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64324-0

No. 64324-0-I

COURT OF APPEALS, DIVISION I

STATE OF WASHINGTON

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ROGER L. SKINNER

Appellant

v.

CITY OF MEDINA , *et al*

Respondents

2016 APR 28 11:28  
FILED  
COURT OF APPEALS  
DIVISION I

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REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

**A. SUMMARY OF REPLY** ..... 1

**B. ARGUMENT** ..... 1

1. THIS APPEAL PRESENTS A CONSTITUTIONAL  
ISSUE AND CANNOT BE DECIDED ON NON-  
CONSTITUTIONAL GROUNDS ..... 1

2 ACCESS TO JUSTICE IS A FUNDAMENTAL  
RIGHT THAT CANNOT BE ABRIDGED. .... 2

3. STRICT SCRUTINY IS THE APPROPRIATE  
STANDARD OF REVIEW FOR STATUTES  
THAT ABRIDGE FUNDAMENTAL RIGHTS ..... 7

4. RCW 4.24.510 DOES NOT SURVIVE A STRICT  
SCRUTINY ANALYSIS AS IT DOES NOT SERVE  
A COMPELLING STATE INTEREST NOR IS IT  
NARROWLY TAILORED ..... 7

5. SKINNER FULLY COMPLIED WITH THE CLAIM  
FILING REQUIREMENTS OF RCW 4.96.020 .... 11

6. RCW 4.96.020 DOES NOT SURVIVE A STRICT  
SCRUTINY ANALYSIS AS IT DOES NOT SERVE  
A COMPELLING STATE INTEREST NOR IS IT  
NARROWLY TAILORED ..... 13

**C. CONCLUSION** ..... 18

**TABLE OF AUTHORITIES**

CASES

Adult Entertainment Center, Inc. v. Pierce Cy., 57 Wash.App. 435, 439,  
review denied, 115 Wash.2d 1006 (1990)..... 9

Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006),  
cert. denied, — U.S. ----, 127 S. Ct. 1844, 167 L. Ed. 2d 324 (2007).... 2

Anderson v. King County, 158 W2d 1 (2006)..... 7

Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113  
(1971)..... 5

Bullock v. Roberts, 84 Wn.2d 101, 104, 524 P.2d 385 (1974)..... 5

Carter v. Univ. of Washington, 85 Wn.2d 391, 399, 536 P.2d 618 (1975) 5

Christensen v. Ellsworth, 162 Wash.2d 365, 372-73, 173 P.3d 228 (2007)  
..... 12

Christopher v. Harbury, 536 U.S. 403, 122 S. Ct. 2179 (2002)..... 6

Dreiling v. Jain, 151 Wash.2d 900, 93 P.3d 861 (2004)..... 4

Ford Motor Co. v. Barret, 115 Wn.2d 556 (1990) ..... 6

Gates v. Port of Kalama, 152 Wn.App. 82 (Div. 2 2009)..... 11, 12, 13

Hall v. Niemer, 97 Wash.2d at 582 (1982) ..... 16

Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988) ..... 2

Housing Auth. v. Saylor, 87 Wn.2d 732 (1976)..... 6

In re Personal Restraint Petition of Rainey, 81244-6 (WASC)..... 9

In re Welfare of C.S., 168 Wn.2d 51, 54 (Wash. 2010). ..... 9

John Doe v. Puget Sound Blood Ctr., 117 Wash.2d 772, 780, 819 P.2d  
370 (1991). ..... 3, 4, 5, 6, 7

King v. King, 162 Wn.2d 379 (2007)..... 4, 5, 6, 7, 10, 14

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803). ..... 3

Medina v. PUD 1 of Benton County, 147 Wn.2d 303 (2002).... 1, 3, 4, 5, 6,  
7, 8, 11, 14, 15, 16, 18

Putman v. Wenatchee Med. Ctr., 166 Wn.2d 974 (2009)..... 3, 6, 7

RCW 7.70.150..... 3

Reyes v. City of Renton, 121 Wn.App. 498 (Div.1 2004)..... 11

Right-Price Recreation LLC v. Connells Prairie Community Council, 146  
W.2d 370 (2002)..... 10

Schoonover v. State, 116 Wn.App. 171, 175-6 (Div. 2 2003)..... 11

Segaline v. Dep't of Labor & Indus., 144 Wn. App. 312, 325, 182 P.3d  
480 (2008). ..... 10

