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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LILIANE ROY-CONDRON, Plaintiff and Appellant, v. EVELYN NAZARIO et al., Defendants and Respondents.	B263468 (Los Angeles County Super. Ct. No. NC057546)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ross M. Klein, Judge. Affirmed.

Curd Galindo & Smith and Alexis Galindo for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Kristin G. Hogue, Assistant Attorney General, Richard J. Rojo and Daniel G. Eskue, Deputy Attorneys General, for Defendant and Respondent the Board of Trustees of California State University.

Plaintiff and appellant Liliane Roy-Condron appeals the judgment entered after the trial court granted the motion of defendant and respondent Board of Trustees of California State University (CSU) for judgment on the pleadings, based on Roy-Condron's failure to timely present a claim with CSU as required by the Government Claims Act (the Act). We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On October 21, 2011, at 7:42 a.m., Roy-Condron was walking eastbound in a crosswalk on Ocean Boulevard in Long Beach.[1] Defendant Evelyn Nazario, who was driving her Honda Civic, struck Roy-Condron as Nazario made a left turn. Nazario was allegedly acting in the course and scope of her employment at the time.

On May 2, 2012, Roy-Condron filed an unverified complaint against Nazario and Doe defendants in Los Angeles County Superior Court, alleging a single cause of action for negligence.[2]

On December 4, 2012, Roy-Condron mailed a "Governmental Tort Claim" (hereinafter Claim) along with an "Application for Late Filing of Governmental Tort Claim" (hereinafter Application for Late Filing) to the State Board of Control. On December 28, 2012, the Victim Compensation and Government Claims Board, which had received the Claim and

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[1] We take the facts from Roy-Condron's Complaint and documents subject to judicial notice. (See *Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 670, fn. 1; *DiPirro v. American Isuzu Motors, Inc.* (2004) 119 Cal.App.4th 966, 972 (*DiPirro*).)

[2] Nazario is not a party to this appeal.

Application for Late Filing, informed Roy-Condron's counsel by mail that it lacked jurisdiction to consider the Claim because as of January 1, 2011 all claims against CSU had to be filed with CSU's Office of Risk Management and Public Safety. (See Gov. Code, §§ 912.5, 915, subd. (d).)[3]

On approximately January 7, 2013, Roy-Condron's counsel mailed the Claim to CSU. The Claim stated that Roy-Condron had discovered on October 3, 2012 that Nazario was employed by CSU and was driving to work when the accident occurred. On November 30, 2012, Roy-Condron discovered that CSU derived a benefit from Nazario's use of her own vehicle, and therefore the "required vehicle exception" applied to exempt Nazario from the "going and coming rule," supporting a theory that CSU was vicariously liable for the accident. The Claim stated, in both the caption and the body of the document, that it was being filed concurrently with the Application for Late Filing.

The Application for Late Filing – which bore the State Board of Control's address, rather than CSU's – reiterated the information in the Claim. Further, it explained that plaintiff had learned through discovery that Nazario used her personal vehicle for CSU travel and as a result CSU received a benefit from her use of her personal vehicle. Plaintiff had no knowledge of Nazario's employment or work-related use of her personal vehicle within the six months following the accident.

The parties disagree about whether the Application for Late Filing was actually included with the Claim sent to CSU. Roy-Condron's counsel averred in a declaration offered in

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[3] All further undesignated statutory references are to the Government Code.

opposition to CSU's motion for judgment on the pleadings that both the Claim and the Application for Late Filing were served on CSU. Zachary Gifford, the Associate Director of CSU's Office of Systemwide Risk Management & Public Safety, stated in his declaration in support of the motion that he received the Claim, but not the Application for Late Filing. Nonetheless, he "considered [the Claim] to be a request for leave to present a late claim."

On January 15, 2013, Gifford informed Roy-Condron's counsel via mail that Roy-Condron's claim had been rejected. The letter stated: "Notice is hereby given that the claim which you presented on behalf of Liliane Roy-[Condron] to the California State University, Office of the Chancellor, Risk Management & Public Safety on January 8, 2013 was rejected on January 15, 2013. [¶] WARNING [¶] Subject to certain exceptions, you have only six (6) months from the date this notice was personally delivered or deposited in the mail to file a court action on this claim. See Government Code Section 945.6." The letter did not state that the Application for Late Filing had been denied or that the Claim was being treated as such an application. The letter indicated a copy had been sent to Richard Maynard at the Office of Risk and Insurance Management.

On January 17, 2013, Roy-Condron filed an amendment to her complaint in the trial court, substituting CSU for a Doe defendant.[4] She did not amend or seek leave to amend her complaint to allege compliance with the Act.

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[4] The Amendment to Complaint bears a file stamp of January 17, 2012. However, it is apparent the document was actually filed on January 17, 2013.

Plaintiff's counsel received a letter dated January 18, 2013, from Maynard, indicating Maynard had concluded his investigation of Roy-Condron's claim and was denying it on the merits. The letter advised that if Roy-Condron disagreed she had to file and serve the summons and complaint within six months. Maynard requested that counsel forward to him copies of the complaint and Nazario's deposition.

