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COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

LISA GATES

Respondent

vs.

PORT OF KALAMA, a Washington Municipal Corporation, *et al*

Appellant

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Port of Kalama's ("the Port's") motion for summary judgment before the trial court posed a simple question: did Lisa Gates ("Gates") comply with the requirements of RCW 4.96.020, a notice provision statute? The evidence submitted to the trial court was uncontroverted and established that Gates had not complied with the notice requirements of the statute. Nonetheless, despite the overwhelming evidence before it, the trial court denied the Port's motion.

As the Court of Appeals Commissioner noted in the Ruling Granting Review, the only means by which this case can continue is through the application of the doctrine of equitable estoppel to deny the Port's right to assert its affirmative defense concerning RCW 4.96.020. Gates argues that equitable estoppel excuses her failure to comply with RCW 4.96.020; however, that is incorrect. If the doctrine applies at all, then the Port would be bound by the misinformation provided by a totally unrelated agency. This, however, does not excuse Gates' failure to comply with RCW 4.96.020 nor does it change the fact that the trial court's decision with regard to the motion for summary judgment was erroneous.

Nothing in Gates' responding brief provides a supportable basis for application of equitable estoppel in this circumstance. Furthermore, Gates does not come to the court of equity with clean hands, having elected not to comply with RCW 4.96.020 in reliance upon what she believed was a failure by the Port. Application of equitable estoppel against a

governmental entity is strongly disfavored and its application in this instance would be unprecedented and would undermine the legislative intent for notice statutes. Furthermore, dismissal of Gates' claims against the Port would not preclude her from moving forward with her claims against LAM Management, the other defendant in this civil action.

II. ARGUMENT

A. Motion to Strike Attachments to Respondent's Revised Brief

Gates submitted the Brief of Respondent on or about October 27, 2008, and attached a number of documents that were not part of the record in this matter pursuant to RAP 9.1. The Court Clerk of the Court of Appeals notified Gates' counsel through correspondence dated October 28, 2008 that the attachments could not be considered by the Court.

Gates then submitted a revised Brief of Respondent, received by the Port on November 10, 2008, which included similar attachments that are not part of the record pursuant to RAP 9.1. The Port, thereby, asks the Court of Appeals to strike the attachments submitted by Gates as part of her revised Brief of Respondent.

B. Standard of Review

Gates argues that the applicable standard of review is a mixed question of law and fact wherein the trial court should be reversed only if the decision was clearly erroneous, citing to *Kramarevcky v. DSHS*, 65 Wn. App. 14, 82 P.2d 1227 (1992). However, in *Kramarevcky*, the Court of Appeals was reviewing an administrative decision regarding an

agency's determination. Furthermore, the Court in *Kramarevcky* determined that the issues raised on certification concerned the application of law to facts and were, therefore, conclusions of law subject to *de novo* review.¹

Washington case law has established that review of a summary judgment is *de novo* and the appellate court performs the same inquiry as the trial court.

C. Application of Equitable Estoppel

Gates argues that, since she received misinformation from the Auditor's office, she could not possibly comply with RCW 4.96.020 and therefore was excused from doing so. However, nothing in the notice statute supports this position. Indeed, Gates was able to successfully communicate with the Port and with the proper agent at the Port from her first communication on January 28, 2005. She had no difficulty providing the Port with information concerning her claim. There would have been no obstacle to her providing the Port with a personally verified claim at that time, had she wanted to do so. Even before she contacted the Auditor's office, Gates had initiated communication with the registered agent at the Port. Therefore, her argument that she could not have possibly complied with RCW 4.96.020(2) and was excused from doing so is refuted by her own actions.

¹ *Kramarevcky v. Department of Social and Health Services*, 64 Wn. App. 14, 18, 822 P.2d 1227 (1992).

