2d Civil No. B176881

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

LOURDES A. ARREDONDO, a minor, by and through her guardian ad litem, ANGEL ARREDONDO,

Plaintiff and Appellant,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendant and Respondent.

Appeal from the Superior Court of Los Angeles County
Superior Court Case No. BC258655
Honorable Valerie Baker, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

The trial court granted judgment in favor of defendant Regents of the University of California on the ground that minor plaintiff's medical negligence action was time-barred because it was not filed within three years after the date of manifestation of injury. It is undisputed that plaintiff's injury manifested itself in May of 1998 and that plaintiff did not file her lawsuit until September 2001. The not-so-novel question raised by this appeal is whether the three-year statute of limitations for minors contained in Code of Civil Procedure section 340.5 runs from the date of manifestation of injury, as the trial court held, or from the date plaintiff's parents allegedly discovered the negligent cause of the injury, as asserted by plaintiff.

As we will explain, no published case supports adoption of the rule urged by plaintiff. Instead, the cases consistently hold that: (1) the three-year period for minors runs from the date of manifestation of injury, just like the adult period and (2) outside the Tort Claims Act, which does not apply to this case, the discovery rule does not apply to minors' claims for medical malpractice. Reading the statute in the way suggested by plaintiff – i.e., that a minor has three years after the date her parents discover the negligent cause of the injury to file her lawsuit – would effectively reinstate the discovery rule for minors, eliminate the outside time limit for filing medical malpractice actions by minors and, in doing so, frustrate the Legislature's intent in enacting section 340.5 in the first instance.

The trial court properly concluded, in reliance on the analysis of California law in *Katz v. Children's Hospital of Orange County* (9th Cir. 1994) 28 F.3d 1520, 1532-1533, that the three-year period commences running on the date of manifestation of injury. Using this date protects

minors, keeps the statute constitutional, and satisfies the Legislative intent behind the statute.

Because the evidence showed, and plaintiff admitted, that her injury manifested itself more than three years before she filed her lawsuit, the trial court properly concluded that the action was barred by the statute of limitations and entered judgment for the Regents on this ground.

STATEMENT OF FACTS

Between February 1995 and May 1998, minor plaintiff and appellant Lourdes Arredondo underwent four separate brain surgeries for excision of a recurring, benign tumor. This litigation concerns the fourth surgery at UCLA Medical Center on May 1, 1998, when plaintiff was seven years old. (Appellant's Appendix ["AA"] 47; Appellant's Opening Brief ["AOB"] 4.)[1/] Plaintiff contends the fourth surgery should not have been performed because her sodium levels were too high, causing her to suffer bilateral thalamic infarcts (stroke in part of the brain). (AA 47.)

The record shows manifestation of injury shortly after the May 1 surgery. In the days following the surgery, plaintiff "'showed clearly signs of impairment.'" (AA 48.) The day after the surgery, she had right-sided weakness and had to be reintubated because of breathing difficulties. (AA 48, 71.) By the second day after surgery, plaintiff showed decreased

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1/ Statements of fact in an appellate brief without citations to the record may be disregarded. (Cal. Rules of Court, rule 14(a)(1)(C); *Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632; *Silver Organizations Ltd. v. Frank* (1990) 217 Cal.App.3d 94, 101-102.) The statement of facts in the appellant's opening brief in this case does not contain a single citation to the record on appeal and, therefore, the facts contained in the opening brief may be ignored.

spontaneous movement and had no response to voice. (AA 49, 73.) During this time, plaintiff's parents were "bedside and . . . kept informed of her course." (AA 74.)

Although plaintiff showed some improvement on May 6, her pupils remained fixed and dilated. (AA 50, 78.) An MRI taken on May 15 showed "hemorrhagic transformation" in the basal ganglia, "[h]yperintensity changes in the midbrain and cerebral peduncles," and "[d]iffuse enhancement in the margin of the tumor site." (AA 81.) On June 5, another surgery was done to replace a shunt for hydrocephalus. (AA 84.) By June 23, plaintiff was obtunded (mentally dulled), unable to talk and severely limited in her function. (AA 50, 88.)

STATEMENT OF THE CASE

On June 28, 2001, plaintiff served on the Regents a notice of intention to sue, pursuant to Code of Civil Procedure section 364. (AA 95.) Plaintiff then filed her lawsuit on September 26, 2001. (AA 98.)

