diligence should have discovered that he or she has been injured by a particular (emphasis in original) defendant’s negligent conduct’.”. 193 Ariz. at p. 114. (emphasis added)

...

“In any event, we hold that section 12-821.01 cannot abrogate the discovery rule.”. 193 Ariz. at p. 115.

In fact, all of the old laws barring a lawsuit unless filed within a fixed time even if the claimant did not and could not know he/she had a lawsuit have been or will be declared void because:

“ . . .the right to bring and pursue the action is a ‘fundamental right’ guaranteed by Article 18, §6 of the constitution and the other provisions cited ante at 971.”. *Kenyon v. Hammer*, 142 Ariz. 69, 83, 688 P.2d 961 (1984).

The above Court decisions establish the following rules:

(1) A wrongful death claim does not necessarily accrue at the time of death.

(2) The soonest a cause of action for wrongful death accrues is when the claimant knows a single core of operative facts supporting the conclusion that the claimant can sustain a legal action, that is, survive a motion to dismiss.

(3) Specifically, the cause of action does not accrue until the claimant has discovered or by the exercise of reasonable diligence should have discovered that he or she has been injured (a) by a particular defendant and (b) knows that defendant's particular negligent conduct which caused the injury.

(4) Because of the fiduciary relationship between a doctor and a patient, when a patient suffers an injury, the

doctor has an affirmative duty to voluntarily provide to the patient or one in the patient's position all information the doctor knows or should know about why the patient suffered the injury so that the patient or one in the patient's position can decide if he or she has a cause of action against the doctor.

(5) The patient has no obligation to even investigate a possible claim until the doctor provides all relevant information.

(6) The rule relieving the patient of any obligation to investigate whether there is a cause of action until the doctor provides all relevant information applies even if the doctor's failure to provide the information is not due to dishonesty or an intent to deceive.

(7) After the doctor has provided all relevant information, the standard to decide whether the patient has

enough knowledge to know he or she has a cause of action against the doctor is the patient's subjective belief, not the objective standard of what a hypothetical reasonable person would have known.

(8) When a patient dies and, therefore, cannot investigate and decide whether his or her death was due to the doctor's negligence, the doctor's affirmative duty to voluntarily provide all relevant information is equitably and legally transferred to the deceased patient's statutory beneficiaries, including the patient's parents.

(9) A.R.S. §12-821.01A and B must be interpreted to favor a claimant's right to pursue a lawsuit against the State and have the matter decided on the merits.

The next issue is whether the Trial Court or the jury decides whether this Notice of Claim is filed timely.

In *Walk v. Ring*, supra, the Supreme Court held:

“Indeed, it is often the rule that in such cases the question of accrual is for the jury.” 202 Ariz. at pp. 314-315. (emphasis added)

...

“While it is ordinarily sufficient when the plaintiff is aware of the injury and its causative agent (the ‘what and who’ elements), summary judgment is warranted only if the failure to go forward and investigate is not reasonably justified. . . . Thus, the ‘jury must determine at what point Plaintiff’s knowledge, understanding, and acceptance in the aggregate provided sufficient facts to constitute a cause of action.’ . . .” 202 Ariz. at p. 316. (emphasis added)

“We pointed out that determinations of the time when discovery occurs and a cause of action accrues ‘are usually and necessarily questions of fact for the jury.’” 202 Ariz. at p. 316. (emphasis added)

“The issue of discovery and consequent accrual is for the jury.” 202 Ariz. at p. 318. (emphasis added)

In Premium Cigars Intern. v. Farmer-Butler, supra, the

Court held:

“[D]etermination of a claim’s accrual date [for limitations] usually is a question of fact, . . . This court will not resolve statute-of-limitations issues based upon disputed facts, . . .” 208 Ariz. at p. 570. (emphasis added)

Of course, whether to apply the doctrine of equitable tolling is for the Trial Court, not the jury, to decide, *McCloud v. State*, 217 Ariz. 82, 86, 170 P.3d 691 (2007), because equitable issues are generally decided by the Court.

The defense of a statute of limitations, that is, whether the claim or lawsuit was filed too late, is a legal issue which must be decided by the jury if the material facts, (when did the claimant know he or she had been injured by a particular doctor and when did the claimant know that doctor’s particular negligence), are disputed or if the undisputed facts would lead some reasonable jurors to conclude the claim or

lawsuit was filed timely and was not barred.

