

Dec 05, 2016, 4:32 pm

RECEIVED ELECTRONICALLY

NO. 93659-5

SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR WEST,

Appellant,

v.

THE EVERGREEN STATE COLLEGE BOARD OF TRUSTEES,
STATE OF WASHINGTON,

Respondents.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

COLLEEN G. WARREN
Senior Counsel
WSBA No. 16506
1125 Washington St SE
Olympia, WA 98504-0100
(360) 753-6200
OID No. 91035

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUE1

III. COUNTERSTATEMENT OF THE CASE1

IV. REASONS WHY THE COURT SHOULD DENY REVIEW.....4

 A. The Court of Appeals Decision is Consistent with
 Previous Decisions by This Court and the Court of
 Appeals5

 B. No Constitutional Question is at Issue in This Case.....9

 C. This Case Does Not Involve an Issue of Substantial
 Public Interest That Should be Determined by the
 Supreme Court10

V. CONCLUSION13

TABLE OF AUTHORITIES

Cases

<i>Brigham v. Seattle</i> , 34 Wn.2d 786, 789, 210 P.2d 144 (1949).....	6, 7
<i>Coulter v. State</i> , 93 Wn.2d 205, 608 P.2d 261 (1980).....	11
<i>Davis v. Mississippi</i> , 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 672 (1969).....	9
<i>Hall v. Niemer</i> , 97 Wn.2d 574, 649 P.2d 98 (1982).....	8, 9
<i>Hardesty v. Stenchever</i> , 82 Wn. App 253, 258-59, 917 P.2d 577 (1996).....	6
<i>Medina v. Pub. Util. Dist. No. 1 of Benton Cty</i> , 147 Wn.2d 303, 310, 53 P.3d 993 (2002).....	6
<i>Renner v. City of Marysville</i> , 168 Wn.2d 540, 230 P.3d 569 (2010).....	8, 9
<i>State v. Young</i> , 123 Wn.2d 173, 867 P.2d 593 (1994).....	10
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....	9
<i>Tran v. State Farm Fire & Cas. Co.</i> , 136 Wn.2d 214, 961 P.2d 358 (1998).....	12
<i>Truck Ins. Exch. v. VanPort Homes, Inc.</i> , 147 Wn.2d 751, 58 P.3d 276 (2002).....	12

Constitutional Provisions

Const. art. I, § 7.....	9
-------------------------	---

Const. art. II, § 26	5
U.S. Const. amend. IV	9

Statutes

18 U.S.C. § 241	3
42 U.S.C. § 1983	3
42 U.S.C. § 1985	3
RCW 4.92.090	5
RCW 4.92.100	1, 4, 5, 8, 9, 11
RCW 4.92.100(3)	7
RCW 4.92.110	1, 4, 5, 8, 9, 11

Rules

RAP 13.4(b)	4
RAP 13.4(b)(1)	5
RAP 13.4(b)(2)	5
RAP 13.4(b)(3)	8
RAP 13.4(b)(4)	9, 11

I. INTRODUCTION

The trial court dismissed Arthur West's tort lawsuit because he failed to file a tort claim that complied with the requirements of RCW 4.92.100-110. West fails to show that the Court of Appeals' unpublished decision affirming that dismissal satisfies any of the criteria for granting review under RAP 13.4(b). The Court should deny West's petition for review.

II. COUNTERSTATEMENT OF THE ISSUE

Did the Court of Appeals properly affirm the trial court's Order granting summary judgment to The Evergreen State College dismissing West's claim of unlawful arrest and seizure based on his failure to file a tort claim as required by RCW 4.92.100-110?

III. COUNTERSTATEMENT OF THE CASE

Arthur West submitted a public records request to The Evergreen State College (College) in March of 2010. CP 53, 225. The College provided West with an initial installment of records within a few weeks of receiving the request. CP 226. The final installment of records was made available to West for review at a pre-scheduled appointment on May 14, 2010, at the office of the College's president. CP 53, 226.

West reviewed the documents and requested copies of all the records. CP 53. The College's Public Records Officer, Patricia King, proceeded to fulfill the request while West went to the cashier's office to pay for the copies. CP 53-54.