On February 22, 2013, CSU answered the complaint with a general denial and alleged 13 affirmative defenses, including that plaintiff had failed to timely comply with the Act's claim presentation requirements.

On December 23, 2013, the trial court denied CSU's motion for summary judgment.[5]

On September 18, 2014, CSU moved for judgment on the pleadings (Code Civ. Proc., § 438) on the ground Roy-Condron's complaint failed to plead timely compliance with or excusal of the Act's claim presentation requirements.[6] CSU argued that the

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[5] CSU moved for summary judgment on the ground it was not vicariously liable because Nazario had not been acting in the course and scope of her duties when the accident occurred, and was not required to have a vehicle to perform her job. The trial court concluded that because Nazario occasionally travelled for work using her own vehicle, a triable issue of fact existed. (See *Lobo v. Tamco* (2010) 182 Cal.App.4th 297.) The trial court's ruling on the summary judgment motion is not at issue here.

[6] On March 7, 2014, Travelers Property Casualty Company of America sought leave to intervene in the action on the ground it had paid workers' compensation benefits to Roy-Condron for her injuries suffered in the accident. Travelers' request to intervene was apparently granted. Travelers is not a party to this appeal.

claim accrued on the date of the accident, October 21, 2011; Roy-Condron's January 8, 2013 Application for Late Filing was denied; and she thereafter failed to "perfect her right" to sue CSU by petitioning for relief in the superior court pursuant to section 946.6. Roy-Condron opposed the motion, arguing CSU was estopped and had waived its right to assert noncompliance with the claim presentation statutes.

The trial court granted the motion for judgment on the pleadings without leave to amend. It took judicial notice of Roy-Condron's January 9, 2013 Claim, CSU's January 15, 2013 letter rejecting the Claim, and the "case file." It found that Roy-Condron alleged the date of the accident was October 21, 2011; failed to allege compliance with the Act; did not present a claim within six months of the accident as required by section 911.2; presented the Application for Late Filing more than one year after the accident; and did not obtain relief pursuant to a section 946.6 petition in the trial court. Section 911.3's waiver provisions were inapplicable, and there was no basis for equitable estoppel.

Roy-Condron's timely notice of appeal was filed on April 13, 2015.[7] (Cal. Rules of Court, rule 8.104(a); Code Civ. Proc., §§ 904.1, 581d.)

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[7] An order on a motion for judgment on the pleadings is not appealable; an appeal lies only from the judgment itself. (*Neufeld v. State Bd. of Equalization* (2004) 124 Cal.App.4th 1471, 1476, fn. 4.) A signed order of dismissal is an appealable judgment. (Code Civ. Proc., 581d.) Here the court's signed order of judgment does not state that the matter is dismissed but does state that plaintiff shall "take nothing by her Complaint against defendant CSU." Accordingly, we deem the judgment to incorporate an order of dismissal. (See *Beazell v. Schrader* (1963) 59 Cal.2d 577, 579; *Alpha Therapeutic Corp. v. County of*

DISCUSSION

1. *Standard of review*

" 'A motion for judgment on the pleadings, like a general demurrer, challenges the sufficiency of the plaintiff's cause of action and raises the legal issue, regardless of the existence of triable issues of fact, of whether the complaint states a cause of action.' " (*Castaneda v. Department of Corrections & Rehabilitation* (2013) 212 Cal.App.4th 1051, 1060 (*Castaneda*); *Sykora v. State Dept. of State Hospitals* (2014) 225 Cal.App.4th 1530, 1534.) On appeal, we apply the same standard of review as with a general demurrer. (*Castaneda,* at p. 1060; *Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298 (*Dunn*).) We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. (*DiPirro*, *supra*, 119 Cal.App.4th at p. 972; *Castaneda,* at p. 1060.)

All properly pleaded material facts alleged in the pleading are deemed to be true; contentions, deductions, and conclusions of law are not. (*Dunn, supra,* 135 Cal.App.4th at p. 1298; *DiPirro, supra,* 119 Cal.App.4th at p. 972.) We may also consider matters

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Los Angeles (1986) 179 Cal.App.3d 265, 268-269; *Schisler v. Mitchell* (1959) 174 Cal.App.2d 27, 29.) The notice of appeal erroneously states that the appeal is taken from judgment after an order granting a summary judgment motion. Given the policy to liberally construe notices of appeal and the fact CSU has obviously not been misled regarding the plaintiff's intent to appeal the dismissal after grant of the motion for judgment on the pleadings, we treat the notice as an appeal from the underlying judgment. (See *In re Joshua S.* (2007) 41 Cal.4th 261, 272; *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.)

subject to judicial notice and evidence outside the pleadings which the trial court considered without objection. (*Dunn,* at p. 1298; *Castaneda, supra,* 212 Cal.App.4th at p. 1060; *DiPirro,* at p. 972; *Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1773, fn. 2 (*Munoz*).) Denial of leave to amend after a grant of judgment on the pleadings is reviewed for abuse of discretion. (*Rice v. Center Point, Inc.* (2007) 154 Cal.App.4th 949, 959; *Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1448.) To show abuse, the plaintiff has the burden of demonstrating there is a reasonable possibility he or she could cure the defect with an amendment. (*Shimmon v. Franchise Tax Bd.* (2010) 189 Cal.App.4th 688, 692-693; *Rice,* at p. 959; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