The facts in this case prove this Notice of Claim is timely or that the issue must be decided by a jury.

THE FACTS

Shawntinice received medical care from the State of Arizona and University of Arizona physicians, including Dr. Donald Porter, Board Certified in Family Practice and Sports Medicine, who was also the team physician for the University's women's basketball team.

Exhibit 1 are University of Arizona Campus Healthcare records reflecting the care Dr. Porter provided to Shawntinice from January 26, 2004, through September 23, 2005, the fire department and University Medical Center records of the day Shawntinice died and the September 26, 2005, autopsy report authored by Dr. Eric D. Peters (a total of 63 pages).

Dr. Porter did not provide these records to Ms. Little nor did he verbally tell Ms. Little any relevant information so that she could decide whether her daughter's death might have been caused by Dr. Porter's negligence.

Exhibit 2 is a 47 page limited analysis with comments of the health care records, unequivocally proving that the continuing negligence of Dr. Porter and other University employees led to Shawntinice's death.

The analysis/comments combined with common knowledge and Ms. Little's testimony support the following conclusions:

Before Shawntinice arrived, the women's basketball program was a failure.

The University administration, coaches, trainers and team doctors expected Shawntinice to improve the women's basketball program to a level approaching the

success of the men's basketball program.

The only way for the women's basketball program to succeed was to keep Shawntinice playing basketball.

Whether they acted intentionally or negligently, the coaches, trainers and doctors ignored or discounted Shawntinice's health problems to keep her playing basketball.

Shortly before her death, Shawntinice suffered symptoms which were negligently ignored by the coaches, trainers and Dr. Porter.

On the day of her death, the coaches and trainers as well as University employees Dr. Ed Clarke and Dr. Stephen Paul negligently delayed arranging for Shawntinice to receive prompt and proper treatment which would have saved her life.

After Shawntinice died, Ms. Little contacted the

University to find out why her daughter died. The only information Ms. Little was given was that her daughter went into the training room because she had trouble breathing, then someone called the doctor, but Shawntinice stopped breathing and could not be resuscitated. Ms. Little was told ‘HIPAA’ law prevented the release of medical records to her.

Ms. Little signed proper authorizations requesting her daughter’s medical records, but neither the University nor Dr. Porter gave her the records.

A friend, Mr. Len Johnson, volunteered to help Ms. Little find out why her daughter died. Mr. Johnson tried to get medical records on behalf of Ms. Little, but was unsuccessful even though Ms. Little again signed proper authorizations.

Mr. Johnson contacted an attorney, Mr. Michael J. Meehan, who was able to get the medical records for the day Shawntinice died and the autopsy report. He was not given

the critical Campus HealthCare records, Exhibit 1.

Mr. Meehan declined to represent Ms. Little. Exhibit 3 is his March 6, 2006, letter telling Ms. Little he would not represent her and also telling her that if she wanted to pursue the matter against a public entity (the University or its employees), she had to file a Notice of Claim by March 24, 2006. That date is 180 days after Shawntinice's death. His letter requires discussion.

***McCloud v. State*, 217 Ariz. 82, 170 P.3d 691 (2007)**

involved a claim against the State for personal injury arising out of an auto accident. The plaintiff did not file the lawsuit within one year from the date of the accident and the State moved to dismiss based upon the one year limitation of A.R.S. §12-821.01. Plaintiff claimed the statute was equitably tolled because her attorney had serious family and health problems which prevented him from timely filing the

Complaint. Her lawyer, A, asked another attorney, B, to assist A in handling the daily requirements of A's files, but B was not a personal injury attorney and was not expected to know the various applicable statutes of limitation. Further, B took a leave of absence from his own practice because of health problems, but did not tell A nor did B seek court relief in A's case. The Trial Court granted the State's motion.

The Court of Appeals said the Trial Court did not abuse its discretion in granting the motion to dismiss because the attorney problems did not constitute excusable neglect.