West returned to the president's office and became impatient with the time it was taking to obtain copies of the records. CP 54. He proceeded to enter Ms. King's cubicle, demanding she "get the lead out" as he needed to be at another appointment with an unnamed official. CP 54. Ms. King found West to be extremely hostile and very aggressive. CP 54. She told West she did not have to take his abuse and was working on his request. CP 54. Ms. King asked West three to four times to sit out front until she finished making copies of the records. She eventually reported to Vice President Dr. John Hurley that West was being verbally abusive and threatening. CP 54. Dr. Hurley spoke with West regarding his behavior while his assistant contacted campus police to request that an officer be dispatched to the president's office. CP 51.

Ed Sorger, the College's Chief of Police, arrived at the president's office and spoke with West. CP 113-14. Chief Sorger subsequently spoke with Dr. Hurley who advised that West was being loud, threatening, and abusive toward Ms. King. CP 114. Dr. Hurley wanted West to leave the president's office. CP 114. Campus police officer Monohon responded to the call and also spoke with West. CP 114, 116-17.

While West was still at the president's office, Ms. King was able to complete copying of the documents West had requested. CP 54. After receiving the requested copies, West voluntarily left the president's office, but only after expressing disappointment that the police had not issued a trespass warning to West. CP 114, 117. The College took no further action regarding this incident. CP 52.

West filed a tort claim with the Risk Management Division of the Office of Financial Management alleging that Dr. Hurley and other College officials had “attempted to obstruct [his] access to public records and threatened to “Trespass” him for attempting to obtain records in a reasonable time.” CP 98-99. West claimed this was “part of a continuing pattern and policy of invidious violation of [his] rights” in violation of 18 U.S.C. § 241, 42 U.S.C. § 1983, and 42 U.S.C. § 1985. CP 99. West’s claim stated that “the police did not do anything of their own accord” when they responded to investigate the May 14, 2010 incident. CP 99.

Eventually, West filed a lawsuit seeking penalties and fees for violation of the PRA, and damages for claims of false arrest, false imprisonment, unlawful seizure, and malicious prosecution related to the May 2010 incident. CP 4-8.¹ The superior court granted the College partial summary judgment on West’s PRA claims. CP 40-41, 191. On January 3, 2014, the court granted the College summary judgment dismissing his causes of action alleging false arrest, false imprisonment, unlawful seizure, and malicious prosecution related to May 14, 2010. These claims

¹ West’s Complaint also sought damages for claims of defamation, false light, negligence, and violation of his civil rights based on a claim of fraud arising out of a separate unrelated incident involving West and two professors at the College. CP 4-8. West’s motions for recusal of the trial judge, a continuance of the summary judgment hearing, sanctions against opposing counsel and a cross-motion for summary judgment were denied by the trial court. CP 194. West’s petition for review does not raise these claims.

were dismissed based on West's failure to comply with RCW 4.92.100-110. The dismissal of these causes of action is the sole issue West raises in his Petition for Discretionary Review.

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

RAP 13.4(b) sets forth the following four limited circumstances where this Court may choose to accept review of a decision by the Court of Appeals.

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

West fails to demonstrate any of these criteria. The Court of Appeals correctly affirmed the trial court's decision dismissing West's claims for false arrest and unlawful seizure based on noncompliance with the pre-suit filing requirements of RCW 4.92.100-110. The court's decision is consistent with established precedent, raises no constitutional issues, and does not involve an issue of substantial public interest.

A. The Court of Appeals Decision is Consistent with Previous Decisions by This Court and the Court of Appeals

This Court may accept review of a Court of Appeals decision if it conflicts with a prior decision of this Court or of a published decision of the Court of Appeals. RAP 13.4(b)(1)-(2). Contrary to West's arguments, the Court of Appeals' decision is entirely consistent with previous case law.