2. *The Act*

The Act, sections 810 et seq., requires that "[b]efore suing a public entity, a plaintiff must present a timely written claim for damages to the entity." (*E.M. v. Los Angeles Unified School Dist.* (2011) 194 Cal.App.4th 736, 744.) The Act establishes a uniform claims procedure, including prescribing deadlines for both the filing of claims with public entities and for the commencement of litigation. (*Roberts v. County of Los Angeles* (2009) 175 Cal.App.4th 474, 480.) The Act's purpose is to provide the public entity with notice of a proposed action so as to permit it to investigate and settle the matter, if appropriate, thereby avoiding the expense of litigation. (*Ibid.; Castaneda, supra,* 212 Cal.App.4th at p. 1060.) A claimant who wishes to sue a public entity based on a cause of action relating to personal injuries must present a claim to the entity within six months of the date the cause of action accrues. (*J.J. v. County of San Diego* (2014) 223 Cal.App.4th 1214, 1219; *Ovando v. County of*

Los Angeles (2008) 159 Cal.App.4th 42, 62-63 (*Ovando*); § 911.2.) Timely submission of such a claim is mandatory and a condition precedent to the maintenance of the action. (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1240 (*State of California*); *Castaneda,* at p. 1061.) "[F]ailure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity." (*State of California,* at p. 1239; § 945.4.) Likewise, the "failure to allege facts demonstrating or excusing compliance with the claim presentation requirement subjects a claim against a public entity to a demurrer for failure to state a cause of action." (*State of California,* at p. 1239.)

The Act contains several provisions potentially providing relief from the six-month claim presentation requirement. (*State of California, supra,* 32 Cal.4th at p. 1245.) If a claim is not presented within the six-month period, a claimant may apply to the public entity for leave to present a late claim. Such an application must be made within a reasonable time, not to exceed one year of the date the cause of action accrues. (§ 911.4; *Ovando, supra,* 159 Cal.App.4th at p. 63.) As relevant here, the public entity must grant the application if it determines that the failure to present a timely claim was due to mistake, inadvertence, surprise, or excusable neglect, and the public entity was not prejudiced by the delay. (§ 911.6, subd. (b)(1); *Ovando,* at p. 63.) The public entity has 45 days to grant or deny the late claim application; if it fails to act, the application will be deemed denied. (§ 911.6; *Ovando,* at p. 63.) If the application is denied, the claimant may petition the trial court for relief from the claim presentation requirement. (§ 946.6; *DeVore v. Department of California Highway Patrol* (2013) 221 Cal.App.4th 454, 459

(*DeVore*); *Ovando,* at p. 63.) Other provisions of the Act, discussed in more detail *post,* require that the public entity alert a claimant to certain deficiencies in his or her claim or waive defenses based on those deficiencies. (See §§ 911.3, subd. (b), 910.8, 911; *State of California, supra,* 32 Cal.4th at p. 1245.)

3. *Plaintiff's complaint is barred by her failure to timely comply with the Act's claim presentation requirements*

It is undisputed that CSU is a public entity, that the Act's claim presentation requirements apply, and that plaintiff first filed her Claim with CSU over a year after the accident occurred. Although the parties disagree about whether her Application for Late Filing was actually filed with CSU, there is no dispute that if it was, it was also filed over a year after the accident.[8] Thus, plaintiff missed both the six-month deadline for filing a personal injury claim with CSU (§ 911.2, subd. (a)) and the one-year deadline for filing an application to present an untimely claim (§ 911.4, subd. (b)). It is also undisputed that she never petitioned the superior court for an order relieving her from the claim presentation requirement. (§ 946.6.) Plaintiff acknowledges that her complaint failed to allege facts demonstrating or excusing compliance with the claim presentation requirement.

Nonetheless, plaintiff urges that the trial court erred by granting CSU's motion for judgment on the pleadings without leave to amend. In support of her position, she makes two

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[8] We take judicial notice of the date Roy-Condron's Claim was presented, and her Application for Late Filing was allegedly presented, to CSU. (Evid. Code, § 452, subd. (c); see *Munoz, supra,* 33 Cal.App.4th at p. 1773, fn. 2.)

primary arguments. First, she contends that her Claim was timely filed with CSU because her cause of action did not accrue until November 30, 2012, the date she allegedly learned CSU was vicariously liable for the accident. Second, CSU's failure to comply with various provisions of the Act waived its right to raise the defense that the Claim was untimely. Therefore, plaintiff contends she can cure the defects in her complaint by amending to demonstrate timely compliance with the Act's claim presentation requirements.[9] Accordingly, she seeks reversal of the order granting judgment on the pleadings and leave to amend.