The trial was trifurcated to try the statute of limitations first. (See AA 46.) The parties submitted written trial briefs on the question of whether plaintiff's lawsuit was timely filed. (AA 46, 103.) The exhibits attached to the briefs were admitted into evidence for the court's consideration and the parties stipulated that the critical facts in the briefs were true, including the facts in the Regents' brief that demonstrated that the "injury had clearly manifested itself in the period of time May 1, 1998 through June 23, 1998." (AA 50; Reporter's Transcript ["RT"] 3.) In arguing to the court, plaintiff confirmed that she was not disputing that the

injury manifested itself shortly after the surgery and before June 28, 1998. (See RT 4.)[2/]

Despite her concession that the injury manifested more than three years before she filed her lawsuit, plaintiff argued that her action was timely. It was (and is) her position that the three-year period did not accrue, or start running, until her parents had reason to believe the injury was caused by negligence, which she contends did not happen until July 1, 1998. (RT 24-25; AA 105.) She then argued that her notice of intention to sue, served on June 28, 2001, extended the three-year period for 90 days, making the complaint timely. (AA 105.)[3/]

The trial court ruled that plaintiff's action was time-barred because it was filed more than three years after the date of manifestation of injury, based on the stipulated facts. (RA 150.)[4/] Judgment was subsequently entered in favor of the Regents (AA 145-146) and plaintiff appealed (AA 147).

2/ Additionally, in the opening brief, plaintiff has conceded that the injury manifested as early as May 2, 1998. (AOB 14, 17.)

3/ In this regard, the trial court's minute order contains a typographical error. It incorrectly states that the notice of intent to sue was served on June *23*, 2001 (Respondent's Appendix ["RA"] 150), but the letter is dated June *28*, 2001 (AA 95; see also AOB 3 [letter sent June 28]).

4/ Plaintiff erroneously contends the trial court found that the three-year period commenced running on May 1, 1998 – i.e., the date of the purportedly wrongful act. (AOB 12.) Actually, the trial court found that the three-year period accrued *between* May 1 and June 23, 1998, when the injury manifested itself. (RA 150.) Moreover, plaintiff has repeatedly admitted the injury manifested during this time period – indeed, as early as May 2. (RT 4; AOB 14, 17.)

LEGAL DISCUSSION

I.

THE COURT SHOULD DISREGARD THE DECLARATION OF DR. AYUS AND ANY REFERENCES TO HIS DECLARATION IN THE OPENING BRIEF.

Plaintiff has attached to her opening brief and included in her appellant's appendix the declaration of Juan Carlos Ayus, M.D. (Exhibit A to AOB; AA 10.) She asserts that the declaration was submitted in opposition to the Regents motion for summary judgment in the trial court. (See AA, first page [listing documents to be included in appendix and signed by plaintiff's counsel].) As we now explain, the court should disregard this declaration and the argument in the opening brief related to it. (See AOB 5-9.)

This case comes to this court after a court trial on the issue of the statute of limitations, and not after a summary judgment. Thus, only documents that were before the court *during the trial* are relevant to the appeal. (*Pulver v. Avco Financial Services*, *supra*, 182 Cal.App.3d at p. 632 ["documents not before the trial court cannot be included as part of the record on appeal and thus must be disregarded as beyond the scope of appellate review"]; *Knapp v. City of Newport Beach* (1960) 186 Cal.App.2d 669, 679 ["Statements of alleged fact in the briefs on appeal which . . . were never called to the attention of the trial court will be disregarded by this court on appeal"].) In addition to the trial briefs, several exhibits attached to the briefs and certain stipulated facts were submitted for the court's consideration. (RT 3.) Dr. Ayus's declaration was not attached to

plaintiff's trial brief (see AA 103, 110) and plaintiff does not otherwise contend that it was before the trial court during the first phase of the trial.

It makes no difference that the declaration may have been in the court file in connection with a prior summary judgment motion if it was not introduced into evidence during the trial. Accordingly, both the declaration and the discussion of the declaration in the opening brief (AOB 5-9) should be disregarded. (*Schumpert v. Tishman Co.* (1988) 198 Cal.App.3d 598, 601, fn. 2 [reviewing court should not consider "evidence which was not presented to or passed upon by the trial court"].)[5/]

II.

THE TRIAL COURT PROPERLY CONCLUDED THAT PLAINTIFF'S ACTION WAS UNTIMELY FILED MORE THAN THREE YEARS AFTER THE DATE OF MANIFESTATION OF INJURY.