State v. Easterling, 157 Wash.2d 167, 137 P.3d 825 (2006) ..... 4

State v. Roggenkamp, 153 Wash.2d 614, 624, 106 P.3d 196 (2005)..12, 13

Voter’s Educ. Comm. V. Wa. State Public Disclosure Comm’n, 161 W.2d  
470 (2008). ..... 7

STATUTES

RCW 4.24.510..... i, 1, 2, 4, 7, 8, 10  
RCW 4.96.020.....i, 1, 11, 12, 13, 14, 15, 17

TREATISES

Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A  
Reference Guide 24 (2002) ..... 4

CONSTITUTIONAL PROVISIONS

Article 1 § 10..... 4  
Article 1 § 29..... 5

## **A. SUMMARY OF REPLY**

The statutes, RCW 4.24.510 and RCW 4.96.020, underlying the judgments that are the subject of this appeal, as applied, violate the Washington State Constitution as well as the Constitution of the United States. In their reply, Medina incorrectly argues that the right of access to the courts is not a fundamental right. To support this argument, Medina ignores, and fails to inform this court of, relevant authority from both the United States Supreme Court and the Supreme Court of the State of Washington. (In this brief, the respondents as a group will be referred to as Medina, Medina as a municipal entity will be referred to as the City, and the remaining respondents will be referred to as the “individual defendants.”)

With regard to Skinner’s compliance with the notice of claim statute, RCW 4.96.020, Skinner fully complied with that statute in accordance with recent case law not cited by Medina.

## **B. ARGUMENT**

### **1. THIS APPEAL PRESENTS A CONSTITUTIONAL ISSUE AND CANNOT BE DECIDED ON NON-CONSTITUTIONAL GROUNDS**

The order and judgments that are the subject of this appeal awarded substantial statutory damages and statutory attorneys fees to the individual respondents. The sole basis for these damages and fees was the

express language of RCW 4.24.510. A dismissal of Skinner's claim on any other grounds would not support the judgments entered against Skinner. Therefore, the constitutional validity of RCW 4.24.510, as applied, is a central and unavoidable issue before this court.

The issues presented in this appeal are constitutional and require this Court's de novo review. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006), cert. denied, — U.S. —, 127 S. Ct. 1844, 167 L. Ed. 2d 324 (2007). Dismissal should be granted only sparingly and with care in the unusual case where "there is some insuperable bar to relief." *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988).

Should this Court decide to reverse the trial court judgments but find other grounds for dismissal, Skinner respectfully requests this Court to instruct the trial court to allow Skinner to amend his pleadings as supported by law and the facts of this case.

**2. ACCESS TO JUSTICE IS A FUNDAMENTAL RIGHT THAT CANNOT BE ABRIDGED**

The central question before this court is whether it is constitutional for the legislature to absolutely prohibit Skinner from seeking recourse, in the courts of this state, for the personal injury he suffered due to the acts of respondents.

Medina incorrectly argues that the Washington State Supreme Court, in *Putman v. Wenatchee Med. Ctr.*, 166 Wn.2d 974 (2009), did not conclude that access to justice was a fundamental right. The Supreme Court did not mince words in *Putman*. It applied a strict scrutiny standard to answer the question “Does RCW 7.70.150 Unduly Burden the Right of Access to Courts?” The Supreme Court of the State of Washington required only two paragraphs to analyze the issue and come to its conclusion:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803). The people have a right of access to courts; indeed, it is "the bedrock foundation upon which rest all the people's rights and obligations." *John Doe v. Puget Sound Blood Ctr.*, 117 Wash.2d 772, 780, 819 P.2d 370 (1991). This right of access to courts " includes the right of discovery authorized by the civil rules." *Id.* As we have said before, "[i]t is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense." *Id.* at 782, 819 P.2d 370.

Requiring medical malpractice plaintiffs to submit a certificate prior to discovery hinders their right of access to courts. Through the discovery process, plaintiffs uncover the evidence necessary to pursue their claims. *Id.* Obtaining the evidence necessary to obtain a certificate of merit may not be possible prior to discovery, when health care workers can be interviewed and procedural manuals reviewed. Requiring plaintiffs to submit evidence supporting their claims prior to the discovery process violates the plaintiffs' right of access to courts. It is the duty of the courts to administer justice by protecting the legal rights and

enforcing the legal obligations of the people. *Id.* at 780, 819 P.2d 370. Accordingly, we must strike down this law.

Thus, the Supreme Court held that merely requiring plaintiffs to obtain a certificate prior to commencing discovery was an undue burden on the right of access to the courts. The legislative requirement here is far more onerous. Pursuant to RCW 4.24.510, Skinner is absolutely barred from seeking redress in the courts for his personal injury.