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[9] Roy-Condron argues in her opening brief that she "sought leave to amend." This is incorrect. Plaintiff argued in her opposition papers below that she should have "sought leave of court to amend the complaint to allege the facts which support [her] late discovery and the governmental liability. This of course can be done through a simple amendment to the complaint; but frankly, it's not necessary after nearly two years of litigation including a motion for summary judgment which was denied, CSU is well aware of the Plaintiff's factual contentions." Apart from this statement, plaintiff never sought leave to amend. However, this circumstance does not defeat her argument that leave to amend should have been granted. " 'It is an abuse of discretion to deny leave to amend if there is a reasonable possibility that the pleading can be cured by amendment. [Citation.] *Regardless of whether a request therefore was made, unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion.* [Citation.]' " (*Lee v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 848, 854.) A plaintiff can make a showing that amendment would cure a defect " 'in the first instance to the appellate court.' " (*Ibid.*)

a. *The delayed discovery rule does not apply; plaintiff's claim accrued on the date of the accident*

Plaintiff's contention that the delayed discovery rule applies to her claim lacks merit. The date of accrual for purposes of the Act's claim presentation requirement is the same date on which the cause of action would accrue for purposes of the statute of limitations in an action against a private party. (§ 901; *Ovando, supra,* 159 Cal.App.4th at p. 63.) "The general rule for defining the accrual of a cause of action sets the date as the time 'when, under the substantive law, the wrongful act is done,' or the wrongful result occurs, and the consequent 'liability arises.' [Citation.] In other words, it sets the date as the time when the cause of action is complete with all of its elements." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397 (*Norgart*); *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191; *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806-807 (*Fox*); *Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 743 (*Vaca*) [" 'it is generally said that "an action accrues on the date of injury" ' "].)

An "important exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Fox, supra,* 35 Cal.4th at p. 807; *Aryeh v. Canon Business Solutions, Inc., supra,* 55 Cal.4th at p. 1192; *Norgart, supra,* 21 Cal.4th at p. 397; *Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797.) A plaintiff has reason to discover a cause of action when he or she " 'has reason at least to suspect a factual basis for its elements.' [Citations.]" (*Fox,* at p. 807.) A cause of action thus accrues "when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that

someone has done something wrong to her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110; *Vaca, supra,* 198 Cal.App.4th at p. 744.) "[T]he limitations period begins once the plaintiff ' " 'has notice or information of circumstances to put a reasonable person *on inquiry* . . . .' " ' " (*Jolly,* at pp. 1110-1111.) To rely on the delayed discovery rule for delayed accrual of a cause of action, a plaintiff must specifically plead facts to show the time and manner of discovery and his or her inability to have made earlier discovery despite reasonable diligence. (*Fox,* at p. 808; *Jolly,* at p. 1111 ["plaintiff must go find the facts; she cannot wait for the facts to find her"].)

It is well settled that ignorance of the defendant's identity does not delay accrual. (*Fox, supra,* 35 Cal.4th at p. 807; *Vaca, supra,* 198 Cal.App.4th at pp. 743-744.) "The discovery rule . . . allows accrual of the cause of action even if the plaintiff does not have reason to suspect the defendant's identity. [Citation.] The discovery rule does not delay accrual in that situation because the identity of the defendant is not an element of a cause of action. [Citations.] . . . . '[I]t follows that failure to discover, or have reason to discover, the identity of the defendant does not postpone the accrual of a cause of action, whereas a like failure concerning the cause of action itself does.' " (*Fox,* at p. 807*; Norgart, supra*, 21 Cal.4th at p. 399; *Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 932 ["While ignorance of the existence of an injury or cause of action may delay the running of the statute of limitations until the date of discovery, the general rule in California has been that ignorance of the identity of the defendant is not essential to a claim and therefore will not toll the statute"].)

Here, Roy-Condron's cause of action for negligence accrued when the accident occurred. She clearly had reason to suspect her injury was caused by wrongdoing when Nazario's car hit her. At that point, all elements necessary to the cause of action existed and would necessarily have been apparent to her. (See Judicial Council of Cal. Civ. Jury Instns. (2016) CACI No. 700 [a driver must use reasonable care, look out for pedestrians, and control the speed and movement of his or her vehicle; the failure to use reasonable care is negligence].) Roy-Condron's complaint alleged Nazario drove "negligently, carelessly and unlawfully," causing her injury. In short, the facts alleged are subject to only one interpretation: plaintiff had reason to suspect her injury was caused by wrongdoing when it happened. Based on the allegations of the complaint, the claim accrued on October 21, 2011.

Roy-Condron's invocation of the delayed discovery rule does not assist her. She argues that "there were no facts to suggest CSU should have been a party until later," and she could not have discovered CSU's alleged vicarious liability until she conducted discovery. She argues that the Claim and Application for Late Filing sufficiently explained "why she did not know about CSU and that she acted in a reasonable manner to discover such facts." She points out that the police incident report regarding the accident did not disclose that Nazario was employed by CSU. In response to these arguments, CSU urges that Roy-Condron has failed to allege or otherwise proffer facts showing that she conducted a reasonably diligent investigation during the six months following the accident.