However, the Appellate Court also held:

**“Arizona courts have recognized and applied the equitable tolling doctrine.”
217 Ariz. at p. 87.**

In addition to finding that the statute of limitations can be tolled based on the conduct of the defendant, the Court of Appeals cited with approval many cases with different fact

patterns tolling the applicable statute of limitations,

including:

“When second wrongful death claim untimely filed after successful verdict on first claim overturned on appeal due to defective service of process . . . when right-to-sue letter from Arizona Attorney General’s office contained incorrect date by which plaintiff was required to sue on his claim . . . when a claimant received inadequate notice of her right to file suit, . . . where the court has misled the plaintiff into believing that she had done everything required of her, . . . when there is a lack of clarity in the law, . . . when an attorney affirmatively lied to a diligent client, . . . if plaintiff pursued his claim diligently, yet was abandoned by his attorney due to his attorney’s mental illness, . . . filing in the wrong forum by a lawyer and law firm under the extreme duress caused by the illness and death of the lawyer during the proceedings”. (217 Ariz. at pp. 87-89.

And, of course, in rare cases, attorney illness.

The quoted examples of attorney conduct equitably

tolling the statute of limitations are no different than Mr. Meehan telling Ms. Little he would not represent her (implying based on the records available to him that she had no case) and mistakenly telling her a Notice of Claim had to be filed by March 24, 2006, only days after she received his letter. His conduct equitably tolled both the 180 day rule and the one year statute of limitations.

Of course, neither statute of limitation had started to run and Ms. Little's cause of action against the State based upon the conduct of Dr. Porter had not accrued because Dr. Porter never gave any records to Ms. Little. She did not even have a duty to investigate.

Upon receiving Mr. Meehan's letter, any reasonable person would conclude, as Ms. Little did, that Mr. Meehan did not think Ms. Little had a case. Furthermore, being told a "claim" had to be filed within days would discourage anyone

from proceeding. Ms. Little did not know what a “claim” was or how or where to file it.

Ms. Little did the only thing she could think of which was to send the letter to her friend, Mr. Johnson, who continued to investigate and try to get the records.

His efforts were resisted. For example, a lady in the Campus Health records department told Mr. Johnson she had received a proper request, but could not release the records until the request was approved by a University attorney. The records clerk gave Mr. Johnson the name and phone number of the University attorney. When Mr. Johnson called the attorney, she said that she was familiar with the release signed by Ms. Little, that the records of a deceased student should be sent to the mother and she would call the records clerk. After some time passed and neither Ms. Little nor Mr. Johnson received any records, Mr. Johnson called the

records clerk who said she had not heard from the attorney.

More time passed.

Mr. Johnson was finally able to get what he believed to be all of the Campus HealthCare records. After reviewing the records and talking to doctors, Mr. Johnson was persuaded to file a complaint, Exhibit 4, with the State Medical Board in which he alleged, on behalf of Ms. Little, that Dr. Porter had negligently caused Shawntinice's death.

It is important to note there is no Arizona law or Court case stating that the knowledge of a friend, Mr. Johnson, is legally binding on Ms. Little for purposes of deciding when she personally had enough information to conclude Dr. Porter negligently caused Shawntinice's death.

Similarly, there is no Arizona decision holding that a claim prepared by a non-lawyer friend of the claimant and filed with the State Medical Board starts the applicable

statute of limitations.

The conclusion that Dr. Porter's negligence caused Shawntinice's death was "officially" decided by the Arizona State Medical Board February 7, 2008, Exhibit 5, pages 8-9.

That was the date the 180 days started to run which is why this Notice of Claim is filed timely.

Before the Board's decision, Mrs. Little knew her daughter died as the result of pulmonary thromboembolism due to deep venous thrombosis, but she did not know, as required by A.R.S. §12-821.01B for the time period to start, that Dr. Porter's negligence (the particular acts) was the cause, source, act, event, instrumentality or condition that caused Shawntinice's death. Ms. Little did not so conclude and no reasonable person would have so concluded until the Medical Board so concluded.

Even if Ms. Little did suspect Dr. Porter negligently

killed her daughter, she is still entitled to the benefit of the equitable tolling doctrine because Dr. Porter never provided her with records or other information.

Exhibit 5 consists of nine pages from the records of the State Medical Board. Pages 8 and 9 are the minutes of the February 7, 2008, hearing when the Board decided to find Dr. Porter guilty of unprofessional conduct and to issue a Letter of Reprimand to Dr. Porter for failing to promptly investigate Shawntinice's symptoms which would have led to the diagnosis and treatment of the conditions that killed her. Her death was avoidable.

The relevance of the other pages of Exhibit 5 are as follows:

Page 1–Dr. Porter was issued an Arizona license July 23, 1982, and was told he had to re-register every year.

