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No. 645447

COURT OF APPEALS
 DIVISION 1
 OF THE STATE OF WASHINGTON

CAROL MAVIS,

Appellant

v.

KING COUNTY PUBLIC HOSPITAL NO. 2,

Respondent

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF REPLY

Evergreen Hospital asks the Court to read an additional requirement into RCW 4.96.020: that a claim can only be presented during “normal business hours.” The statute contains no such requirement. In its current form the statute reads:

A claim is deemed presented when the claim form is delivered in person or is received by the agent by regular mail, registered mail, or certified mail, with return receipt requested, to the agent or other person designated to accept delivery at the agent's office.

RCW 4.96.020, as amended July 26, 2009. Evergreen’s interpretation of RCW 4.96.020 to require that the notice be presented only during “normal business hours” creates an unwary trap for every person sending notice in compliance with the foregoing provision of the statute. First, the claimant does not know the “normal business hours” kept by a particular public entity. Second, the claimant cannot know whether the notice of claim was received before, during, or after “normal business hours.” Third, the public entity controls the methods for accepting delivery of the notice of claim and so a claimant has no means of assurance that its notice is received during “normal business hours.”

The only evidence which a claimant can rely on to know that its notice of claim was properly presented to the public entity is the return receipt showing that the notice of claim has been signed for as being

received; a return receipt which is required by the statute. *See* RCW 4.96.020(2). However, if Evergreen's interpretation of the statute is accepted, and a public entity takes delivery of a notice of claim outside of its "normal business hours," the return receipt will identify an incorrect date but the claimant will not know. A trap would be set for the unsuspecting claimant who sends notice by certified mail in compliance with the express provisions of the statute, and obtains a receipt showing the date the notice was delivered.

This is exactly what happened in the pending matter. Mrs. Mavis sent her notice by certified mail with return receipt requested to the designated individual (Steven Brown) at the designated address (12040 NE 128th Street, Kirkland, WA 98109). Her notice was delivered on Saturday, January 31, 2010, and the return receipt was signed showing that the document had been received. Mrs. Mavis did not know the 'normal business hours' of Evergreen. That information was not contained on the designation of agent recorded at the King County Auditor's office. Mrs. Mavis was also unaware of the circumstances of how her notice was received (Mrs. Mavis respectfully submits that those circumstances are a question of fact which also prevents summary judgment), and could not control how delivery occurred. All that Mrs. Mavis had to rely on to know that her notice had been presented to Evergreen was the return receipt

which showed delivery to Mr. Brown on January 31, 2010. Mrs. Mavis appropriately relied on the return receipt to start counting the 60-day waiting period required by the statute, and timely filed her lawsuit on the 62nd day.¹

This Court's decision as to Evergreen's interpretation of RCW 4.96.020, will not be limited to the prior statute, as it existed before July 26, 2009. The current form of the statute now expressly provides that sending notice by certified mail with return receipt requested is an acceptable means for presenting a claim. If the court finds that presentation under the statute can only occur during "normal business hours" it will be adding additional requirements to the statute and setting new precedent. That precedent will create confusion and undermine the concept of presentation by certified mail with return receipt requested, because the claimant will not be able to rely on the return receipt showing the date the notice was received for purposes of complying with the statute.

¹ The Court might inquire why Mrs. Mavis did not simply wait additional days to make sure that she had waited a full 60 days. First, Mrs. Mavis had no reason to disbelieve the date identified on the return receipt. Second, the window of opportunity for filing a notice of claim is small because RCW 4.96.020(4) provides that: "For the purposes of the applicable statute of limitations, an action commenced within five court days after the sixty calendar day period has elapsed is deemed to have been presented on the first day after the sixty calendar day period elapsed." If Mrs. Mavis had waited only two additional days to file her lawsuit, she might have faced a summary judgment by Evergreen arguing that her lawsuit was not commenced within five days after receipt by Evergreen on January 31, 2009.

II. FACTUAL DISPUTES

The following facts are disputed by the parties. All inferences must be interpreted in the light most favorable to the non-moving party *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 690, 977 P.2d 836 (1999). Accordingly, the following facts submitted by Mrs. Mavis, and all reasonable inferences therefrom, must be taken as true for purpose of resolution of this pending matter.