Code of Civil Procedure section 340.5 provides that an action by a minor over the age of six against a health care provider must be "commenced within three years from the date of the alleged wrongful act." As a result of constitutional challenges to this language, the courts have concluded that calculating a minor's statute of limitations from the date of the defendant's "alleged wrongful act" violates a minor's equal protection rights. This is so because the outside, three-year period for an adult

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5/ In any event, Dr. Ayus's declaration appears to relate to the substance of plaintiff's malpractice claim. The instant appeal involves only a procedural issue – i.e., whether the complaint was timely filed – an issue unaffected by the relative merits of the underlying claim. Thus, the declaration may be disregarded also on the ground that it is irrelevant to the instant appeal.

plaintiff does not commence running until the date of *injury* – a date that may be substantially later than the date of the alleged wrongful act that caused the injury. (*Young v. Haines* (1986) 41 Cal.3d 883, 895; *Torres v. County of Los Angeles* (1989) 209 Cal.App.3d 325, 334.)

This point does not require substantial exposition because the parties here agree that the minor's statute cannot commence running on the date of the alleged wrongful act.[6/] (AA 51, 105.) However, that being said, the parties disagree on when the three-year period for minors *does* commence running. (RT 17.)

The Regents contend that the courts have properly interpreted the statute to mean that a minor has three years after the *date of manifestation of injury* to commence his or her action. (*Katz v. Children's Hospital of Orange County*, *supra*, 28 F.3d at pp. 1532-1533; *Photias v. Doerfler* (1996) 45 Cal.App.4th 1014, 1021.) Injury is "'manifested' for purposes of commencing the three-year period when it has become evidenced in some significant fashion." (*McNall v. Summers* (1994) 25 Cal.App.4th 1300, 1311.) "'[D]amage which has clearly surfaced and is noticeable'" constitutes "injury" for purposes of the three-year period, even if the plaintiff or his physician fails to recognize it as an injury. (*Ibid.*; *Photias v. Doerfler*, *supra*, 45 Cal.App.4th at p. 1021 [same]; cf., *San Francisco Unified School Dist. v. W.R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1333 ["The word 'injury' is a term of art referring to the damaging effect of the wrongful act, not the act itself"].)

6/ Plaintiff appears to contend otherwise in her opening brief, seeming to attribute the "alleged wrongful act" argument to the Regents. (See AOB 11-13.) However, this is a straw man, as this has never been the Regents' position. Rather, it has always been the Regents' position that the three-year period runs from the date of manifestation of injury. (See AA 53-54.)

Plaintiff, on the other hand, contends that manifestation of the injury is not enough – that the three-year period did not start running until her parents also discovered the negligent cause of the injury. (RT 35; AOB 14, 15.)[7/]

As we now explain, plaintiff's contention must be rejected. It is not supported by any case law, including the cases cited in the opening brief, and her position was soundly rejected by the Supreme Court almost two decades ago in *Young v. Haines*, *supra*, 41 Cal.3d 883. Furthermore, implementation of the rule urged by plaintiff would not only defeat the legislative intent behind section 340.5, but would essentially obliterate section 340.5 altogether and reinstate the common law rule that existed prior to section 340.5's enactment. On the other hand, commencing the three-year period on the date of manifestation of injury gives meaning to every part of the statute and the legislative intent, while protecting a minor's equal protection rights.

Finally, since plaintiff has conceded that her injury manifested itself as early as May 2, 1998 (AOB 14, 17) and certainly no later than June 23, 1998 (RT 4), her action, filed more than three years later, is time-barred.[8/]

7/ Plaintiff attempts to articulate three separate issues on appeal (AOB 1-2); but they are all just different ways of asking the same question – to wit, when did the three-year period start to run?

8/ Plaintiff contends her service of a notice of intention to sue on June 28, 2001, extended the three-year period for 90 days. (AOB 3.) This contention only works if the court also concludes that the three-year period did not start to run until plaintiff's parents discovered the negligent cause of the injury. If the date of manifestation rule applies – as the Regents contend it must – then the notice of intention to sue cannot extend the three-year period because it was sent *after* the three-year period had already expired. (Code Civ. Proc., § 364, subd. (d) [period extended or tolled only if notice sent during the last 90 days of the applicable limitations period]; *Woods v.*
(continued...)

A. The History Of Section 340.5 Reveals A Legislative Intent To Curtail Long-Tail Claims.

Prior to 1970, an action for medical malpractice was governed by former section 340(3) of the Code of Civil Procedure, the general statute of limitations for personal injury actions [now codified in section 335.1 and extended from one year to two years]. Section 340(3)'s one-year period was subject to the common law discovery rule – i.e., a plaintiff's action was not deemed to accrue until the plaintiff discovered, or should have discovered, the injury and its negligent cause. (*Katz v. Children's Hospital of Orange County*, *supra*, 28 F.3d at p. 1525.) When the plaintiff was a minor, it was his parent's discovery of the cause of action that triggered the one-year period. (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 885; *Wozniak v. Peninsula Hospital* (1969) 1 Cal.App.3d 716, 723.)