Gates argues that because the Port responded to her initial communication and began an investigation that, somehow, that excuses her failure to comply with the notice statute. However, Washington law is clearly established that the governmental agency has no affirmative duty to advise the claimant as to the notice provision and, further, that a governmental agency's initiation of an investigation does not serve as a waiver. The plaintiff in *Hardesty v. Stenchever* filed her claim for damages at the Office of Risk Management at the University of Washington rather than at the Office of Risk Management at the Department of General Administration in Olympia.² The plaintiff claimed that the state "should be equitably estopped from asserting her failure to comply with RCW 4.92 as an affirmative defense because no one at the Office of Risk Management at the UW informed her that she was also required to file a claim in Olympia."³ The court held: "We reject these arguments because Washington courts have consistently held that strict compliance with the requirements of notice of claim statutes is a condition precedent to recovery. The proper remedy for a plaintiff's failure to comply with the statute is dismissal of the suit."⁴ As the Court of Appeals has held, "[i]n the claims statute, the sovereign has established the method by which it can be held liable. As we have noted, previous

² *Hardesty v. Stenchever*, 82 Wn.App. 253, 258-59, 917 P.2d 577 (1996).

³ *Id.*

⁴ *Id.* at 259.

case law has held that strict compliance with the filing requirements is mandatory.”⁵

RCW 4.96.020(2) requires a governmental entity to record the identity of its agent for service; however, it does not expressly excuse a claimant from complying with RCW 4.96.020(3) if the governmental agency fails to record the identity of an agent or if the Auditor provides incorrect information concerning the recorded information. Furthermore, in this instance the Port did record the identity of its agent with the Auditor’s office, so even if the statute provided an excuse where a governmental entity failed to comply, that excuse would not apply to Gates.

Gates alleges that the trial court found “clear, cogent and convincing evidence” that the elements of equitable estoppel were met. However, that is simply not possible since nowhere in the briefing or oral argument before the trial court did Gates even raise the issue of manifest injustice or impairment of governmental powers – elements that must be established for the application of the doctrine. Now, in her appellate brief, Gates attempts to make the argument for these elements, but they were not made at the trial court level and were not part of the findings made by the trial court.

In discussing the *Strand* decision, Gates does not reconcile the major dispositive differences between the facts of that case and the facts

⁵ *Levy v. State of Washington*, 91 Wn.App. 934, 944, 957 P.2d 1272 (1998).

before this Court. Gates mentions in passing the length of time involved in the *Strand* case, but states that this factor was not dispositive. BR at 15. However, the length of time, coupled with the expenses incurred by the citizens, was largely dispositive in the *Strand* decision. Furthermore, Gates does not address the fact that *Strand* is a property rights case, not a case concerning compliance with notice provision statutes. The difference is significant since notice provision statutes must be strictly complied with before there can be any claim against the sovereign.

As Gates correctly points out in her brief, neither the Port nor Gates had control over what information the Cowlitz County Auditor records or provides to the public. BR at 14. However, Gates did have control over whether she would file a personally verified claim in accordance with RCW 4.96.020(3). In fact, she was able to communicate directly with the Port's registered agent, even without the information from the Auditor's office. Certainly the Port had no affirmative duty to advise Gates of her need to comply with the notice provision. Therefore, it was within her control to comply with RCW 4.96.020(3), despite the misinformation from the Auditor's office.

Gates' contention that *Strand* is instructive to prevent governmental collusion is attenuated at best. The facts disclose that Gates herself failed to meet the requirements of RCW 4.96.020(3) and it is on that basis alone that her claims should be dismissed. Suggesting that "chaos would reign" and agencies would be tempted to file different agents on a regular basis is not a legitimate concern and is not sufficient to

vitiate the notice provisions that are a condition precedent to filing a civil action against a governmental agency. The Port filed its agent with the Auditor in 2001, several years prior to the Gates' claim.

Contrary to Gates' assertion, *Fitzgerald* is analogous because it addresses the issue of reliance upon misinformation from a governmental agency and the actions taken by the party receiving that information. As with Gates, the plaintiff in *Fitzgerald* was not an "innocent bystander", but made a choice based on a calculated risk. In this case, Gates made a choice not to comply with RCW 4.96.020(3), taking a calculated risk that the Port had not recorded the identity of an agent. There was nothing to prevent Gates from providing the Port with a personally verified claim. It would not have been an onerous burden and she was already in communication with the Port. The requirements of the notice provision are fairly simple and straightforward and easily within the reach of Gates, had she made the decision to comply. Like the claimant in *Fitzgerald*, however, she gambled on the fact that the Port allegedly had not filed with the Auditor in accordance with RCW 4.96.020(2).