Washington's Constitution authorizes the Legislature to "direct by law, in what manner, and in what courts, suits may be brought against the state." Const. art. II, § 26. The Legislature did this in 1961 in waiving the state's sovereign immunity with respect to tort actions and establishing procedures for suing the state. RCW 4.92.090.² Among these are the filing requirements provided in RCW 4.92.100 and .110 which require the filing of a tort claim with the Risk Management Division of the State's Office of Financial Management at least 60 days before commencing an action against the State in superior court. The proper remedy for a plaintiff's failure to file a claim as required by these statutes is dismissal of the suit. *Hardesty v. Stenchever*, 82 Wn. App 253, 258-59, 917 P.2d 577 (1996).

In order to act in substantial compliance with a tort claim statute, there must be a "bona fide attempt to comply with the law." *Brigham v.*

² RCW 4.92.090 provides as follows: "The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."

Seattle, 34 Wn.2d 786, 789, 210 P.2d 144 (1949). In addition, the filing must “actually accomplish its purpose.” *Id.* The purpose of the statute is to provide sufficient time to investigate, evaluate, and settle claims before a suit is filed. *See, Medina v. Pub. Util. Dist. No. 1 of Benton Cty*, 147 Wn.2d 303, 310, 53 P.3d 993 (2002) (construing a similar tort claim filing statute applying to municipalities).

However, a liberal construction rule has no application to a case where a tort claim totally fails to identify the alleged tort or the alleged tortious conduct. As the court stated in *Brigham*, “where there is no attempt to comply with the law, there is nothing to construe. To hold otherwise would abrogate the law.” *Brigham*, 34 Wn.2d at 790.

While West filed a tort claim with the State on May 14, 2010, nothing in it suggests he was falsely arrested, seized, or imprisoned by anyone at the College. CP 94-99. He stated in his claim:

As part of a continuing pattern and policy of invidious violation of rights protected under 42 USC 1983-5 and 18 USC 241, TESC Vice president and other officials attempted to obstruct access to public records and threatened to “Trespass” West for attempting to obtain records in a reasonable time. **TESC Police were summoned and conducted an investigation although the police did not do anything of their own accord.** These continuing violations have caused substantial mental and emotional distress.

CP 99 (emphasis added). The tort claim makes no mention of a seizure, arrest, or false imprisonment by the police. West can't argue that the Court of Appeals decision conflicts with the requirements of RCW 4.92.100(3) when he entirely failed to comply with the statute prior to filing a lawsuit against the College.

West further claims, without analysis, that the Court of Appeals' decision conflicts with this Court's ruling in *Renner v. City of Marysville*, 168 Wn.2d 540, 230 P.3d 569 (2010) and *Hall v. Niemer*, 97 Wn.2d 574, 649 P.2d 98 (1982). This argument is without merit.

In *Renner*, the court ruled that the plaintiff substantially complied with former RCW 4.96.020(3) in regards to his residential address and statement of damages in a tort claim filed with the City of Marysville. Nothing in *Renner* suggests that a claimant substantially complies when, like West, the tort claim fails to name the tort that is later alleged in the lawsuit. There can be no bona fide attempt to comply where the College has no prior notice that West will file a lawsuit alleging an unlawful arrest or seizure by its campus police.

In *Hall v. Niemer*, the court considered whether the pre-suit notice requirements in statute and city charter were constitutional. *Hall* does not address what is substantial compliance with the claim-filing statute. As

Hall addressed a different issue than the Court of Appeals, there is no conflict that would support discretionary review.

Nothing in *Hall* or *Renner* conflicts with the Court of Appeals' decision in this case. To the contrary, these cases support the requirement that a plaintiff must file a tort claim with the state as required under RCW 4.92.100 and .110 as a condition precedent to filing a lawsuit seeking damages for tortious conduct.

B. No Constitutional Question is at Issue in This Case

West argues that this case raises an issue of constitutional concern because the Court of Appeals decision conflicts with the U.S. Supreme Court's rulings in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), *Davis v. Mississippi*, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 672 (1969), and this Court's ruling in *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994). Pet. at 14-15; See RAP 13.4(b)(3). West misreads the Court of Appeals decision in an attempt to create a constitutional question that does not exist.