In 1970, the Legislature enacted section 340.5, which codified the discovery rule for medical malpractice actions, but also provided an outside time limit of four years (later shortened to three years) after the date of injury within which to file a lawsuit against a health care professional. A primary purpose of the limitation was to curtail "long tail" claims – i.e., causes of action that were not discovered for many years after the injury occurred – that were perceived as a cause of spiraling medical insurance costs. (*Young v. Haines*, *supra*, 41 Cal.3d at p. 896.) In 1975, the Legislature amended section 340.5 to add a provision for minors that would end long-tail claims of minors as well, thus eliminating tolling during

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8/ (...continued)
Young (1991) 53 Cal.3d 315, 325 [same]; *Forman v. Chicago Title Ins. Co.* (1995) 32 Cal.App.4th 998, 1006 [tolling "cannot revive a statute which has already run out"].)

minority pursuant to Code of Civil Procedure section 352.[9] (*Fogarty v. Superior Court* (1981) 117 Cal.App.3d 316, 320.)

But the new provision for minors created a new problem. Pursuant to the plain language of the statute, a minor had to commence his action within three years after the date of the defendant's "alleged wrongful act," while a similarly situated adult had three years from the "date of injury" within which to sue. Since the date of injury could be later – even significantly later – than the date of the alleged wrongful act, an adult could have a significantly longer period of time to sue than a minor. Thus, the statute as written violates a minor's equal protection rights. (*Young v. Haines*, *supra*, 41 Cal.3d at p. 895; *Torres v. County of Los Angeles*, *supra*, 209 Cal.App.3d at p. 334.)

However, saying that the three-year period cannot commence running on the date of the alleged wrongful act does not answer the question raised by the instant appeal, which is *when does* the three-year period start to run? In *Young v. Haines*, *supra*, the Supreme Court held only that the express tolling provisions of the statute (for fraud, intentional concealment and presence of a foreign body) – previously thought only to apply to adults – applied to minors, also. In *Torres v. County of Los Angeles*, *supra*, this court held that the six-month period for presenting a tort claim to a public entity prior to commencing a lawsuit for medical malpractice starts to run when the minor's parents discover the injury and

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9/ In pertinent part, section 352 provides: "(a) If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335) is, at the time the cause of action accrued either under the age of majority or insane, the time of the disability is not part of the time limited for the commencement of the action." Where applicable, it effectively tolls the statute of limitations for minors until they reach the age of majority.

its negligent cause. Thus, neither *Young* nor *Torres* addressed the narrow issue raised in this case.

B. The *Katz* Decision Correctly Analyzed California Law And Properly Concluded That The Three-Year Period For Minors Should Commence Upon Manifestation Of Injury.

The Ninth Circuit was the first court to address the issue raised in this appeal. In *Katz v. Children's Hospital of Orange County, supra*, 28 F.3d 1520, the minor plaintiff was infected with HIV by a blood transfusion at age four. The child was almost nine years old when a blood test revealed the HIV and almost 12 when his lawsuit against the hospital and the blood bank was filed. The defendants moved for summary judgment on the statute of limitations on the ground that plaintiff's action was filed beyond the plaintiff's eighth birthday and more than three years after the alleged wrongful act – i.e., the transfusion. The district court granted the motion and plaintiff appealed.

The Ninth Circuit reversed. The court first concluded that the three-year period could not run from the date of the alleged wrongful act, as set forth in the statute, because California courts (namely *Young v. Haines, supra*, and *Torres v. County of Los Angeles, supra*) had already invalidated that language in the statute. (*Katz v. Children's Hospital of Orange County, supra*, 28 F.3d at pp. 1524, 1527.) The court then set about determining what date of accrual for the three-year period California courts would adopt instead of the date of the alleged wrongful act.

The plaintiff in *Katz* argued that he should have three years from the date he discovered the injury – essentially the same argument plaintiff

makes here. (*Id.* at p. 1530.) The Ninth Circuit rejected this argument, pointing out that it was foreclosed by the California Supreme Court's decision in *Young v. Haines, supra*, in which the Supreme Court overruled *Kite v. Campbell* (1983) 142 Cal.App.3d 793, 804, which had applied the common law discovery rule to minors suing for medical negligence. The court explained that, "while this [the *Kite* court's] reading [of the statute] avoids the equal protection problem between minors and adults, the conclusion that the Legislature intended to restore the common law tolling provision which it had abolished five years previously is untenable." (*Young v. Haines, supra*, 41 Cal.3d at p. 896.)