Medina also incorrectly argues that the open access to courts guarantee of Article 1 § 10 of the Washington State Constitution relates only to the right of the public to observe and attend judicial proceedings. Respondents Brief, pg. 26. This argument ignores the *King v. King*, 162 Wn.2d 379 (2007) wherein the Washington State Supreme Court stated:

“We have generally applied the open courts clause in one of two contexts: ‘the right of the public and press to be present and gather information at trial and the right to a remedy for a wrong suffered.’ Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 24 (2002); *see, e.g., State v. Easterling*, 157 Wash.2d 167, 137 P.3d 825 (2006) (the right to open and accessible court proceedings); *Dreiling v. Jain*, 151 Wash.2d 900, 93 P.3d 861 (2004) (defendant's right to a public trial); *Doe v. Puget Sound Blood Ctr.*, 117 Wash.2d 772, 780, 819 P.2d 370 (1991) (the right to discovery).

*Id.* at 388 (2007).

The "right to a remedy for a wrong suffered" is precisely the right that has been denied to Skinner. Skinner is not seeking a guaranteed

remedy but he is seeking the right to pursue that remedy by proving he suffered a wrong at the hands of Medina.

The Court in *King* also held that, pursuant to Article I, § 10, full access to the courts. . . is a fundamental right." Id. at 390 (quoting *Bullock v. Roberts*, 84 Wn.2d 101, 104, 524 P.2d 385 (1974)(citing *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971)). The quotation from *Bullock* specifically asserts that full access to the courts is fundamental in divorce actions, however, nothing in Article I, § 10 limits the constitutional guarantee to matters of divorce. To eliminate any doubt about its decision, the Court in *King* reiterated at Note 15 "As we indicated above, the right of access to the courts is fundamental." Id. at Note 15.

In *Doe v. Puget Sound Blood Ctr*, 117 Wn.2d 772, 780-782 (1991)(quoting *Carter v. Univ. of Washington*, 85 Wn.2d 391, 399, 536 P.2d 618 (1975)), the Supreme Court had previously acknowledged that the right of access to the courts is fundamental without imposing any categorical limitation.

The state constitution itself declares "The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise." Const. art. I, § 29.

Medina relies on *Ford Motor Co. v. Barret*, 115 Wn.2d 556 (1990) and *Housing Auth. v. Saylor*, 87 Wn.2d 732 (1976) for the proposition that access to the courts is not a fundamental right under the Constitution. The Court, in *Housing Auth.*, declined to recognize access to courts as a fundamental right only because, in 1976, the United States Supreme Court had not yet found the same right implicit in the Fourteenth Amendment. *Id.* at 738-39. Medina's reliance on *Ford* simply ignores the Washington State Supreme Court's latter rulings in *Puget Sound Blood Center, King* and *Putman*.

In *Christopher v. Harbury*, 536 U.S. 403, 122 S. Ct. 2179 (2002) the United States Supreme Court noted that "prior cases on denial of access to courts have not extended over the entire range of claims. 536 U.S. at 412. That Court rejected, however, the notion that the right was limited to prisoner or family law cases or to cases asserting a fundamental interest. Rather, "the essence of the access claim is that official action is presently denying an opportunity to litigate for a class of potential plaintiffs. *Id.* at 413. Acknowledging that the basis for this right of access had been "unsettled", the Court held that the right is implicitly guaranteed by no less than five separate constitutional provisions. *Id.* at 415 & n.12. All of the cases cited by Medina to argue the right of access is not

fundamental predate *Harbury*, *Puget Sound Blood Center*, *King* and *Putman*.

Medina's failure to apprise this Court of these decisions, while citing over 50 other cases, calls into question the credibility of Medina's analysis supporting their arguments on this issue and the others in their brief.

**3. STRICT SCRUTINY IS THE APPROPRIATE STANDARD OF REVIEW FOR STATUTES THAT ABRIDGE FUNDAMENTAL RIGHTS**

Strict scrutiny applies to laws burdening fundamental rights.

*Anderson v. King County*, 158 W2d 1 (2006). Strict scrutiny requires a statute be narrowly tailored to serve a compelling state interest. *Voter's Educ. Comm. v. Wa. State Public Disclosure Comm'n*, 161 W.2d 470 (2008).