A. Beverly Barksdale Testified That She Was the “Designated Agent” of King County Public Hospital No. 2.

Counsel for Evergreen Hospital argues that Beverly Barksdale never testified that she was the designated agent for Evergreen Hospital. This directly contradicts, paragraph 2 of Beverly Barksdale declaration in which she states: “I am the Executive Assistant to Steven Brown the Chief Executive Officer and designated agent of King County Public Hospital District No. 2.” RP 154-156. Ms. Barksdale’s statement is consistent with Resolution No. 818-08 specifically identifying her as the designated agent to receive the claim. RP 133-136. It is further consistent with the fact that the notice of claim was directed internally to Ms. Barksdale and not Steve Brown. RP 121. In fact, Beverly Barksdale does not testify in her declaration that she ever presented the claim to Steve Brown, and there is no evidence in the record that would support the

inference that Steve Brown ever received Mrs. Mavis's claim. The evidence before the Court shows Ms. Barksdale acting in the role of designated agent, consistent with Resolution No. 818-08.

There is also no evidence in the record to support Evergreen's argument that Resolution No. 818-08 was an "internal" document because "Evergreen had decided to make changes to it." This self-serving argument is made without support in the record. Resolution No. 818-08 was presented to the Court by Evergreen as an operative document and all inferences should resolve in favor of Ms. Mavis for purposes of summary judgment. RP 109.

B. There Is No Evidence in the Record to Support Evergreen's Assertion of the Circumstances of Delivery of Ms. Mavis's Notice of Claim.

In its briefing at page 5, Evergreen describes the alleged circumstances of how Mrs. Mavis's letter was delivered to Evergreen. These circumstances are not supported by any evidence in the record. Specifically, there is no testimony from Ms. Emma Bach as to the circumstances by which she received the notice of claim. There is not even evidence to support Evergreen's labeling of Ms. Bach as a "switchboard operator." Most importantly, there is no evidence to support Evergreen's conclusory statement that Ms. Bach did not have authority to sign for certified mail directed to Steve Brown. The only evidence

contained in the record is that Ms. Bach did in fact sign the return receipt for certified mail directed to Steven Brown. RP 38. In the absence of contrary evidence, the presumption on summary judgment should run in favor of Mrs. Mavis, and it should be presumed that Ms. Bach did have authority to sign for Steve Brown as she did.

C. Carol Mavis Properly Challenged Steve Brown's Role as the Designated Agent of Evergreen.

Mrs. Mavis timely challenged Evergreen's compliance with RCW 4.96.020 to the Superior Court. Mrs. Mavis initially noted the deficiency in her first Response to Summary Judgment dated 10/5/09 at footnote 1. RP 22. Mrs. Mavis's brief filed on October 30, 2009 provides a more detailed analysis in section entitled: "A. CEO Steve Brown was *not* the designated agent of Evergreen Healthcare." RP. 73-75. What followed was largely the same argument as is contained in the Appellant's opening brief. Evergreen replied to this argument in its supplemental reply dated November 6, 2009, arguing that Resolution No. 818-08 was not an operative document. RP 183. There is no basis for Evergreen's assertion on appeal that Ms. Mavis "never claimed or argued to the trial court that Beverly Barksdale, Executive Assistant to CEO Brown, was the designated agent for receipt of claims in January, 2009."

III. REPLY

A. Evergreen Fails to Show Compliance with RCW 4.96.020(2) and Therefore Cannot Raise the Statute as a Defense.

RCW 4.96.020(2) requires that a public entity (1) appoint an agent to receive claims, and (2) record the identity of the designated agent in the county where the entity is located. “The failure of a local governmental entity to comply with the requirements of this section precludes that local governmental entity from raising a defense under this chapter.”

In the Brief of Respondent, Evergreen fails to address how it complied with these two specific requirements of the Statute. It ignores the requirements of the statute and argues that a change to the designated agent cannot occur until a new designation of agent is filed with the King County Auditor’s office. Evergreen provides no legal support for its position.