Pages 2 and 3–In 1992, Dr. Porter received a Letter of

Concern for his “delay in diagnosis and treatment of” a patient’s cancer. Our case is also a delayed diagnosis and treatment case.

Pages 4-7--These are the biennial renewal forms for 2003, 2005 and 2007 in which Dr. Porter said that since his last renewal he had not been subjected to any regulatory disciplinary action. We wonder if he made the same denial when he first renewed his license after 1992, the year he received a Letter of Concern from the Board.

There are more facts proving this Notice of Claim is timely. Shawntinice died September 26, 2005. Less than a month later, on October 18, 2005, the office of the Arizona Attorney General opened a file, Claim No. G200520902 and assigned the file to adjuster Mike Keller. The State opened the file and assigned the claim to Mr. Keller because the State knew there was at least a suspicion that Shawntinice’s

death was caused by the negligence of public employees.

Where did the State get the facts that Shawntinice's death may have been due to negligence? There were only two sources: Either the news media or University employees, including the coaches, trainers and doctors who were with Shawntinice the day she died. Of course, even if the State initially got its information from the news media, the Attorney General's office must have communicated with the involved coaches, trainers and doctors and got information which persuaded the Attorney General's office that Shawntinice's death may have been caused by the negligence of University employees. The State opened a file expecting Ms. Little to file a Notice of Claim.

Nobody told Ms. Little.

There is more. Exhibit 6 is the first page of a copy of the claim form used by the University at the time of

Shawntinice's death. It states "The State statute requires the claim be filed within 180 days of date of loss.". That was not and is not the law.

If Ms. Little had been given that form, she would have reasonably concluded the date of loss was the date of her daughter's death and, after receiving Mr. Meehan's letter, would have understandably thought there was simply not enough time to find out how to prepare and file a Notice of Claim. Perhaps Mr. Meehan was misled by the same wrong form.

Exhibit 7 is the first page of a copy of the claim form the University currently uses. It does not contain the incorrect statement of the law. Was it corrected because of Shawntinice's death?

Why was neither claim form given to Ms. Little, even though, as noted above, the State had opened a file and hired

an adjuster to handle the claim? Was there deliberate concealment?

Even if critical information was withheld from Ms. Little because of ignorance, remember that “a doctor must disclose what he knew or was chargeable with knowing”.

Walk v. Ring, supra, 202 Ariz. at p. 320.

When all of the above legal principles are applied to the facts of our case, the following conclusions are supported:

- 1. This Notice of Claim is timely filed.**
- 2. If the State disputes that conclusion, a jury, not the Court, will decide whether this Notice of Claim has been filed timely.**
- 3. Based upon the facts stated above, a jury will likely decide in Mrs. Little’s favor on the issue of whether the Notice of Claim has been filed timely which means this case will be decided on the merits.**

4. Since the Medical Board has already decided Dr. Porter was negligent and that his negligence caused Shawntinice's death, it is likely a jury will decide the merits of the case in favor of Mrs. Little.

DAMAGES

In a typical "live" personal injury case, the inquiry regarding damages is between the plaintiff and the defendant's conduct. In a wrongful death case, the inquiry regarding damages is between the plaintiff and the decedent.

A.R.S. §12-613 states:

"In an action for wrongful death, the jury shall give such damages as it deems fair and just with reference to the injury resulting from the death to the surviving parties who may be entitled to recover, . . ."

***Englert v. Carondelet*, 199 Ariz. 21, 13 P.3d 763 (2000)**

**was a medical malpractice wrongful death action in which
the Court held:**

“ . . . The issues of liability and damages in a wrongful death action are generally distinct because recoverable damages are not based on the negligent act but, rather, on the survivors’ injuries ‘resulting from the [decedent’s] death.’” 199 Ariz. at p. 27.

Exhibit 8 is the current Arizona jury instruction stating the elements of recoverable damages in a wrongful death case. Elements 1, 2 and 3 are generally summarized as “loss of future consortium” damages.

It is reasonable to assume that if Shawntinice had lived, she and her mother would have continued their loving relationship. However, it is pure speculation to conclude that any particular person will be alive tomorrow.

Nevertheless, damages in a wrongful death case are based on the assumption that the decedent would have lived a

normal life expectancy, but for the defendant's negligence.