RCW 4.96.020(2) provides the Port with an affirmative defense to challenge a claimant's failure to comply with the notice provisions unless the Port failed to record its agent. This is another distinction between the case at bar and *Strand*. *Strand* does not address whether equitable estoppel can preclude a governmental agency from asserting an affirmative defense to which it is entitled after it has complied with its statutory requirements.

More significantly, equitable estoppel does not apply where both parties can determine the law and have knowledge of the underlying facts.⁶ Washington courts have determined that the interpretation of a statute, as in this case, is purely legal and, as such, equitable estoppel does not apply.⁷ In this case, Gates had knowledge of the underlying facts and was able to determine the law regarding compliance with notice provisions. Furthermore, it is clearly established under Washington case law that compliance with the notice provisions is mandatory before a claim can exist. Therefore, equitable estoppel should not be applied.

Plaintiff cites *Shoop v. Kittitas County*, 108 Wn.App. 388, 30 P.3d 529 (2001) for the proposition that RCW 4.96 is not a jurisdictional statute and that the failure to strictly comply with the filing requirements of this statute does not result in lack of jurisdiction. As an initial matter, *Shoop* involves a statute that concerns venue, not a claims filing statute, so it has no relevance to the issue before this Court. Furthermore, *Shoop* stands for the opposite proposition: the *Shoop* Court held that the legislature may determine whether a court has subject matter jurisdiction:

⁶ *Schoonover*, 116 Wn.App. at 180; *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000); *Laymon v. Department of Natural Res.*, 99 Wn.App. 518, 526, 994 P.2d 232 (2000) (equitable estoppel does not apply where the representations allegedly relied on are matters of law, rather than fact).

⁷ *Schoonover*, 116 Wn.App. at 181.

Nevertheless, unless the Supreme Court modifies the holdings of *Aydelotte* and *Cossel*, this court must follow those precedents and assume that the Legislature may, by statute, cause the subject matter jurisdiction of each superior court to vary depending on which county is named as a defendant in any particular case.⁸

Furthermore, *Shoop* confirms that, if the court has no subject matter, dismissal is mandatory:

*When a court lacks subject matter jurisdiction in a case, dismissal is the only permissible action the court may take.*⁹

The Washington State Supreme Court has stated that, although the legislature waived sovereign immunity by enacting RCW 4.96 *et seq.*, such a waiver is conditioned on fulfilling the notice requirements:

In 1967, the Legislature enacted RCW 4.96.010, which abolished the doctrine of sovereign immunity for the political subdivisions of the state. This statute and RCW 35.31.030, however, require that as a condition precedent to maintaining an action in court, an injured party must comply with the applicable claims filing laws. These laws, including SMC 5.24.005, typically require that an injured party file a claim with the political subdivision, describing the accident, the party's current address, and the amount of the claim.¹⁰

⁸ *Shoop v. Kittitas County*, 108 Wn.App. 388, 402, 30 P.3d 529 (2001).

⁹ *Id.* at 390 (citations omitted) (emphasis added).

¹⁰ *Daggs v. City of Seattle*, 110 Wn.2d 49, 52, 750 P.2d 626 (1988).

Gates offers no authority to contradict the Port's contention that failure to strictly comply with the filing requirements of a claims statute results in lack of subject matter jurisdiction. In adopting RCW 4.96 *et seq.* the legislature gave up sovereign immunity only to the extent that the claimant strictly complies with the notice provisions outlined in the statute.

Gates' argument that she has substantially complied with RCW 4.96.020(3) also flies in the face of long established Washington precedent that makes it clear that strict compliance is required.

RCW 4.96.010 states:

(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.¹¹

¹¹ RCW 4.96.010 (2008) (emphasis added).

RCW 4.96.010 expressly states that comporting with the statutory requirements regarding the filing of a claim for damages is a condition precedent to any lawsuit.

RCW 4.96.020 states, in pertinent part:

(3) All claims for damages arising out of tortious conduct must locate and describe the conduct and circumstances which brought about the injury or damage, describe the injury or damage, state the time and place the injury or damage occurred, state the names of all persons involved, if known, and shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six months immediately prior to the time the claim arose. If 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, the claim may be verified, presented, and filed on behalf of the claimant by any relative, attorney, or agent representing the claimant.