Mrs. Mavis’s complaint concerning Evergreen’s failure to properly identify its designated agent with the King County Auditor is significant. The purpose of RCW 4.96.020(2) is to give a public entity 60 days to investigate and settle meritorious claims. *Troxell v. Rainier Pub. Sch. Dist. #307*, 154 Wn.2d 345, 351, 111 P.3d 1173 (2005). The 60 days is required by the statute is for the benefit of the public entity. In fact, this case concerns whether Evergreen received a full 60 days to investigate and settle the claim (counting from the following Monday after the notice was

delivered). However, the 60-day stay for a public entity to investigate meritorious claims is thwarted if the notice of claim is not being delivered to the person responsible for receiving and investigating the claims. For the intention of the statute to be realized, the person identified with the County Auditor must also be the same person internally considered the designated agent by the public entity. The inconsistency matters, and in this case Mrs. Mavis sent her claim to Steven Brown (identified with the Auditor), but the evidence reveals that Ms. Barksdale was acting the role of designated agent at Evergreen. This evidence includes:

- Ms. Barksdale testified she was the designated agent;
- Resolution No. 818-08 identifies Ms. Barksdale as the designated agent;
- Mrs. Mavis's notice of claim shows internal routing to Ms. Barksdale; not to Mr. Brown.

Evergreen urges strict interpretation of RCW 4.96.020 against Mrs. Mavis. However, to enforce this statute Evergreen must first show that it has strictly followed the statute including (1) that it appointed an agent to receive claims, and (2) that the entity of that appointed agent is recorded county where the entity is located. Substantial compliance is not sufficient, and Evergreen fails to show that it complied with the statute. Reversal of the Superior Court is appropriate on this basis alone.

B. Mrs. Mavis Did Not Argue Inconsistent Positions. If Judicial Estoppel Is Applied, It Should Be Applied Against Evergreen.

The primary goal of judicial estoppel is to prevent a party from taking an inconsistent factual position that gives them a tactical advantage in litigation. *Arnco v. Glenfed Financial Corp.*, 746 F. Supp. 1249, 1257 (D.N.J. 1990). Judicial estoppel does not preclude a party from asserting two different legal positions. *Holst v. Fireside Realty, Inc.*, 89 Wn. App. 245, 259, 948 P.2d 858 (1997).

In this case, Mrs. Mavis argues two distinct legal positions: (1) that Resolution No. 818-08 should not be enforced against Mrs. Mavis because it was not recorded with the King County Auditor, and (2) that Evergreen Healthcare failed to comply with the requirements of RCW 4.96.020(2) when it did not identify Beverly Barksdale as its designated agent. These are not inconsistent legal positions. To manufacture its argument, Evergreen blatantly misquotes the Appellant's Response to Summary Judgment by omitting the footnote from the quotation, which reads as follows:

RCW 4.96.020(2) provide[s] that "the failure of a local governmental entity to comply with the requirements of this section precludes that local governmental entity from raising a defense under this chapter." In fact, this Court should require proof that Evergreen Hospital Resolution No. 818.08 was recorded at the King County Recorder's Office before even considering the merits of the Defendant's Motion for Summary Judgment.

RP 22.

In its argument that the doctrine of judicial estoppel should be applied against Ms. Mavis, Evergreen ignores the fact that it is the party who submitted Resolution No. 818.08 as an operative document, before reversing course and claiming that it was not operable or enforceable. If judicial estoppel is to be applied, it should be applied against Evergreen.

Resolution No. 818-08 was presented to the Superior Court by Evergreen as part of its Motion for Summary Judgment. Evergreen submitted it as an operative document stating: “Evergreen Healthcare specifically created a public resolution designating the proper persons for receipt of a Notice of Claim against the Hospital. *See* Exhibit D, Resolution No. 818-08.” RP 109. Evergreen did not submit this document with an explanation to the Superior Court or Mrs. Mavis that this document was somehow an “inoperative” or “unenforceable.” It was only after Mrs. Mavis pointed out the inconsistency between the designation contained in Resolution 818-08 and the designation recorded with the County Auditor that Evergreen reversed course and began arguing that a document it submitted as part of its pleadings was somehow inoperative. This reverse course was made without support of evidence. There is no evidence contained in the record for either the Superior Court or this Appellate Court to find that Resolution 818-08 was not an operable document by Evergreen.

If there is a party occupying inconsistent and contradictory positions, then it is Evergreen which submitted Resolution No. 818-08 as an operable document and then changed course after discovering the deficiency presented by its own documents.