The Ninth Circuit found *Young* conclusive on this point. The court reasoned that "a three-year period that ran, in effect, from 'discovery' appeared inconsistent with the legislature's purpose of combating '"long tail" claims'" (*Katz v. Children's Hospital of Orange County, supra*, 28 F.3d at p. 1530) and concluded it was "unreasonable to suppose that the California legislature wanted minors to benefit from a de facto application of the common-law discovery rule under the guise of redefining the point of accrual" (*id.* at pp. 1530-1531). Instead, the Ninth Circuit concluded that California courts would hold that the three-year period for minors runs from the date of manifestation of injury – just as the three-year period for adults does. This would balance the competing interests of ensuring constitutionality of the statute, protecting minors' rights and ameliorating the effects of long-tail claims. (*Id.* at pp. 1531, 1533.) The court explained:

> Under an "injury" point of accrual, minors would receive at least as much protection as adults, thus solving the equal protection problems identified in *Young [v. Haines, supra,]* and *Steketee [v. Lintz, Williams & Rothberg, infra]* and addressed in *Torres [v. County of Los Angeles, supra]*. Moreover, requiring minors to bring their actions within three years from "injury" still constitutes a significant

> curtailment of the preexisting rule that tolled the operation of the common-law discovery rule during a person's minority. In addition, it is less generous than the three-year from discovery rule rejected by the California Supreme Court in *Young*. The injury point of accrual also advances substantially the legislature's purpose of "giving insurers greater certainty about their liability for any given period of coverage."

Thus, under *Katz*, the three-year period for minors runs from the date of manifestation of injury.

Plaintiff's primary objection to the decision in *Katz* is that it is a federal decision and is, therefore, not binding on this court. (AOB 15.) It is true that this court is not compelled to follow circuit court opinions. However, federal opinions are persuasive in California (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 299; *Finley v. Superior Court* (2000) 80 Cal.App.4th 1152, 1160) and to the extent *Katz* accurately analyzes California law on section 340.5, it is extremely persuasive.

Plaintiff contends that *Katz* did not correctly analyze California law. She contends – without pointing to any specific passages – that the Ninth Circuit's discussion of *Torres* is confusing, at one point saying the discovery rule should apply to all medical malpractice actions and at another implying that it only applies to government tort claims. (AOB 16.) In fact, our reading of *Katz* reveals no such confusion. Rather, the Ninth Circuit addressed two separate issues regarding *Torres*. First, it held that *Torres* definitively invalidated the "date of alleged wrongful act" as an accrual date for any malpractice action by a minor. (*Katz v. Children's Hospital of Orange County*, *supra*, 28 F.3d at p. 1528 ["*Torres* must be read as facially invalidating the 'wrongful act' accrual period for minors contained in section 340.5"].) Second, the court held that *Torres* limited application of the discovery rule in place of the "wrongful act" rule to

actions involving the claims statute. (*Id.* at p. 1529 ["although *Torres* held the wrongful act accrual provision invalid on its face, the court appeared to limit the applicability of the discovery rule to cases involving section 911.2"].) The Ninth Circuit correctly interpreted *Torres*, and without confusing the two separate issues. Thus, plaintiff's criticism of *Katz* is unwarranted.

C. Plaintiff's Reliance On *Torres* Is Misplaced As *Torres* Has Been Limited To Claims Under The Government Tort Claims Act.

Plaintiff contends *Torres v. County of Los Angeles, supra,* 209 Cal.App.3d 325, supports her position because it holds that a minor's cause of action accrues when the minor's parents discover the negligent cause of the injury. (AOB 13.) Plaintiff is wrong.

Torres was a Government Tort Claims Act case, to which special rules apply. An injured plaintiff wishing to sue a public entity for medical malpractice must present a claim for damages to the public entity within six months after the cause of action accrues. (Gov. Code, § 911.2.) For an adult, the cause of action accrues (i.e., the six-month period for presenting a claim starts to run) when he or she discovers, or should discover, the injury and its negligent cause, as set forth in Code of Civil Procedure section 340.5. (*Whitfield v. Roth, supra,* 10 Cal.3d at p. 885; *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 895.)