In our view, apart from the question of whether diligent investigation would have revealed information allowing plaintiff

to file her Claim earlier, the salient point is that plaintiff's asserted ignorance of CSU's identity cannot serve to delay accrual of the claim. As the authorities cited *ante* demonstrate, plaintiff's ignorance of CSU's identity was not an element of or essential to her cause of action. (*Fox, supra,* 35 Cal.4th at p. 807.) Her discovery that CSU was Nazario's employer and might have derived a benefit from Nazario's use of her car did not reveal a previously unknown cause of the injury or accident. Roy-Condron fails to "distinguish between a plaintiff's ignorance of the identity of a particular defendant – a fact that is not an element of the underlying cause of action – and ignorance" of a different cause of the injury. (*Id.* at p. 814.)

Fox v. Ethicon Endo-Surgery, Inc. illustrates this distinction. There the plaintiff suffered complications after undergoing gastric bypass surgery, and filed a medical malpractice action against her physician and the hospital. (*Fox, supra,* 35 Cal.4th at pp. 802-804.) During discovery she learned that a stapler used during the surgery may have malfunctioned, causing her injury. (*Id.* at p. 804.) She amended her complaint to allege a products liability cause of action against Ethicon, the stapler's manufacturer. (*Ibid.*) Our Supreme Court concluded the delayed discovery rule could apply under these circumstances. The plaintiff could allege she had no reason to discover facts supporting a products liability action against Ethicon until she deposed her doctor. (*Id.* at p. 811.) There is a "sharp distinction" drawn between "a plaintiff's ignorance of the identity of the person who committed a suspected wrong and ignorance of the existence of a cause of action." (*Id.* at p. 812.) If "a plaintiff's reasonable and diligent investigation discloses only one kind of wrongdoing when the injury was actually caused by

tortious conduct of a wholly different sort, the discovery rule postpones accrual of the statute of limitations on the newly discovered claim." (*Id.* at p. 813.) Unlike the *Fox* plaintiff, Roy-Condron does not suggest CSU is responsible for a wholly different sort of tortious conduct than that allegedly committed by Nazario. Instead, she contends CSU is vicariously liable for Nazario's negligence.

DeVore v. Department of California Highway Patrol, cited by Roy-Condron as "instructional on the issue of accrual of the claim and delayed discovery," is inapt. In *DeVore* the plaintiffs were the wife and daughter of a motorcyclist killed in an accident caused by a drunk driver. Over six months after the accident, plaintiffs learned that a California Highway Patrol (CHP) officer had stopped the driver approximately two hours before the accident, but had not impounded his car even though he was unable to produce a valid drivers' license. (*DeVore, supra,* 221 Cal.App.4th at pp. 457-458.) Within the applicable one-year period, plaintiffs filed an application for leave to file a late claim, alleging that the CHP was liable for failing to carry out a mandatory duty to impound the driver's car. (*Id.* at p. 458.) The public entity denied the application for late filing and the plaintiffs petitioned for relief in the trial court pursuant to section 946.6. The appellate court concluded that the plaintiffs' "failure to discover a basis for public entity liability" before the preliminary hearing was excusable. (*DeVore*, at p. 464.) *DeVore* does not assist Roy-Condron. The opinion concerned a different issue than that presented here, i.e., whether the failure to discover a cause of action was excusable for purposes of a section 946.6 petition. *DeVore* does not stand for the proposition that the discovery rule somehow applies in the instant matter. In *DeVore,*

similar to *Fox* and unlike the circumstances here, the plaintiffs were unable to discover the cause of action itself – i.e. the alleged breach of a mandatory duty to impound the car – not simply the identity of a defendant.

Roy-Condron argues that the question of when a claim accrued is a question of fact "for the jury." "The question [of] when a plaintiff actually discovered or reasonably should have discovered the facts for purposes of the delayed discovery rule is a question of fact unless the evidence can support only one reasonable conclusion." (*Ovando, supra,* 159 Cal.App.4th at p. 61; see *Jefferson v. County of Kern* (2002) 98 Cal.App.4th 606, 610.) " '[W]henever reasonable minds can draw only one conclusion from the evidence, the question becomes one of law.' " (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1320; *M&F Fishing, Inc. v. Sea-Pac Ins. Managers, Inc.* (2012) 202 Cal.App.4th 1509, 1531.) As we have explained, plaintiff's proffered theory of delayed discovery fails as a matter of law. Even if her contention that she could not have discovered CSU's identity prior to the claim filing period is accurate, this circumstance does not change the accrual date. Accordingly, we conclude her cause of action accrued on the date of the accident, October 21, 2011.

b. *Waiver*

Plaintiff next contends that, because CSU failed to comply with various provisions of the Act requiring it to alert her to deficiencies in her Claim, it has waived any defense that her Claim was untimely. We disagree.