This argument is premised on West's notion that the Court of Appeals held that the Fourth Amendment does not apply to an involuntary detention by a police officer during an investigation. Pet. at 14-15. However, the Court of Appeals made no such ruling. The court never reached the merits of West's claim of an unlawful arrest and seizure,

because the court found that West had failed to comply with tort claim filing requirements. This case presents no constitutional question.

C. This Case Does Not Involve an Issue of Substantial Public Interest That Should be Determined by the Supreme Court

Finally, West contends that this case presents an issue of substantial public interest regarding the right to be free from unlawful seizures in violation of article 1, section 7 of the Washington Constitution and the Fourth Amendment to the U.S. Constitution. Pet. at 12; *See*, RAP 13.4(b)(4). He requests that this court accept review to confirm the existence of the rights. Pet. at 12.

First, West argues the Court of Appeals ruled that the tort filing claim requirements of RCW 4.92.100 were to be strictly construed. Pet. at 10. But the court made no such ruling. Instead, the court found that West had not filed any claim alleging an unlawful arrest and seizure as required by RCW 4.92.110 prior to suing the College. This court long ago held that a plaintiff must comply with the requirements of this statutorily created right to bring an action against the state. *See Coulter v. State*, 93 Wn.2d 205, 608 P.2d 261 (1980) (upholding RCW 4.92.110's requirement of filing a claim with the State as a condition precedent to bringing suit). Dismissal was proper since West failed to file a tort claim alleging tortious conduct by the College's police that complied with RCW 4.92.100-110.

Second, West argues that the evidence before the trial court established disputed issues of material fact as to whether he was unlawfully seized, arrested, and imprisoned by the College's police. Pet. at 10-11. However, the Court of Appeals correctly did not reach this issue given the existence of an independent reason justifying dismissal of West's claim. Reviewing courts may affirm the lower court on any grounds established by the pleadings and supported by the record. *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002). In both the trial court and Court of Appeals, West failed to provide a cogent legal argument supported by relevant authority and citation to the record regarding his claim of false arrest, unlawful seizure, or false imprisonment. When a claim is asserted without argument, citation to the record, and pertinent legal authority, it is without foundation and requires no discussion by the reviewing court. *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 223, 961 P.2d 358 (1998) (arguments unsupported by any authority need not be considered on appeal). The uncontroverted evidence establishes that West was never unlawfully seized, arrested, or imprisoned by the police. Instead, West voluntarily left the president's office but only after he requested to be issued a trespass warning, which the police declined to issue. CP 51-54, 90-91, 113-17.

There is no issue of substantial public interest under RAP 13.4(b)(4) where a case has been dismissed based on the plaintiff's failure to comply with procedure. West's petition for review on this basis should be denied.

V. CONCLUSION

The Court of Appeals correctly affirmed the dismissal of West's lawsuit because he failed to file a tort claim that complies with RCW 4.92.100 and .110. Nothing in the decision below conflicts with prior case law, raises a significant constitutional question, or involves an issue of substantial public interest. Accordingly, discretionary review should be denied.

RESPECTFULLY SUBMITTED this 5 day of December 2016.

ROBERT W. FERGUSON
Attorney General


COLLEEN G. WARREN, WSBA 16506
Senior Counsel

Office ID 91035
PO Box 40100-0100
Olympia, WA 98504-0100
360-753-6200

CERTIFICATE OF SERVICE

I certify that I served a copy of Respondents' Answer to Petition for Review on all parties or their counsel of record on the date below as follows:

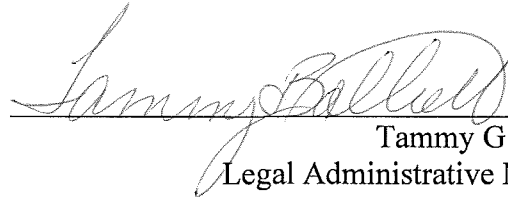
US Mail Postage Prepaid via Consolidated Mail Service

Arthur West
120 State Avenue, North East #1497
Olympia, WA 98501

Email to Arthur West at awestaa@gmail.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 5th day of December 2016 at Olympia, Wash.



Tammy G. Balliett
Legal Administrative Manager