However, the discovery rule of section 340.5 does not apply to a minor; the only accrual date for a minor in the statute is the date of the alleged wrongful act. This court determined in *Torres* that to require a minor to file a claim against a public entity within six months after the

alleged wrongful act could mean that he or she must present a claim even before the injury resulting from the wrongful act manifests itself – i.e., long before the minor, or his parents, could even know they have a claim. Concluding that this rule would violate a minor's equal protection rights, the court correctly concluded that a minor's claim cannot accrue on the date of the wrongful act. Then, since an adult's cause of action accrues on the date of discovery,[10] the court held that "*for purposes of the claims statutes*, a minor's medical malpractice cause of action *against a government defendant* accrues when the minor's parent or guardian knew or should have known through the exercise of reasonable diligence that a negligent wrongful act of medical care caused the child's injuries." (*Id.* at p. 335, emphasis added.)

The Ninth Circuit explicitly recognized this limitation (*Katz v. Children's Hospital of Orange County*, *supra*, 28 F.3d at p. 1530 ["the court [in *Torres*] appeared to *limit* the applicability of the discovery rule to cases involving [Gov. Code] section 911.2"), while California courts have implicitly acknowledged this limitation, consistently applying *Torres* to claims against public entities. (See, e.g., *Reyes v. County of Los Angeles* (1988) 197 Cal.App.3d 584, 591-592; *Jefferson v. County of Kern* (2002) 98 Cal.App.4th 606, 610; *Curtis T. v. County of Los Angeles* (2004) 123 Cal.App.4th 1405.)

10/ Despite the existence of two possible accrual dates for an adult's medical malpractice claim under section 340.5 – i.e., the date of injury (for the three-year period) and the date of discovery (for the one-year period) – for purposes of the claims statutes, there is only one date of accrual: i.e., the date of discovery. There appears to be no outside time limit for presenting a tort claim for medical negligence against a public entity; so long as the claim is presented within six months after the date of discovery, the date of injury would appear to be irrelevant. Under *Torres*, *supra*, this rule applies to both adults and minors.

The instant case does not involve the Tort Claims Act.[11] Thus, the special rules that apply to such actions – including the accrual date set forth in *Torres*, *supra*, – do not apply to this case and, therefore, plaintiff's reliance on *Torres* is misplaced.[12]

D. The *Photias* Decision Follows *Katz* And Supports The Regents' Position.

Plaintiff also relies on this court's decision in *Photias v. Doerfler*, *supra*, 45 Cal.App.4th 1014, arguing that: (1) *Photias* refused to follow *Katz,* and (2) *Photias* follows *Torres*, *supra*, in holding that the three-year period does not commence until a minor plaintiff's parents discover the negligent cause of the injury. (AOB 13-15, 16.) As we now explain, plaintiff is wrong on both counts: *Photias* not only cites *Katz* favorably (*Photias v. Doerfler*, *supra*, 45 Cal.App.4th 1014, 1021), it also adopts the date of manifestation of injury as the accrual date for the three-year period, as correctly predicted by the Ninth Circuit.

The defendant doctor in *Photias* failed to treat plaintiff's undescended testes when plaintiff was an infant. Years later, when the plaintiff applied for employment, the condition was discovered and treated, but plaintiff later learned he was sterile and, as an adult, sued his childhood doctor for malpractice. Relying on the statute as written, the defendant obtained summary judgment on the ground that plaintiff's action was not

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11/ The Regents are exempt from the Tort Claims Act requirements; thus, a plaintiff need not present a claim to the Regents before commencing a lawsuit. (Gov. Code, § 905.6.)

12/ Of course, this conclusion does not, and is not meant to, overlook the value of *Torres*'s conclusion that a minor's cause of action cannot accrue on the date of the alleged wrongful act without violating equal protection.

filed within three years *after the alleged wrongful act* – i.e., the misdiagnosis during plaintiff's infancy.

This court reversed, finding that using the date of the alleged wrongful act to determine when a minor's cause of action accrues denies a minor equal protection of the law, as the court had previously held in *Torres v. County of Los Angeles*, *supra*, 209 Cal.App.3d 325. (*Photias v. Doerfler*, *supra*, 45 Cal.App.4th at p. 1020.) The court then went on to inquire "whether plaintiff timely brought his action *after the date of his injury*" (*id.* at p. 1021, emphasis added), noting that "[a]n injury manifests itself 'when it has become evidenced in some significant fashion, whether or not the patient/plaintiff actually becomes aware of the injury'" (*ibid.*). The plaintiff argued that the injury did not manifest until he learned of the sterility when his semen was tested after surgery to correct the condition, but this court did not find that fact dispositive, noting that only a medical expert could say whether the sterility "might have 'become evidenced in some significant fashion' before plaintiff's semen was tested" (*ibid.*) – i.e., before the plaintiff learned of the injury or its negligent cause.