Both the vagueness of the rule and the reason for the rule were stated in *Southern Pacific Transportation Co. v. Lueck*, 111 Ariz. 560, 535 P.2d 599 (1975), in which the Supreme Court quoted with approval from an Iowa case which said the true measure of recovery for the death of an individual is the value of his life to his estate (in Arizona, substitute survivors) had he not come to an untimely end, adding:

"It is hardly too much to say that this rule is vague, uncertain, and speculative, if not conjectural, but it is the best which judicial wisdom and experience has yet been able to formulate. No evidence is possible of the time which deceased would have lived but for the injury complained of. Had he avoided this injury, death may have met him the next day, week, or year in some other form. In business he might have become a phenomenal success and accumulated millions, or he might have lived to old age

and died a pauper. From a man of good habits and prudence and industry, he might have become a spendthrift or a tramp, or if a man of dissolute habits he might have reformed into an efficient and prosperous citizen. But the demands of justice will not tolerate the idea that human life may be extinguished by the tort of another without the wrongdoer being held to answer therefor in damages, and the rule we have stated is the one which has been devised for this purpose.”. 111 Ariz. at p. 572 (emphasis added).

The tolerance of the Courts to permit damages in a wrongful death case is demonstrated by *Burnham v. Miller*, 193 Ariz. 312, 972 P.2d 645 (1998), which was a wrongful death medical malpractice case in which the Court held that the parents could recover loss of consortium damages for the death of a stillborn child based on the relationship established during the pregnancy. The parents spoke, sang and read to the unborn babies which was enough evidence of “consortium” to support a verdict.

Pertinent to this damages discussion, A.R.S. §12-

821.01A states, in part:

“The claim shall contain facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed. The claim shall also contain a specific amount for which the claim can be settled and the facts supporting that amount. . . .” (emphasis added)

The Legislature made a clear distinction between “facts” needed to explain liability and “facts” needed to support the amount of the claim. As to liability, the statute requires “sufficient” facts. With reference to the amount of the claim, the statute only requires “supporting” facts. Regarding the amount of the claim, the statute does not ask for “sufficient” facts or “most” facts or “certain” facts or “all” facts—just “facts”.

Webster’s New World Fourth Edition Dictionary has

many definitions for the words “sufficient” and “supporting”.

In the context of interpreting §12-821.01A, the most appropriate definition of “sufficient” is:

“As much as is needed; equal to what is specified or required.”

The best definition of “supporting” is:

“To show or tend to show to be true; help prove, vindicate, or corroborate [evidence to support a claim].”

It makes sense that the quality and quantity of facts regarding liability should be more than the quality and quantity of facts regarding damages. We can tell with some precision how Dr. Porter fell below the applicable standard of care and negligently caused Shawntinice’s death. No one can measure with any precision the grief a mother suffers for the loss of a child except to say such grief is devastating.

When the Legislature uses a specific term in one place

within a statute and excludes that term in another place within the statute, the Courts are not permitted to read that term into the section from which it was excluded. In *Bigelsen v. Board of Medical Examiners*, 175 Ariz. 86, 853

P.2d 1133 (1993), the Court held:

“Unlike section 32-2907E, section 32-1407B does not include the word ‘also’ or any other term to indicate that the non-investigating board may impose disciplinary sanctions only if the investigating board has done so, and thus we will not read that term into section 32-1407B. See *Board of Regents v. Public Safety Retirement Fund Manager*, 160 Ariz. 150, 157, 771 P.2d 880, 887 (App. 1989) (where legislature has specifically used a term in certain places within a statute and excluded it in another place, courts will not read that term into the section from which it was excluded).”.
175 Ariz. at p. 91 (emphasis added).

Since §12-821.01 must be construed in favor of permitting a citizen’s claim against the State, a Notice of

Claim need only contain minimum facts supporting the specific amount the claimant will accept to settle. This is particularly true in a wrongful death case where there is no history of the decedent providing financial support to the survivor or the more tenuous situation where the decedent has no earning history at all which is one of the reasons I cited the *Burnham v. Miller* case, supra.

Exhibit 9 (four pages) is a summary of Arizona wrongful death settlements and verdicts for the death of minors who not only did not provide financial support to the parents, but were financial burdens. The average recovery exceeded 1.5 million dollars per parent.

There is more. Shawntinice intended to earn her living as a professional basketball player after graduating from the University. She often said it was her intent to financially support her mother when she started earning money as a

professional basketball player. Though Shawntinice had no legal obligation to support her mother, the loss of such anticipated income is an element of Ms. Little's damages.