C. Prospective Application of the 2009 Amendments Expressly Applies to RCW 4.96.020 Subsection (3) Only.

The legislature's express language prospectively applying the 2009 amendments to RCW 4.96.020, applies only to RCW 4.96.020 subparagraph (3). By negative inference, the prospective application of the statute does not apply to subsections (1) and (2), which remain largely unchanged except for the legislature's clarification of when a claim is deemed "presented." The text of the amended statute reads in full:

(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, except that claims involving injuries from health care are governed solely by the procedures set forth in chapter 7.70 RCW and are exempt from this chapter.

(2) The governing body of each local governmental entity shall appoint an agent to receive any claim for damages made under this chapter. The identity of the agent and the address where he or she may be reached during the normal business hours of the local governmental entity are public records and shall be recorded with the auditor of the county in which the entity is located. All claims for damages against a local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, shall be presented to the agent within the applicable period of limitations within which an

action must be commenced. A claim is deemed presented when the claim form is delivered in person or is received by the agent by regular mail, registered mail, or certified mail, with return receipt requested, to the agent or other person designated to accept delivery at the agent's office. The failure of a local governmental entity to comply with the requirements of this section precludes that local governmental entity from raising a defense under this chapter.

(3) For claims for damages presented after July 26, 2009, all claims for damages must be presented on the standard tort claim form that is maintained by the risk management division of the office of financial management, except as allowed under (c) of this subsection. The standard tort claim form must be posted on the office of financial management's web site.” [Emphasis added.]

The legislature chose to add the restrictive clause “for claims for damages presented after July 26, 2009” only to subparagraph (3) of RCW 4.96.020. In interpreting a statute the court must begin by looking at the plain language of the statute. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009). Also, it is necessary to look at the whole statute when interpreting the statute, and not just the phrase at issue. *In Re Sehome Park Care Center, Inc.*, 127 Wn.2d 774, 778, 903 P.2d 443 (1995).

When reading the statute “as a whole” the introductory clause in RCW 4.96.020(3) was intended to restrict RCW 4.96.020(3) only. The addition of the same introductory clause to RCW 4.96.020(1) would have had the effect of restricting the 2009 amendments to all claims for

damages occurring after July 26, 2009. The legislature in drafting the statute specifically chose to apply the restrictive clause only to RCW 4.96.020(3), and not the entirety of RCW 4.96.020. Evergreen seeks to alter the plain meaning of the statute by applying an introductory clause restricting one section to the entire amendment. This interpretation is not reasonable and does not comply with the plain meaning of the statute when read as a whole.

D. The 2009 Amendments to RCW 4.96.020(2) Must Be Applied Retroactively as a Curative Amendment.

With no evidence that legislature intended to restrict RCW 4.96.020(2) to claims occurring after July 29, 2009, the Court should apply the amendment retroactively as a curative statute. *E.g., Washington Waste Systems, Inc. v. Clark County*, 115 Wn.2d 74, 78, 794 P.2d 508 (1990). An amendment which “clarifies ambiguities in older legislation without changing prior case law, presumably acts retroactively.” *Id.* A statute is considered ambiguous if the interpretation of the plain language is susceptible to more than one meaning. *Estate of Haselwood*, 166 Wn.2d at 498.

RCW 4.96.020(2), as it existed before the amendment, was ambiguous because the word “presented” was not defined. Litigants were left to their own device to interpret the statute and guess how and when a

claim should be “presented.” For relevant example, was sending the notice by certified mail with return receipt requested sufficient, or was process service required to ensure that the notice be delivered in hand to the designated agent? The July, 2009, amendment to RCW 4.96.020(2) clarified the meaning of “presented” by adding: “A claim is deemed presented when the claim form is delivered in person or is received by the agent by regular mail, registered mail, or certified mail, with return receipt requested, to the agent or other person designated to accept delivery at the agent's office.” It is apparent from a plain reading of the statute that the legislature was simply providing clarity as to how and when a claim is deemed “presented.”