Nevertheless, plaintiff insists that *Photias* holds that the three-year period does not start running until the minor's parents discover the injury and its negligent cause. (AOB 14.) She cites the fact that this court quoted from *Torres*, *supra*, in *Photias* – as if merely quoting from the case necessarily constitutes adoption of the holding: it does *not*. In fact, reading the case as a whole and notwithstanding the quote from *Torres*, the *Photias* opinion could hardly be more clear that the court was adopting the date of manifestation of injury as the date of accrual for the three-year period for a minor in section 340.5, just as the Ninth Circuit predicted in *Katz*. Not only does the opinion discuss the "manifestation of injury" at length (as explained in detail above), it also rejects the date of learning of the injury as

the definitive date of accrual in the absence of medical testimony regarding manifestation. Moreover, it contains no discussion of the plaintiff's parents at all, let alone what they knew and when – which would seem critical to plaintiff's argument in this appeal that *Photias* somehow holds that the minor's *parents'* knowledge was the trigger for the limitations period. In short, there is simply no reasonable way to read *Photias* as holding that the "date of alleged wrongful act" in section 340.5 must be read as the "date of discovery by the plaintiff's parents." Accordingly, plaintiff's reliance on *Photias* is misplaced.

E. Section 340.5 Has Not Been And Cannot Be Read As Plaintiff Suggests Without Obliterating The Changes Effected By The Legislature And Frustrating The Legislative Intent.

As we will now explain, if this court were to adopt the rule suggested by plaintiff – i.e., that a minor has three years after the date of discovery to file his or her lawsuit – the court might as well obliterate the whole of section 340.5.

In urging her position, plaintiff cites language in *Photias* that "'[t]he word "injury" signifies both the negligent cause and the damaging effect of the alleged wrongful act and not the act itself.'" (*Photias, supra*, 45 Cal.App.4th at p. 1020; AOB 14.) This court took that quote directly from *Steketee v. Lintz, Williams & Rothberg* (1985) 38 Cal.3d 46, 54, which, in turn, credited *Larcher v. Wanless* (1976) 18 Cal.3d 646 for the idea.

It is true that the Supreme Court has indicated that the Legislature likely "intended the word 'injury' to have the same meaning in the parallel

four-year [now three-year] and one-year limitation periods of the statute" (*Larcher v. Wanless*, *supra*, 18 Cal.3d at p. 658, fn. 14); but that does not mean, as plaintiff insists, that the definition of "injury" must include "its negligent cause" for both the one-year and the three-year statutes. In fact, neither *Larcher*, nor *Steketee*, both *supra*, support this proposition as neither case had the opportunity to address accrual of the three-year period directly. (See *People v. Superior Court (Williams)* (1992) 8 Cal.App.4th 688, 703 ["'a decision does not stand for a proposition not considered by the court'"].)

The court's focus in *Larcher v. Wanless*, *supra*, 18 Cal.3d at p. 654, was on whether, in a wrongful death action, "injury" referred to the injury suffered by the decedent prior to death (as a result of malpractice) or to the death itself (the injury to the heirs). Ultimately, the Supreme Court concluded that it is the death that constitutes the "injury" in a wrongful death action and that the *one-year period* did not commence running until the heirs of the decedent were aware of the death and its negligent cause. (*Id.* at pp. 650-651, 659.) Not only was the three-year period not an issue (*id.* at p. 651, fn. 4), the court expressly acknowledged that the three-year period would be triggered by the injury alone. (See *id.* at p. 656, fn. 11 ["the word 'injury,' as used in section 340.5 to denote the start of the [three]-year limitation period, seems clearly to refer to the *damaging effect* of the alleged wrongful act and not to the act itself," emphasis added].)

Steketee v. Lintz, Williams & Rothberg, *supra*, 38 Cal.3d 46 also failed to address the issue head-on. *Steketee* was a legal malpractice case, in which the minor plaintiff alleged that the defendants failed to file a timely medical negligence action on his behalf. The primary question was centered around whether the adult provisions applied once the minor plaintiff reached the age of majority – i.e., after the plaintiff reached the age

of 18, he had one year after discovery to commence the action. After rejecting this contention, the court concluded that the defendant attorneys could not be held liable for failing to file the lawsuit while they represented the plaintiff because their relationship with the plaintiff was terminated before the statute of limitations expired – i.e., there was still time to file a lawsuit after the relationship ended. To reach this conclusion, the court only had to find that the relationship ended less than three years before the *earliest possible* accrual date – i.e., the date of the alleged wrongful act – which, coincidentally in that case, occurred simultaneously with the injury. (*Id.* at pp. 54, 57 [a minor must have "*at least* three years from the date of the wrongful act in which to file an action, regardless of when the age of majority is reached or the injury is discovered"].) Assuming an even later accrual date, based on whatever facts were developed, would still result in the attorney-client relationship being terminated before the three-year period expired. Under the circumstances, the court had no occasion to determine the actual date of accrual.