In the case of *Hutcherson v. City of Phoenix*, 188 Ariz. 183, 933 P.2d 1251 (1996), reversed in part on other grounds, 192 Ariz. 51, 961 P.2d 449 (1998), two mothers sued the City of Phoenix for negligently failing to prevent the deaths of their adult children. One plaintiff, Ms. Hutcherson, was awarded \$600,000.00 for the death of her daughter. The other plaintiff, Ms. Usher, was awarded \$1,100,000.00 for the death of her son. Mrs. Usher's son played football for the Phoenix Cardinals. A professional sports agent testified to the future income he thought Mr. Usher would earn. Mrs. Usher offered evidence that her son:

“ . . . had a very close relationship with his mother and had told many people that he intended to buy her a house and provide

for her financial security.”. 188 Ariz. at p. 192.

The City’s objection to such testimony was rejected by the Court’s holding that:

“Darryl Usher’s future income was not irrelevant to his mother’s damages.”. 188 Ariz. at p. 192.

. . .

“A parent’s loss of a child can be both devastating and difficult to measure. Valuation of that loss can be heavily influenced by witness demeanor and credibility. The damages testimony reflected that Plaintiff Hutcherson and her daughter were close and that mother actively contributed to daughter’s growth and self-improvement efforts. Following Burt’s death, Plaintiff Hutcherson was extremely depressed, suffered from anxiety and had difficulty working. Plaintiff Usher was also devastated by the loss of her son. The jury heard from several sources about the close relationship between mother and son. Usher provided financial and emotional support for his mother and always intended to ‘take care of her.’ We find in this record evidence to support the damages verdicts, and no legal reason to

disturb them.”. 188 Ariz. at p. 194.

Would Ms. Little and Shawntinice have continued to love each other if Shawntinice had lived? Would Shawntinice have been successful as a professional basketball player? If she was successful, would Shawntinice have supported her mother? Nobody knows the answers to these questions with certainty, but the likely answer to all of them is yes based upon the relationship Ms. Little and her daughter had during Shawntinice’s life which is reflected in the relationship Ms. Little has with her other six children, Linda, Donald, LaGregory, Sharon, James and Mack.

In our case, the State will probably argue that it is mere speculation to conclude Shawntinice would have earned any money as a professional basketball player. That is not correct as was made clear in the recent case of *Felder v. Physiotherapy Associates*, 505 Ariz. Adv. Rpts. 20, filed May

22, 2007. Ken Felder played minor league professional baseball from 1992 through part of 1996 when he injured his elbow. He had surgery in 1997 and was sent to defendant Physiotherapy for rehab when, on February 25, 1998, he suffered an injury to his left eye because of defendant's negligence. The injury only caused Mr. Felder to suffer 20/40 vision in his left eye, but his minor league baseball contract was terminated. Mr. Felder sued Physiotherapy claiming he would have played in the major leagues but for his eye injury which prevented him from doing so and caused him to lose income. Mr. Felder had an assistant manager of a major league baseball team testify that Mr. Felder would have probably made it to the major leagues and had a 12 to 15 year career. Mr. Felder also had a player's agent testify that even though he was not Felder's agent, Mr. Felder would have earned over \$27,000,000 during his career when

compared to two other comparable major league players.

The defendant Physiotherapy presented experts who predictably offered opposite testimony. The jury awarded Mr. Felder \$7,000,000 which was affirmed on appeal. The

Court said:

“From these authorities we conclude that when determining what constitutes ‘reasonable certainty’ as to the amount of damages in a personal injury action, the key consideration must be what is ‘reasonable’ under the circumstances of the particular case. Some cases will simply not be conducive to a high degree of certainty because the future itself is uncertain. This does not, however, deprive an injured plaintiff of a remedy. . .

Applying this standard, we do not believe it would be reasonable in a personal injury action to require a professional athlete to prove with complete certainty how successful he will be at his chosen profession. There will always be uncertainty concerning the athlete’s physical performance and success in

competition. For damages to a sports career, the evidence reasonably available will generally be what was presented at trial in this case – qualified expert testimony concerning the athlete’s prospects, statistics showing past performance and comparative data concerning other athletes.”. (505 Ariz. Adv. Rpts. at p. 24).

. . .