The amendment to RCW 4.96.020(2) does not change any prior case law. Evergreen Healthcare’s reliance on *Ehrhardt v. City of Seattle*, 33 Wash. 664, 74 P. 827 (1903), is misplaced. In *Ehrhardt*, the issue before the Court was whether “incapacitation” would excuse a claimant’s failure to file a claim within 30 days of the injury as required by the Seattle City Charter. 40 Wash. at 221- 222. The plaintiff attempted to file his claim with the City of Seattle in person and after normal business hours on the 30th day after his injury. *Id.* The plaintiff could not file the claim because the Clerk’s office was closed, and returned the next business day to file his claim. *Id.* The plaintiff argued that he was not

required to present the claim within thirty days because he had been incapacitated and unable present the claim. *Id.* at 223. The Supreme Court found that there was insufficient evidence of incapacitation, and that the plaintiff had been required to properly file the claim within 30 days. *Id.*

The facts and law in *Ehrhardt* do not apply to this case. The legal issue involved here is whether a claim that was undisputedly *received* by Evergreen Hospital is deemed *presented* for the purposes of RCW 4.96.020(2); not whether an incapacitated person is excused from filing a timely claim. The *Ehrhardt* court did not seek to define the ambiguous language of RCW 4.96.020(2), and does not clarify whether a claim that is *received* is deemed *presented*. Unlike *Ehrhardt*, in this case Evergreen physically received a properly addressed notice of claim. Subsequent legislative clarification has deemed this receipt proper “presentation” by defining a previously ambiguous statutory term. As such, the 2009 amendments which define and clarify “presented” are curative, and should be applied retroactively.

E. Applying the 2009 Amendments Does Not Alter the Purpose of the Statute.

It is well settled law that the purpose of the notice requirement in RCW 4.96.020 is to give the public entity sufficient time to review the

claim and investigate the allegations. *Troxell v. Rainier Public School District #307*, 154 Wn.2d 345, 351, 111 P.3d 1173 (2005); *Estate of Connelly Ex Rel Connelly v. Snohomish County Pub. Util. Dist. #1*, 145 Wn. App. 941, 944-45, 187 P.3d 842 (2008); *Renner v. City of Marysville*, 145 Wn. App. 443, 451-52, 187 P.3d 283 (2008). Here, Evergreen will not have been prejudiced in any efforts to review and investigate the claims of Mrs. Mavis.

Evergreen is attempting to use a statute intended to shield the hospital from expensive and needless litigation as a sword to strike down meritorious claims. Without any statutory or case law to support its position, Evergreen claims that the statute must be read to require Mrs. Mavis to serve her claim Monday through Friday between 8:00 a.m. to 5:00 p.m. Evergreen Hospital also seeks to have the Court add additional language to the current statute by requiring a claimant serving notice by certified mail do so with "restricted service." Essentially, Evergreen asks the Court to read RCW 4.91.020(2) as follows:

All claims for damages against a local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, shall be presented ***between the hours of 8:00 am to 5:00 pm Monday through Friday*** to the agent within the applicable period of limitations within which an action must be commenced. A claim is deemed presented when the claim form is delivered in person or is received by the agent by regular mail, registered mail, or certified mail ***with***

restricted service, with return receipt requested, to the agent or other person designated to accept delivery at the agent's office. [Emphasis added.]

Evergreen does not offer case law or legislative history to support these changes to the statute.

Evergreen's attempt to add additional requirements to the statute without any statutory or case law support cannot be the basis for dismissal of Mrs. Mavis otherwise meritorious claim. The reading of the statute proposed by Mrs. Mavis is consistent with the purpose of the statute, the 2009 amendments by the Legislature, and does not prejudice the Evergreen's ability to investigate and settle the claim.

F. The Precedent Set in *Stevens v. City of Centralia* Should Be Applied to the Case at Bar.

In *Stevens v. City of Centralia*, 86 Wn. App. 145, 152, 936 P.2d 1141 (1997), Division II of the Court of Appeals held that a claim was constructively presented when first presented to the City office when it is tendered to the correct party. The Clerk refused to accept the claim because it was not printed on the clerk's required form. *Id.* In reversing the trial court's order granting summary judgment, the appellate court held that the date of the first attempt to tender the claim. *Id.* The court analogized the presentation as a "tender" holding: "Here, the case is more analogous to 'tendering' a claim that is refused. Under such

circumstances, City Light waived any lack of formality in the ‘tender’ by refusing to accept the claim.” *Id.*

Applying *Stevens*, Evergreen undisputedly received the notice of claim on Saturday, January 31, 2009. Evergreen is hoping to be rewarded by accepting delivery of the document on a weekend, arguing that even though it was received it was not legally “presented” until the following Monday during normal business hours. However, the *Stevens* case is clear that a properly tendered claim is constructively presented to the public entity. The facts of this case are more egregious than the *Stevens* case because Evergreen actually took possession of the document on January 31, 2009. Evergreen simply does not want to recognize its possession of the document until the following Monday, February 2, 2009, so that it can claim that Mrs. Mavis failed to strictly follow the statute. Mrs. Mavis respectfully asks the Court to hold constructive presentation of the notice of claim on the day it was received.