(i) *Section 911.3*

Plaintiff insists that under section 911.3, CSU waived its right to assert an untimeliness defense. As relevant here,

section 911.3 provides that when a claim for personal injury is presented after section 911.2(a)'s six-month deadline, "without the application provided in Section 911.4" (that is, a written application to the public entity for leave to present an untimely claim), the public entity may, within 45 days, give written notice to the claimant that the claim was "not filed timely and that it is being returned without further action." Section 911.3 states that the notice "shall be in substantially the following form: [¶] 'The claim you presented to the (insert title of board or officer) on (indicate date) is being returned because it was not presented within six months after the event or occurrence as required by law. See Sections 901 and 911.2 of the Government Code. Because the claim was not presented within the time allowed by law, no action was taken on the claim. [¶] Your only recourse at this time is to apply without delay to (name of public entity) for leave to present a late claim. See Sections 911.4 to 912.2, inclusive, and Section 946.6 of the Government Code. Under some circumstances, leave to present a late claim will be granted. See Section 911.6 of the Government Code. [¶] You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.' " (§ 911.3, subd. (a).)

Subdivision (b) of section 911.3 provides that "Any defense as to the time limit for presenting a claim described in subdivision (a) is waived by failure to give the notice set forth in subdivision (a) within 45 days after the claim is presented," unless the claimant failed to provide an address. The purpose of a section 911.3 notice is to assure a claimant "distinguishes between a claim rejected on its merits and one returned as untimely. The claimant thus knows which procedure to pursue."

(*Rason v. Santa Barbara City Housing Authority* (1988) 201 Cal.App.3d 817, 830; *Dixon v. City of Turlock* (1990) 219 Cal.App.3d 907, 911.)

Plaintiff contends that because CSU failed to provide the notice required by section 911.3, it has waived any defense as to the time limit for presenting a claim. But section 911.3 is triggered only when a late claim is presented "*without the application provided in Section 911.4,*" that is, without "a written application . . . to the public entity for leave to present" a claim filed after the six-month period. (§§ 911.4, subd. (a), 911.3, subd. (a), italics added.) Section 911.3, subdivision (b) provides for waiver of the untimeliness defense only as to a "claim described in subdivision (a)" – that is, a claim presented without the application for a late claim. (§ 911.3, subd. (b).) Here, Roy-Condron has consistently averred that she filed with CSU her Application for Late Filing concurrently with her Claim.[10] The trial court accepted this representation, finding that plaintiff "submitted an application to present a late claim more than one year after the accident." Accordingly, section 911.3's waiver provision did not come into play.[11] *Phillips v. Desert Hospital*

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10 For the first time in her reply brief, plaintiff appears to rely on the fact CSU has consistently denied the Application for Late Filing was included with the Claim. Given her prior insistence that the Application for Late Filing was presented with the Claim, and the trial court's acceptance of this contention, plaintiff's belated assertion to the contrary is unhelpful.

11 Plaintiff also contends that CSU has waived an untimeliness defense because it "did not comply with the notices required under Government Code sections 910.8, 911." To the extent she intends to argue section 911 compels a finding of

Dist. (1989) 49 Cal.3d 699, does not assist plaintiff because here, her Claim was filed along with the Application for Late Filing, whereas *Phillips* concerned a document presented without such an application. (*Id.* at pp. 701-703, 709.)

(ii) *Sections 911.4, 911.6, 911.8, 913, and 945.6*

Roy-Condron further avers that application of other notice provisions in the Act require a finding of waiver.

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waiver, she is mistaken. Section 910 states that a claim made to a public entity must contain certain information, including, inter alia, the claimant's name and address, the date, place, and circumstances of the occurrence or transaction that gave rise to the claim, and the amount claimed. Section 910.2 pertains to the requirement that a claimant sign the claim. Section 910.8 provides that if the public entity believes the claim fails to comply substantially with the "requirements of Sections 910 and 910.2," or with the requirements of a form provided by the entity, the entity may give written notice of the insufficiency, stating with particularity the defects or omissions therein. Section 911 provides that "Any defense as to the sufficiency of the claim based upon a defect or omission in the claim as presented is waived by failure to give notice of insufficiency with respect to the defect or omission as provided in Section 910.8," unless the claimant failed to provide an address. Thus, reading the relevant provisions in context, section 911 pertains to waiver of the entity's right to contest the claimant's compliance with the requisites of sections 910 and 910.2, not the timeliness requirement. CSU did not deny plaintiff's Claim because it failed to comply with sections 910 or 910.2, and therefore section 911 is inapplicable.

Plaintiff also states in passing that CSU failed to comply with section 915.4. Section 915.4 pertains to the methods of delivery (i.e., by mail or personal delivery) of notices required under sections 910.8, 911.8, and 913. There is no contention or showing that CSU used an impermissible method of delivery.

Sections 911.4, 911.6, and 911.8 pertain to the procedures applicable when a claimant seeks leave from the public entity to file a late claim. Section 911.4 provides that a claimant who seeks to file a claim after the six-month period may make a written application, stating the reasons for the delay, to the public entity for leave to present the claim. Such an application must be presented "within a reasonable time not to exceed one year after the accrual of the cause of action." (§ 911.4, subds. (a), (b).)

Section 911.6 provides that the public entity shall grant or deny the application within 45 days after its presentation (unless the parties agree to an extension); and if the public entity fails to act within the prescribed time, the application "shall be deemed to have been denied on the 45th day . . . ." (§ 911.6, subds. (a), (c).) Subdivision (b) of the statute sets forth the circumstances under which the public entity "shall" grant the application.