“No one can say with complete certainty whether Felder would, or would not, have been promoted to the major leagues or how long he might have played there. We can say, however, as the jury did, that his eye injury prevented him from having that chance. Under these circumstances, the amount of his damages for being deprived of that chance was for the jury to decide.”. (505 Ariz. Adv. Rpts. at p. 25).

If this case proceeds to Trial, part of the proof that Shawntinice would have made it as a professional basketball player will come from the University coaches who recruited and worked with her before her death. Part of the proof will

come from professional agents who will offer testimony and evidence similar to what occurred in the *Felder* case.

Regarding the amount Shawntinice would have earned, I offer the research attached as Exhibit 10 (five pages). Page 1 states that in 2004 the minimum WNBA salary was \$30,600.00 for a new player rising to \$87,000.00 plus bonuses for the top players. Pages 2 and 3 provide the salary range for the years 2008 through 2012. Rookies can start at \$97,500.00. Page 4 discusses whether current college stars should join the WNBA and on the top of page 5 we are told that the best female American players earn \$100,000.00 a month playing in Europe after the conclusion of the WNBA season.

All of the above facts support Ms. Little's willingness to settle her claim against the State based on the negligence of Dr. Porter for \$2,000,000.00 and to settle her claim against

the State based upon the negligence of all other State employees who were with Shawntinice during the hours before her death, including but not limited to coaching and training staff members and Drs. Ed Clarke and Stephen Paul for \$1,000,000.00.

When a spouse dies, the surviving spouse is called a widow or widower. When a parent dies, the surviving child is called an orphan. When a child dies, we have no special name for the parent. The grief of losing a child is almost unimaginable. Ms. Little's settlement demand is quite reasonable.

Respectfully submitted,

STOMPOLY & STROUD, P.C.

By _____

JOHN G. STOMPOLY

Appendix 3

LAW OFFICES
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FILED
08 AUG 14 2008
P.M. 5:06
PIMA COUNTY
CLERK OF SUPERIOR COURT
BY *Shirley Steere*
SHIRLEY STEERE

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

JOHNNIE LITTLE, for herself as natural mother of SHAWNTINICE POLK, who was born March 27, 1983, and died September 26, 2005, and on behalf of all A.R.S. §12-611, et seq, beneficiaries, if any,

Plaintiff,

vs.

STATE OF ARIZONA, JOHN and JANE DOES 1-10 and ABC CORPORATIONS 1-10,

Defendants.

No. **C2008-5379**

COMPLAINT

Negligence, Medical Negligence, Wrongful Death

Assigned to:

LESLIE B. MILLER

Plaintiff alleges:

1. Plaintiff is the natural mother of Shawntinice Polk who was born March 27, 1983, and died September 26, 2005, when she was 22 years of age. At the time of her death, Shawntinice had a life expectancy of 55.9 years. Plaintiff was born December 19, 1955, and at the time of her daughter's death, Plaintiff had a life expectancy of 29.4 years.

2. At all pertinent times, defendant State of Arizona acted through its agents, servants and employees, some of whom are hereinafter identified, and said agents, servants and employees acted within the course and scope of their

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1 employment. Defendant State of Arizona is liable for the negligence of such
2 agents, servants and employees.

3 3. Defendants John and Jane Does 1-10 and ABC Corporations 1-10 are
4 private citizens or entities whose identity is currently unknown and may have
5 negligently contributed to Plaintiff's injuries and damages.

6 4. At all pertinent times, decedent Shawntinice Polk was a full time
7 student at the University of Arizona and received medical care from University of
8 Arizona health care providers, including Dr. Donald Porter who provided care to
9 Shawntinice from January, 2004, through September, 2005.

10 5. On the day Shawntinice died, September 26, 2005, she also received
11 medical treatment from other health care providers, employed by the defendant
12 State of Arizona through the University of Arizona.

13 6. Dr. Ed Clarke and Dr. Stephen Paul, the aforementioned named
14 agents, servants and employees of defendant State of Arizona were, at all
15 pertinent times, health care providers as defined in A.R.S. §12-561 et seq.

16 7. Shawntinice died as a result of pulmonary thromboembolism due to
17 deep venous thrombosis.

18 8. On February 7, 2008, the Arizona State Medical Board decided Dr.
19 Porter's medical care of Shawntinice Polk constituted unprofessional conduct in
20 violation of A.R.S. §32-1401(27)(q) and decided to issue a Letter of Reprimand
21 for Dr. Porter's failure to consider and pursue a diagnosis of pulmonary
22 embolus, for failing to perform an adequate exam and for failing to measure
23 vitals, including pulse oximetry, in view of Shawntinice's complaints of respirator
24 symptoms.