**4. RCW 4.24.510 DOES NOT SURVIVE A STRICT SCRUTINY ANALYSIS AS IT DOES NOT SERVE A COMPELLING STATE INTEREST NOR IS IT NARROWLY TAILORED**

RCW 4.24.510 provides, in its entirety:

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to

that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

By its own terms, RCW 4.24.510 applies to any person who communicates any information to any governmental entity regarding any matter reasonably of concern to that entity.

Medina cites RCW 4.24.500 to argue that the purpose of the statute “is to protect individuals who make good-faith reports to government agencies **because this information is vital to effective law enforcement and the efficient operation of government**” RCW 4.24.500 and Respondent’s Brief at pg. 20 (emphasis in Respondent’s Brief).

The statements allegedly made by Skinner to his co-workers were not illegal or criminal in any way and did not relate to enforcement of law. The only other “state interest” expressed by the legislature (through RCW 4.24.500) and Medina is the “efficient operation of government.”

While the Courts have never provided a bright line rule defining “compelling interest” the concept generally means something necessary or crucial, not something merely preferred. To constitute a compelling interest, the purpose must be a fundamental one and the legislation must bear a reasonable relation to the achievement of the purpose. *Adult*

*Entertainment Center, Inc. v. Pierce Cy.*, 57 Wash.App. 435, 439, review denied, 115 Wash.2d 1006 (1990). For instance, protecting a witness to a crime has been found compelling, as has been preventing children from witnessing domestic violence *In re Personal Restraint Petition of Rainey*, 81244-6 (WASC). Also found compelling was prevention of harm to a child but not protection of the “child’s best interest.” *In re Welfare of C.S.*, 168 Wn.2d 51, 54 (Wash. 2010).”

The efficient operation of government, while perhaps a laudable goal, is not necessary or crucial. Clearly, virtually all governments operate inefficiently. If governmental efficiency were necessary or crucial, there would be no viable government.

Even if efficient government was accepted as a compelling purpose, the statute does not serve that purpose. The statute protects false speech to government officials. Governmental efficiency is certainly not served by allowing false information to be provided to the government officials who then must expend state resources to investigate false information.

Furthermore, the statute is not narrowly drawn. It is, in fact, overly broad encompassing all communications to government regarding any matter reasonably of concern to the government agency. The language “any matter reasonably of concern” is so broad as to be nearly

meaningless. For instance, there is no requirement that the communication relate to the jurisdiction of that agency. There is no requirement that the person communicating the information believes such information is true. In fact, the statute protects even those who knowingly communicate false information to the government. One of the stated purposes of the statute, according to RCW 4.24.500, is the protection of good faith reports to government. Yet, despite this “purpose”, there is no language in the statute requiring the communications to be made in good faith.<sup>1</sup> In fact, the statute allows bad faith reporting and even provides immunity to “bad faith information providers.” If the plaintiff in an action can manage to prove bad faith before dismissal, the bad faith actor remains immune from suit pursuant to the statute, but simply cannot collect statutory damages or attorneys fees.

It is worthy of note that the most recent pronouncement of the Washington State Supreme Court upholding the constitutionality of RCW 4.24.510 was in the case of *Right-Price Recreation LLC v. Connells Prairie Community Council*, 146 W.2d 370 (2002), decided some five years prior to *King*. Thus, the Washington Supreme Court has not

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<sup>1</sup> Former RCW 4.24.510 (1999) contained a good faith requirement. This phrase was deleted by amendment. Laws of 2002, ch. 232, § 2; *see Segaline v. Dep't of Labor & Indus.*, 144 Wn. App. 312, 325, 182 P.3d 480 (2008).

rendered a decision on the constitutional validity of RCW 4.24.510 since it established access to justice as a fundamental right.

**5. SKINNER FULLY COMPLIED WITH THE CLAIM FILING REQUIREMENTS OF RCW 4.96.020**

Skinner filed a claim, in accordance with RCW 4.96.020, with the City of Medina on November 10, 2008 and did not file it's lawsuit against the City until eighty (80) days later, on January 29, 2009. *See* CP62 and CP 1-10. The claim filed on November 10, 2008 was not verified as the express language of RCW 4.96.020 did not require verification. The appellate court of this state had previously inferred a verification requirement on such claims, taking that requirement indirectly from the language of the statute, although the statute did not expressly require verification. *See Reyes v. City of Renton*, 121 Wn.App. 498 (Div.1 2004) and *Schoonover v. State*, 116 Wn.App. 171, 175-6 (Div. 2 2003).