In *Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, too, one finds this general language (i.e., that "the word 'injury" ha[s] come to be used in the cases to denote both a person's physical condition and its 'negligent cause'" [*id.* at p. 99]). However, this statement appears in the context of a discussion of the one-year statute and the discovery rule. (See *ibid.*) The court did not apply the definition to "injury" as it appears in the three-year statute.

In fact, the courts have long applied different definitions for the two periods, holding that the one-year period commences running when the plaintiff discovers the injury and its negligent cause, while the three-year period runs from the date of manifestation of injury, even if the plaintiff is unaware of the injury or its cause. (See *Hills v. Aronsohn* (1984)

152 Cal.App.3d 753, 759-760; *Steingart v. White* (1988) 198 Cal.App.3d 406, 412.) Thus, the "negligent cause" seems to be tied to the discovery rule rather than to a strict definition of "injury."

A contrary conclusion cannot be upheld. If, in contrast to what the cases hold, the word "injury" were always to be interpreted to mean "injury and its negligent cause" for both the one-year and the three-year periods, then both periods would necessarily start to run for an adult *on the same date* – i.e., the date of discovery of the injury and its negligent cause. This would effectively nullify the three-year period for adults (since an adult must file on the earlier of the two dates, which, applying plaintiff's rule, would be either one year after discovery or three years after discovery) and reinstate the former common law discovery rule as it existed prior to 1970 with no outside time limitation, thereby frustrating the legislative intent to curb long-tail claims. Inasmuch as the courts should not interpret statutes to render any part of the statute superfluous (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22; *Steketee v. Lintz, Williams & Rothberg, supra*, 38 Cal.3d at p. 52) or to frustrate the known legislative intent (*Rice v. Superior Court* (1982) 136 Cal.App.3d 81, 86), plaintiff's contention that, for purposes of the three-year period, "injury" must mean the injury and its negligent cause must be rejected.

Similarly unavailing is plaintiff's contention that, using her rule, there would still be a limit on minors' claims. In this regard, plaintiff argues that, at most, a minor would have until age 19 years to file suit. (AOB 17.) In the trial court, plaintiff explained that this means that when the child reaches the age of majority, "then the adult portion of 340[.5] would apply" (RT 28), apparently giving the plaintiff one year after that to file her lawsuit. This makes no sense. Whether the plaintiff has one year or three years after discovery is still dependent upon the discovery rule

applying. If plaintiff did not discover the injury and its negligent cause until she was 25 or 30 or older, she would have only one year, rather than three years, to file suit, according to plaintiff, but this rule clearly does not put an *outside* time limit on the claim.

Moreover, a similar contention was expressly rejected by the Supreme Court in *Steketee v. Lintz, Williams & Rothberg, supra,* 38 Cal.3d at p. 53, fn. 3, where the court held that if the wrongful act occurs while the plaintiff is a minor, the minor provisions of section 340.5 *always* apply, even if the lawsuit is not filed until adulthood. (*Steketee v. Lintz, Williams & Rothberg, supra,* 38 Cal.3d at pp. 52-57.) Thus, if a minor's injury does not manifest until after he reaches adulthood, he still has three years after the date of manifestation of injury to file his lawsuit.

Finally, plaintiff's attempt to appeal to the court's sympathy, arguing that the Regents are only complaining "about a few extra weeks" (AOB 17) must also be rejected. The length of time since the statute expired is irrelevant. A limitations period represents the Legislature's determination of the point when the right to be free of stale claims comes to prevail over the right to prosecute them. (*Wood v. Elling Corp.* (1977) 20 Cal.3d 353, 362.) It is strictly construed: A complaint filed even one day after the statute of limitations expires is barred as much as a complaint filed ten years too late. (See *Bonifield v. County of Nevada* (2001) 94 Cal.App.4th 298, 304 [action filed one week too late].)

CONCLUSION

A minor over the age of six has three years after the date of manifestation of injury to commence her medical malpractice action. It is undisputed that plaintiff's injury manifested by no later than June 23, 1998 – more than three years before she filed her lawsuit. Thus, the trial court properly found that plaintiff's lawsuit was untimely filed and entered judgment in favor of the Regents. For this reason, the judgment must be affirmed.

Dated: May 23, 2005

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1))

Pursuant to California Rules of Court, rule 14(c)(1), I certify that this brief contains 6,662 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: May 23, 2005

Carolyn Oill