G. The Case Law Cited by Evergreen Is Properly Distinguished.

The cases cited by the Evergreen relating to constructive notice do not apply here. These cases concern claimants who failed to properly file their claims with the appropriate person, at the appropriate address, or in the appropriate manner. In this case, Mrs. Mavis fully and faithfully complied with the statute in mailing a notice by certified mail to the

appropriate person at the appropriate address. The only question is whether the notice is deemed “presented” on the same day it was “received.”

In *Cole v. City of Seattle*, 64 Wn. 1, 3, 166 P. 257 (1911), the claimant failed to submit her notice of claim until months after the claim was due. The claimant argued that “informal notices” by way of telephone calls to two city councilmen, a verbal discussion with the project foreman, and a letter to the president of the city council was sufficient notice. *Id.* This opinion was rejected by the Court. *Id.* at 6-7. In the case at bar, Mrs. Mavis mailed a notice of claim conforming with the statute to the agent designated for service recorded in the county auditor’s office, and that notice was received.

The following cases cited by Evergreen are all distinguished on the basis that they concern deficiencies in the method and manner of service of the notice of claim: *Burnett v. Tacoma City of Light*, 124 Wn. App. 550, 104 P.3d 677 (2004) (Plaintiffs never presented the claim for damages with the City Clerk as required by City Ordinance); *Margetan v. Superior Chair Craft Co.*, 92 Wn. App. 240, 963 P.2d 907 (1998) (Filing fee for the complaint was paid after the statute of limitations had run); *Faucher v. Burlington Northern, Inc.*, 24 Wn. App. 711, 603 P.2d 844 (1979) (evidence from the surrounding circumstances indicate that the

party served did not have sufficient authority to accept service); *Harberd v. Kettle Falls*, 120 Wn. App. 498, 84 P.3d 1241 (2004) (Personal service of the notice of claim was not served upon the correct party); *Seattle National Bank v. Dickinson*, 72 Wn. 403, 130 P. 372 (1913) (Attorney attempted to serve claim when the office was closed but was unable. The office of the executor did not receive the claim until after the period for claims had run). The cases do not apply here where the method of service is sufficient and the only question is *when* the claim is deemed presented.

The foregoing cases cited by Evergreen all contain a material deficiency in the service of the notice of claim made knowingly by the claimant. Here that is simply not the case. Mrs. Mavis complied with all of the statutory requirements: she prepared a notice of claim that complied with the statute; she mailed the notice of claim by certified mail, return receipt requested; and the notice of claim was received on January 31, 2009. Evergreen seeks to add statutory provisions requiring “restrictive delivery” during “normal business hours,” but that is simply not required by the statute.

H. Evergreen Healthcare Improperly Denied Requests for Admission Number 21 and 22.

Requests for admission are used to settle factual matters that will not be disputed at trial. *Thompson v. King Feed & Nutrition Service, Inc.*

153 Wn.2d 447, 460, 105 P.3d 378 (2005). Issues central to the matter or legal conclusions do not have to be conceded in requests for admissions. *Id.* CR 36 does allow for “statements of opinions of fact or of the application of law to fact.” *Id.* at 461.

A party improperly denying a request for admission will have an order granted against them for failure to admit:

“(c) Expenses on Failure To Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees.”

Unlike CR 37(a), the application to the court is not required to be made by a separate motion, nor does the rule require certification with CR 26(i).

Here, Mrs. Mavis requests for admission seeks to eliminate two basic contentions for trial, (1) the date that Evergreen *received* the notice of claim form, and (2) that Mrs. Mavis’s notice of claim complied with the requirements of RCW 4.96.020. Neither of these facts has been disputed by Evergreen, yet they denied the proper request for admission anyway.

Request for Admission No. 21 sought to have Evergreen admit that it received Mrs. Mavis on January 31, 2009. Evergreen contends that it did not need to admit this fact because it is a legal conclusion regarding

the presentation of the notice of claim. Evergreen is attempting to justify their denial of Request for Admission No. 21 by inserting the term “presented” where it was not included by counsel for Mrs. Mavis. It is undisputed that Evergreen *received* the notice of claim on January 31, 2009, however, the legal issue and issue on appeal is whether *receipt* of the notice of claim sufficient for *presentation* under RCW 4.96.020(2). When Mrs. Mavis *presented* the claim is the legal issue, when Evergreen *received* the claim is an undisputed factual issue. Evergreen cannot be allowed to insert a legal issue into any otherwise meritorious request for admission to justify their wrongful denial.