25 9. Dr. Campbell's negligence was a cause of the death of Shawntinice
26 and Dr. Campbell's negligence was the direct and proximate cause of Plaintiff
27 Little's damages.

28 10. Shawntinice's death was also caused, in part, by the negligence of Dr.

1 Ed Clarke and Dr. Stephen Paul due to their failure to promptly provide or
2 arrange for appropriate medical care when advised of Shawntinice's medical
3 condition, signs and symptoms on September 26, 2005.

4 11. Upon information and belief, Plaintiff Little alleges that Shawntinice's
5 death was caused, in part, by the negligence of coaches and trainers of the
6 University of Arizona Women's Basketball Program, whose negligence generally
7 consisted of permitting, encouraging and directing Shawntinice to play
8 basketball in practice and in games, knowing that such strenuous physical
9 activity was obviously detrimental to her health and whose negligence
10 specifically consisted of permitting, encouraging and directing her to practice on
11 the day of her death, failing to recognize that Shawntinice's signs and symptoms
12 constituted a medical emergency and failing to promptly obtain medical care.

13 12. Plaintiff Little's cause of action did not accrue as defined by A.R.S.
14 §12-821.01B until February 7, 2008, when the Arizona State Medical Board
15 found Dr. Porter guilty of unprofessional conduct and decided to issue a Letter of
16 Reprimand.

17 13. Alternatively, the accrual of Plaintiff Little's cause of action was and
18 remains equitably tolled due to the constructively fraudulent concealment by the
19 State's agents, servants and employees of material facts Plaintiff needed to
20 know before her cause of action accrued.

21 14. On May 15, 2008, a proper Notice of Claim on behalf of Plaintiff Little
22 was filed and served upon all persons and legal entities entitled to receive such
23 notice, although Plaintiff denies any legal obligation to file such a Notice of
24 Claim.

25 15. Dr. Porter and other health care providers employed by Defendant,
26 committed negligence, misconduct or errors or omissions in the rendering of
27 health care, medical services and other health-related services when treating
28 Shawntinice Polk. Said agents, servants and employees of Defendant failed to

1 exercise that degree of care, skill and learning expected of reasonable, prudent
2 health care providers in the profession or class to which they belong within the
3 State of Arizona acting in the same or similar circumstances, or provided such
4 care without the patient's informed consent or committed batteries.

5 16. As a direct and proximate result of the negligence of Defendant's
6 agents, servants and employees, and each of them, Plaintiff suffered the loss of
7 her daughter's consortium.

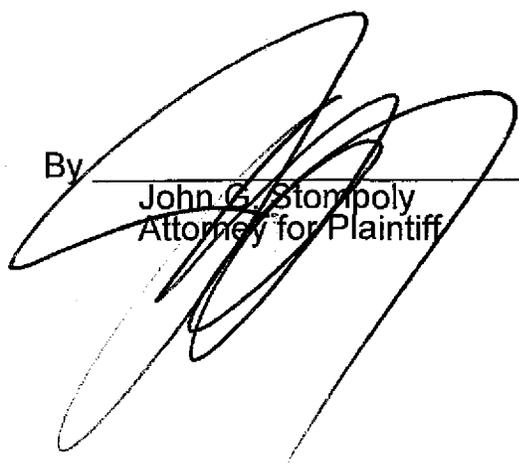
8 WHEREFORE, Plaintiff prays for Judgment against the Defendant State
9 of Arizona for reasonable and just damages together with interest, costs of suit,
10 attorneys fees and such other and further relief as the Court deems just and
11 proper.

12
13 CERTIFICATION

14 The undersigned attorney for Plaintiff certifies that expert opinion
15 testimony is not necessary to prove the health care professional standard of
16 care or Defendant's liability for this claim. By filing this statement, Plaintiff's
17 attorney does not admit or acknowledge A.R.S. §12-2603 et seq is valid or
18 applicable and reserves the right to challenge such statute.

19 DATED this 4th day of August, 2008.

20 STOMPOLY & STROUD, P.C.

21
22
23 By  _____
24 John G. Stompoly
25 Attorney for Plaintiff
26
27
28