Skinner respectfully suggests that the holdings in *Reyes* and *Scoonover* imposed a requirement not intended by the legislature and that Skinner's November 10, 2008 claim, although not verified, fully complied with RCW 4.96.020.

In *Gates v. Port of Kalama*, 152 Wn.App. 82 (Div. 2 2009) the appellate court analyzed the court's imposition of the verification requirement as follows:

We must first determine whether the plain language of former RCW 4.96.020(3) (2006) required claim verification. *See Christensen v. Ellsworth*, 162 Wash.2d 365, 372-73, 173 P.3d 228 (2007). We look to the statute itself, its context, its related provisions, and the entire statutory scheme. *Christensen*, 162 Wash.2d at 373, 173 P.3d 228. We also construe statutes "so that all the language used is given effect, with no portion rendered meaningless or superfluous." *State v. Roggenkamp*, 153 Wash.2d 614, 624, 106 P.3d 196 (2005) (internal quotation marks omitted) (quoting *State v. J.P.*, 149 Wash.2d 444, 450, 69 P.3d 318 (2003)). If a plain meaning analysis fails to resolve the issue, we look to legislative history and relevant case law to discern legislative intent. *Christensen*, 162 Wash.2d at 373, 173 P.3d 228.

We conclude that former RCW 4.96.020(3) (2006) did not require claim verification. The statute provided only that "[a]ll claims ... must locate and describe" the related facts and context of the claimant's injuries. Former RCW 4.96.020(3) (2006). It mentioned verification permissively only "[i]f the claimant is incapacitated from verifying, presenting, and filing the claim in the time prescribed or if the claimant is a minor, or is a nonresident of the state absent therefrom during the time within which the claim is required to be filed." Former RCW 4.96.020(3) (2006). Then, "the claim *may be verified*, presented, and filed on behalf of the claimant." Former RCW 4.96.020(3) (emphasis added). This permissive language failed to require verification even in these three exceptional cases. *See* former RCW 4.96.020(3) (2006).

Moreover, the legislative history of RCW 4.96.020 supports our interpretation that it did not require Gates to verify her claim. We are mindful that our "fundamental objective is to ascertain and carry out the [l]egislature's intent." *Campbell & Gwinn*, 146 Wash.2d at 9, 43 P.3d 4. In 1993, lawmakers removed the verification requirement from RCW 4.96.020(3). Laws of 1993, ch. 449, § 3. Because our review of the legislative record from 1993 to the 2009 change, reinstating the verification requirement, found no other relevant indicia of intent, we conclude that the 1993 amendment signaled the legislature's unmistakable intent to differentiate between claims filed against local governments and those filed against the State.

Even though the statute's plain language resolves this issue, we compare it to former RCW 4.92.100 (2002), the statute addressing tort claims against the State. " While we seek statutory harmony, we nevertheless deem that the legislature intended a different meaning when it employed different terms and " ' meant exactly what it said.' " *Roggenkamp*, 153 Wash.2d at 623-25, 106 P.3d 196 (internal quotation marks omitted) (quoting *In re Recall of Pearsall-Stipek*, 141 Wash.2d 756, 767, 10 P.3d 1034 (2000)).

*Gates v. Port of Kalama*, 152 Wn.App. 82, 89-90 (Div. 2 2009). RCW 4.96.020 was substantially amended by the legislature to require verification but such amendments did not become effective (according to the express language of the statute) until July 26, 2009, over eight months after Skinner filed his claim and nearly six months after he filed suit. For this reason, Skinner contends that he fully complied with the requirements of RCW 4.96.020 and the constitutional analysis below need not be considered.

**6. RCW 4.96.020 DOES NOT SURVIVE A STRICT SCRUTINY ANALYSIS AS IT DOES NOT SERVE A COMPELLING STATE INTEREST NOR IS IT NARROWLY TAILORED**

If this court determines that Skinner's November 10, 2008 claim did not satisfy the requirements of RCW 4.96.020, Skinner contends that the statute is unconstitutional, as discussed below.

RCW 4.96.020 presents an unconstitutional burden on Skinner's fundamental right of access to justice. In the past, before it deemed access to justice as a fundamental right, the Washington State Supreme Court

upheld RCW 4.96.020 (solely with respect to the government entity itself) on the grounds that the government, as a sovereign entity, was immune to suit and therefore could regulate the manner in which they are sued.

*Medina v. PUD 1 of Benton County*, 147 Wn.2d 303 (2002).