Section 911.8 governs the form of notice the public entity is required to give when denying such an application. Subdivision (b) provides: "If the application is denied, the notice shall include a warning in substantially the following form: [¶] 'WARNING [¶] 'If you wish to file a court action on this matter, you must first petition the appropriate court for an order relieving you from the provisions of Government Code Section 945.4 (claims presentation requirement). See Government Code Section 946.6. Such petition must be filed with the court within six (6) months from the date your application for leave to present a late claim was denied. [¶] 'You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so

immediately.' " Unlike section 911.3, section 911.8 does not provide that the failure to give the required notice compels waiver of any defense based on the timeliness requirements.

Finally, section 913 provides for the form of written notice to be provided when CSU denies a claim. As pertinent here, it states: "(a) Written notice of the action taken under Section 912.5 [pertaining to actions by the CSU Trustees] . . . or the inaction that is deemed rejection under Section 912.4 [pertaining to actions by local, judicial, and state public entities] shall be given in the manner prescribed by Section 915.4. The notice may be in substantially the following form: [¶] 'Notice is hereby given that the claim that you presented to the (insert title of board or officer) on (indicate date) was (indicate whether rejected, allowed, allowed in the amount of $____ and rejected as to the balance, rejected by operation of law, or other appropriate language, whichever is applicable) on (indicate date of action or rejection by operation of law).' [¶] (b) If the claim is rejected, in whole or in part, the notice required by subdivision (a) shall include a warning in substantially the following form: [¶] 'WARNING [¶] 'Subject to certain exceptions, you have only six (6) months from the date this notice was personally delivered or deposited in the mail to file a court action on this claim. See Government Code Section 945.6. [¶] 'You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.' " Section 945.6 provides that if written notice is given in accordance with section 913, the claimant must commence a civil action not later than six months after the date notice is given. (§ 945.6, subd. (a)(1).) If written notice is *not* given in accordance

with section 913, the claimant may commence a civil action within two years. (§ 945.6, subd. (a)(2).)

Roy-Condron's argument that CSU "failed to comply with the notice requirements pursuant to Government Code section 913" and has therefore waived an untimeliness defense is mistaken. CSU complied with section 913. As plaintiff acknowledges, the letter CSU sent denying her Claim used the language suggested by section 913.[12] Likewise, her contention that the two-year period for commencement of a civil suit applied is incorrect. (See § 945.6, subd. (a)(1), (2).)

We agree with plaintiff, however, that CSU's rejection letter was problematic. CSU asserts that its representative, Gifford, "treated the submission itself as a late claim application and denied it." If so, CSU was required to send a notice containing language substantially similar to that contained in section 911.8, clearly informing plaintiff that her Application for Late Filing had been denied, and alerting her that if she wished to file a court action, she was required to petition the appropriate court for an order relieving her of the claim presentation requirement. Instead, CSU sent a section 913 letter, the form used when a claim is denied on the merits.

We cannot conclude that the failure to give the section 911.8 notice waived CSU's right to assert an untimeliness defense. Unlike section 911.3, section 911.8 does not contain an express waiver provision. "When language is

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[12] The letter sent to plaintiff omitted the final sentence of the warning required by section 913, regarding representation by an attorney. In light of the fact plaintiff was already represented by counsel, this omission was appropriate.

included in one portion of a statute, its omission from a different portion addressing a similar subject suggests that the omission was purposeful." (*In re Ethan C.* (2012) 54 Cal.4th 610, 638; see also *People v. Trevino* (2001) 26 Cal.4th 237, 242.) The fact the Legislature included an express waiver provision for section 911.3, but omitted a similar provision for section 911.8, indicates it understood how to provide for waiver when intended to do so. That it chose to omit a waiver provision in regard to section 911.8 suggests a public entity's failure to give a section 911.8 notice does not preclude a public entity from asserting an untimeliness defense.

Although CSU's response did not trigger a mandatory waiver provision, it cannot be denied that the letter sent to plaintiff left quite a lot to be desired and was potentially confusing. Although Gifford declares he treated plaintiff's Claim as an application for leave to file a late claim, his letter did not state the claim was being denied as untimely. (Cf. § 911.3, subd. (a) [when a claim is untimely filed, the public entity's written notice shall state "no action was taken on the claim"].) The "obvious intent of subdivision (b) of section 911.8 was to give an unsuccessful applicant the information that applicant would need in order to file a timely section 946.6 petition" with the trial court for relief from the claim presentation requirements. (*D.C. v. Oakdale Joint Unified School Dist.* (2012) 203 Cal.App.4th 1572, 1580.) CSU's letter did not fulfill that purpose here. The use of the section 913 language could well have suggested to plaintiff that her Application for Late Filing had been granted, but the Claim was being denied on the merits. By so implying, the letter could have deterred her from filing a

section 946.6 petition for relief, as it could have appeared such was unnecessary.[13]