Request for Admission No. 22, seeks the admission that the contents of Mrs. Mavis “document” comply with RCW 4.96.020. This is a simple application of the facts to law as contemplated by the *Thompson* court. The ultimate issue regarding the notice of claim is when Mrs. Mavis presented the document not whether the contents of the “document” complied with RCW 4.96.020. Evergreen wrongly denied this request because the notice of claim itself is not at issue. Evergreen’s sole contention is that the lawsuit was filed prior to the 60 day period expiring.

CR 37(c) does not require that a party engage in and certify that they have met the requirements of CR 26(i). It does not require a separate “motion” to award attorneys’ fees and expenses. Rather, the statute

requires an application to the court for costs and attorneys' fees associated with proving that denial was wrongful. Mrs. Mavis made such an application, and the trial court wrongfully denied her request for attorney fees. Evergreen has not stated a sufficient reason for the denial of Requests for Admission No. 21 and 22, and, therefore, sanctions are mandatory under CR 37(c).

IV. ARGUMENTS NOT CONTESTED

Notably absent from the Brief of Respondent is any argument in response to Mrs. Mavis's reliance on the 2009 Amendment to RCW 4.96.020, as strong evidence of the intent of the first statute. See *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 953 P.2d 88 (1998). As explained in Appellant's Opening Brief, Washington case law authority provides that where the legislature has amended a statute to clarify or interpret a phrase of doubtful or vague meaning in a former statute, the Courts are not at liberty to speculate further on legislative intent. See *Miller v. St. Regis Paper Co.*, 60 Wn.2d 484, 374 P.2d 675 (1962). Mrs. Mavis respectfully submits that this authority is dispositive of this case because the 2009 amendment to the statute clarifies the legislature's intent that a claim be deemed "presented" within the meaning of RCW 4.96.020(2) when it is sent by certified mail with return receipt requested.

V. CONCLUSION

The question before the Court is: what date was Appellant Carol Mavis's notice of claim deemed "presented" to Evergreen for the purpose of compliance with the RCW 4.96.020. Mrs. Mavis respectfully submits that her notice of claim was "presented" on Saturday, January 31, 2009, when it was received by Evergreen by certified mail and the return receipt signed. Mrs. Mavis's claim is supported as follows:

(1) The July 2009 amendment to the statute provides that "a claim is deemed presented when the claim form is delivered in person or is received by the agent by regular mail, registered mail, or certified mail with return receipt requested, to the agent or other person designated to accept delivery at the agent's office." This amendment is strong evidence of the intent of the first statute. *See Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 755, 953 P.2d 88 (1998).

(2) The July 2009 amendment to the statute is curative in that it resolves ambiguity as to the term "presented," and should therefore be applied retroactively. *See Tomlinson v. Clark*, 188 Wn.2d 495, 510, 825 P.2d 706 (1992).

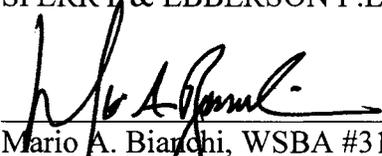
(3) Washington law recognizes constructive receipt of claims when equity dictates. *See Stevens v. City of Centralia*, 86 Wn. App. 145, 936 P.2d 1141 (1997).

(4) There is no authority for Evergreen's interpretation of RCW 4.96.020 to require presentation of the notice of claim only during "normal business hours." The case of *Ehrhardt v. City of Seattle*, 40 Wash. 221, 82 P. 296 (1905), is properly distinguished from the case at hand.

Mrs. Mavis respectfully submits that the Trial Court's Order Granting Summary Judgment was in error and asks this Court of Appeals to reverse and remand.

DATED: 28 day of June, 2010.

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CERTIFICATE OF SERVICE

I certify that a true copy of the document on which this certificate appears was made on the 28th day of June, 2010 was delivered to the following via legal messenger:

Lee M. Barns/Amy K. Robles
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DATED this 28th day of June, 2010.



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