

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2010-016054

03/11/2013

HONORABLE ARTHUR T. ANDERSON

CLERK OF THE COURT  
K. Carter  
Deputy

NICK TAVILLA, et al.

MATTHEW P MILLEA

v.

JAMES F OTOOLE COMPANY INC, et al.

E SCOTT DOSEK

BRITNY TAVILLA  
3038 E AVALON  
PHOENIX AZ 85006

UNDER ADVISEMENT RULING

The Court has had under advisement Plaintiffs' Motion for New Trial and Defendants' Motion to Strike Affidavit of Richard Treon. Having read and considered the briefing and having heard oral argument, the Court issues the following rulings.

***Tavilla Children.***

Acknowledging that the minority tolling issue was not raised in their response to the motion for summary judgment or at oral argument,<sup>1</sup> Plaintiffs contend that as a matter of law this issue could not be waived. *See* A.R.S. § 12-502; *Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 143 Ariz. 101, 107 (1984); *see also Porter v. Triad of Ariz. (L.P.)*, 203 Ariz. 230, 234 (App. 2002) (§ 12-502 applies to all claims owned by a minor). The Court agrees. Defendants sidestep this issue by arguing the general rule regarding waiver for failure to raise an issue.<sup>2</sup>

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<sup>1</sup> "[P]laintiffs' counsel...failed to see that the claims of the children were tolled by their minority. [N]either party brought the issue to the attention of the Court." Reply at 1; *see also* Mot. at 4.

<sup>2</sup> Defendants' citation to *Baxter v. Harrison*, 83 Ariz. 354, 356 (1958) (a defendant can waive the plaintiff's lack of capacity to sue) is inapposite.

SUPERIOR COURT OF ARIZONA  
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03/11/2013

***Nick and Donna Tavilla.***

Initially, the Court agrees with Plaintiffs that “law of the case” does not govern the Court’s review of a motion for new trial.<sup>3</sup> *Compare Farmers Ins. Co. of Ariz. v. Vagnozzi*, 132 Ariz. 219, 221 & n.2 (1982) (motion for new trial) *with Union Rock & Materials Corp. v. Scottsdale Conference Ctr.*, 139 Ariz. 268, 273 (App. 1983) (motion for reconsideration).

*Loss of Right to Appraisal.*

Plaintiffs re-urge their argument that the course of litigation exception deferred accrual of this professional negligence claim against Defendants until the appeals process in the underlying EMC action had run.<sup>4</sup> Assuming without deciding that the course of litigation exception applies here, Plaintiffs simply misconstrue it. Plaintiffs contend Defendants’ negligent advice caused Plaintiffs’ loss of their right to appraisal. That advice did *not* occur in the context of the EMC litigation. The possibility that Plaintiffs would recover what they believed to be the full value of their claim in the EMC action does not alter the fact that Plaintiffs suffered discernible harm no later than the trial court’s denial of their motion to remand (May 15, 2003). *See Best Choice Fund, LLC v. Low & Childers, P.C.*, 228 Ariz. 502, 507-08 (App. 2011). The clock started ticking then, *even though* Plaintiffs’ damages could have been eliminated or substantially minimized by a favorable jury verdict in the EMC action. *See id.* at 508; *see also Environmental Liners, Inc. v. Ryley, Carlock & Applewhite*, 187 Ariz. 379, 384 (App. 1996).

*Fraudulent Concealment.*

Plaintiffs also now obliquely argue that Defendants concealed their negligent conduct during the adjustment phase, but they admit that they discovered this during the trial in the EMC action (May 2006). Again, the course of litigation exception would only apply to defer accrual if the negligence occurred in the context of the EMC litigation, which it did not. Plaintiffs having admittedly discovered this claim in May 2006, their cause of action (filed May 2010) was untimely.<sup>5</sup>

Accordingly, based on the foregoing,

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<sup>3</sup> Plaintiffs state in their Motion that it was brought pursuant to Rule 59(a)(8) (decision not justified by the evidence or is contrary to law). In their Reply, Plaintiffs refer to Rules 59(a)(4) (newly discovered evidence) and 59(g) (on initiative of court). *See* Reply at 4.

<sup>4</sup> *Tavilla v. Employer Mutual Cas. Ins. Co.*, Maricopa Cnty. Super. Ct., CV 2001-019327.

<sup>5</sup> Plaintiffs concede that a two-year statute of limitations applies. *See generally* Minute Entry May 8, 2012 at 1 n.1.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

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03/11/2013

**IT IS ORDERED** granting Plaintiffs' Motion for New Trial (as to the Tavilla children) and denying same (as to Nick and Donna Tavilla).

**IT IS FURTHER ORDERED** denying Defendants' Motion to Strike Affidavit of Richard Treon as moot.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.