This analysis supporting the constitutionality of RCW 4.96.020 is wholly inapplicable to individuals who happen to be employed by the government. Such individuals have no sovereign immunity and therefore have no right to regulate the manner in which they are sued. Because suit against an individual is not a suit against the sovereign, a pre-filing requirement with respect to the individual defendants is an unconstitutional burden on the plaintiff's fundamental right of access to justice.

It is of critical importance to consider that the Court's ruling in *Medina* pre-dated the *Harbury* and *King* decisions which established access to justice as a fundamental right. The Washington State Supreme Court applied a minimal scrutiny analysis to the constitutional question raised by *Medina* with respect to RCW 4.96.020. At the time *Medina* was decided, access to justice had not yet been established as a fundamental right and therefore the constitutional analysis applied by the Court in *Medina* is no longer be applicable. In any event, the analysis applied in

*Medina* related to claims against the government entity, not individual defendants.

The question before this court is whether, with respect to the individual defendants, RCW 4.96.020 is narrowly tailored to serve a compelling state interest.

RCW 4.96.020 provides:

(1) The provisions of this section apply to claims for damages against all local governmental entities and their officers, employees, or volunteers, acting in such capacity.

.....

(4) No action shall be commenced against any local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct until sixty days have elapsed after the claim has first been presented to and filed with the governing body thereof. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty-day period. (*emphasis added*).

First, the Washington State Supreme Court in *Medina* did not address whether the statute served a compelling state interest or was narrowly drawn because, as previously noted, it did not, at that time, view access to justice as a fundamental right and therefore applied a minimal scrutiny analysis to the question, rather than the strict scrutiny analysis required when assessing the constitutionality of statutes that impair fundamental rights..

In Medina, the court did note the purpose of the statute was to “encourage negotiation and settlement of claims against the government.” Id. at 313 citing Hall v. Niemer, 97 Wash.2d at 582 (1982). It is doubtful whether such a purpose rises to the level of satisfying the “compelling state interest” test. With respect to being narrowly tailored, however, the statute fails to meet the strict scrutiny test. First, there is nothing in the statute that requires the government to engage in negotiations or settlement or even to respond at all to such claims. The statute, could for instance require the government to engage in mediation or, at the very least, meet with the plaintiff to determine whether the claim had merit and/or was subject to settlement. The statute simply imposes a 60-day waiting period on the plaintiff and does not “encourage negotiations or settlement” in any way.

The statute also unnecessarily imposes a burden on the plaintiff’s right of access to justice because it permits the government to achieve a dismissal of an action for failure to serve a pre-filing claim when another, less burdensome option is available. A narrowly tailored statute could, for instance, allow the plaintiff to file a lawsuit but then impose a sixty day waiting period prior to any dispositive action is taken in the case. This would accomplish the stated purpose of the statute without burdening plaintiff’s fundamental right to access justice.

The analysis above applies, of course, solely to the validity of the RCW 4.96.020 as to claims against the government. Even if the statute is found to be constitutionally valid with respect to claims against the government entity, claims against individual defendants require a completely separate analysis.

First and foremost, individual defendants do not have any sovereign basis for a claim of immunity. Secondly, the purpose of the statute “to encourage negotiations or settlement of claims against the government” is clearly inapplicable to claims against the individuals.

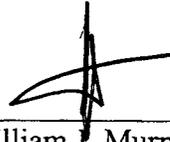
In fact, prior to 2006, RCW 4.96.020 applied only to claims against the government. The language extending this claim requirement to the government’s officers, employees, or volunteers was added to the statute, effective in 2006. Despite the addition of this language, the purpose of the statute remained the same “to encourage negotiations or settlement of claims against the government.” There simply is little, if any, connection between this purpose and providing individual defendants with a 60-day notice of a lawsuit. The same arguments made with respect to the unconstitutionality of RCW 4.96.020 in connection with claims against the government apply here but even more so as claims against individual employees are a level removed from claims against the government itself.

### C. CONCLUSION

For the reasons set forth above, and those presented in the Amended Brief of Appellant, Skinner respectfully requests this Court to reverse the judgments entered by the trial court in this matter and the dismissal of Skinner's claims.<sup>2</sup>

July 30, 2010

Respectfully submitted,



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<sup>2</sup> Medina suggests that Skinner failed, in 5 instances, to properly cite to the record. Skinner does not believe this discussion is germane to the issues on appeal but addresses the matter in the event the court desires a response. In each instance, Skinner provided a citation to the record at the conclusion of the paragraph and believes those citations are proper. Skinner is willing to provide the Court with a more detailed analysis of this matter, if the Court so desires.