CSU argues that its rejection letter substantially complied with section 911.8. It argues the letter "specifically noted the requirement to seek further court action within the ensuing six months which provided notice substantially similar to the notice required by Government Code section 911.8."[14] It urges that section 911.8 was intended to advise a claimant that "something more was legally required after rejection and that there [were] only six months to pursue such relief," and that is "exactly what CSU's notice provided." Not so. The rejection letter stated plaintiff had six months "to file a court action on this claim. See Government Code Section 945.6." Section 945.6 pertains to the time limitations for bringing "suit . . . against a public entity on a cause of action" – in other words, a lawsuit. This is an entirely different proceeding than the "petition" to the court "for an order relieving the petitioner from" the claim presentation requirement addressed in section 946.6. That

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[13] Additionally, the January 18, 2013 Maynard letter suggested the claim was being denied on the merits. CSU argues that Maynard was not a CSU employee and therefore his letter, if misleading, cannot be attributed to CSU. It is unclear to us what Maynard's role in the claims process was, or why, if he had no connection to CSU, Gifford copied him on CSU's rejection letter. However, in light of our conclusion that plaintiff cannot have been misled to her detriment, see *post,* the Maynard letter is not significant to our analysis.

[14] CSU also argues Roy-Condron has waived any argument regarding section 911.8 because she did not raise the argument below. In light of our conclusion, we do not reach this question.

section 945.6 uses the language "Except as provided in Sections 946.4 and 946.6" is hardly a substitute for the clear reference to the petition procedure mandated by section 911.8. Under the circumstances, CSU's response was nebulous at best. A reasonable reading of the letter would have suggested plaintiff was free to bring a lawsuit within six months.

Indeed, under similar circumstances it has been held that a public entity is estopped from asserting the untimeliness defense. In *McLaughlin v. Superior Court* (1972) 29 Cal.App.3d 35, the plaintiff applied for leave to present a late claim. The board's response led the plaintiff to believe the board had acted on the claim itself, not the application for leave to file the late claim, in part because the board's response used language similar to that contained in section 913. Consequently, the plaintiff did not petition the court for relief from the claim presentation requirement. (*McLaughlin, supra,* at pp. 38-39.) The appellate court concluded the defendant was estopped from asserting the plaintiff's noncompliance with the claim presentation statutes. (*Id.* at p. 40; see also *Dujardin v. Ventura County Gen. Hosp.* (1977) 69 Cal.App.3d 350, 360; cf. *Mandjik v. Eden Township Hospital Dist.* (1992) 4 Cal.App.4th 1488, 1503-1504 [defective notice that gave wrong time limit for presenting claim waived public entity's right to assert a different, shorter presentation period].)

CSU's letter, like that in *McLaughlin,* had the potential to mislead Roy-Condron for the reasons we have discussed. But, unlike in that case, the estoppel doctrine does not assist plaintiff. The flaw in CSU's letter was that it suggested it had granted plaintiff's request to file a late claim, which could have deterred plaintiff from petitioning the trial court for relief from the claim

presentation requirement. But, because Roy-Condron's Application for Late Filing was itself untimely, she could not have obtained relief in the trial court in any event. Section 911.4, subdivision (b), requires that an application to present a late claim must be filed "within a reasonable time *not to exceed one year after the accrual of the cause of action*." (Italics added.) Where the application is filed past the one-year deadline, a trial court is powerless to grant relief from the claim presentation requirement. "Filing a late-claim application within one year after the accrual of a cause of action is a jurisdictional prerequisite to a claim-relief petition. [Citation.] When the underlying application to file a late claim is filed more than one year after the accrual of the cause of action, the court is without jurisdiction to grant relief under Government Code section 946.6." (*Munoz, supra,* 33 Cal.App.4th at p. 1779; see *J.J. v. County of San Diego, supra,* 223 Cal.App.4th at p. 1221; *Brandon G. v. Gray* (2003) 111 Cal.App.4th 29, 34 [court lacks jurisdiction to grant relief under section 946.6 if the application to file a late claim was filed with the public entity more than one year after the cause of action accrued]; *Department of Water & Power v. Superior Court* (2000) 82 Cal.App.4th 1288, 1293; *Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 713 ["filing a late-claim application within one year is a jurisdictional prerequisite to a claim-relief petition"]; *Greyhound Lines, Inc. v. County of Santa Clara* (1986) 187 Cal.App.3d 480, 488; Van Alstyne et al., Cal. Government Tort Liability Practice (Cont.Ed.Bar 2015) § 7.65.) Plaintiff's reliance on CSU's letter therefore could not have caused her any harm. Because she could not have detrimentally relied on CSU's

letter, estoppel principles are inapplicable.[15] (See *Santee, supra,* at pp. 715-716; *El Dorado Irrigation Dist. v. Superior Court* (1979) 98 Cal.App.3d 57, 61.)

DISPOSITION

The judgment dismissing the action as against CSU is affirmed. CSU shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

EDMON, P. J.

STRATTON, J.*

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[15] CSU argues that, although Roy-Condron argued estoppel below, she has abandoned that theory on appeal. In light of our conclusion, we need not reach the question of abandonment.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.