(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.¹²

¹² RCW 4.96.020 (2008) (emphasis added).

Compliance with RCW 4.96 *et seq.* requires certain actions: (1) no civil action may be filed until at least 60 days after a proper claim is filed with the governmental entity; (2) filing a claim comporting with the statutory requirements is a condition precedent to the commencement of a civil action; and (3) the claim, which must be filed prior to the civil action, must be personally verified. Each and every one of these requirements must be strictly construed or the civil action must be dismissed.¹³

In *Schoonover*, the Court of Appeals stated that the compliance with the verification requirement could not be liberally construed but must be strictly construed:

Furthermore, in contrast to the contents of the claim, which we liberally construe for substantial compliance, we strictly construe the statutory filing requirements. Accordingly, whether Phelps verified and signed Schoonover's claim in his capacity as his attorney or his agent is ultimately immaterial, as neither status carries more authority than the other. Thus, unless Schoonover can demonstrate that he falls into one or more of the three statutory exceptions, Phelps' verification is deficient.¹⁴

¹³ *Medina v. Public Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303, 53 P.3d 993 (2002); *Lewis v. City of Mercer Island*, 63 Wn.App. 29, 817 P.2d 408 (1991) (filing requirements of RCW 4.96.010 are conditions precedent to commencing suit and must be strictly complied with); *Andrews v. State*, 65 Wn.App. 734, 738-39, 829 P.2d 250 (1992) (statutory requirements are a mandatory condition precedent and will be strictly construed).

¹⁴ *Schoonover v. State of Washington*, 116 Wn.App. 171, 178-79, 64 P.3d 677 (2003).

In *Medina v. Public Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303, 53 P.3d 993 (2002), the plaintiff filed a cause of action prior to the expiration of sixty days after the presentation of the claim.¹⁵ The plaintiff in *Medina* argued that the court should apply a substantial compliance standard in analyzing whether the plaintiff's early filing fulfilled the requirements of RCW 4.96.020(4).¹⁶ The *Medina* Court noted that the Court of Appeals has required strict compliance with all statutory notice claim provisions except as to the content of the claim.¹⁷ The Court went on to state:

Where time requirements are concerned, this court has held that "failure to comply with a statutorily set time limitation cannot be considered substantial compliance" with the statute.¹⁸

Gates essentially argues that since the Port began its investigation, the purpose of providing notice to the Port has been served. RB at 24. The *Medina* plaintiff made the same argument, "that because the purposes

¹⁵ *Medina v. Public Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303, 315, 53 P.3d 993 (2002).

¹⁶ *Id.* at 316.

¹⁷ *Id.*

¹⁸ *Id.* at 317.

of the statute, even when the results appear unduly harsh.²¹ In *Sievers v. Mountlake Terrace*, 97 Wn.App. 181, 983 P.2d 1127 (1999), the plaintiff failed to comply with the statute by only one day, commencing her action 59 days after filing her claim; nonetheless, the Court of Appeals determined that dismissal was appropriate.²²

Additionally, Gates' argument that RCW 4.96.020(3) does not require personal verification has also been well settled through Washington case law. Although RCW 4.96 does not include the same language contained in RCW 4.92.100 ("All such claims shall be verified"), there can be no reasonable interpretation of RCW 4.96 that does not require personal verification. In *Schoonover*, the plaintiff attempted to use this minor discrepancy to challenge the constitutionality of the statute.²³ The Court disagreed and, in fact, concluded that the only reasonable interpretation of RCW 4.96 requires personal verification:

Schoonover also argues that the personal verification requirement is arbitrary because under RCW 4.96.020, similarly situated claimants against local governmental entities do not have to verify their tort claims, whereas claimants against the State do. He claims that a

²¹ *Sievers v. Mountlake Terrace*, 97 Wn.App. 181, 183, 983 P.2d 1127 (1999); *Pirtle v. Spokane Pub. School Dist.*, 83 Wn.App. 304, 309, 921 P.2d 1084 (1996).

²² *Sievers v. Mountlake Terrace*, 97 Wn.App. 181, 184-85, 983 P.2d 1127 (1999).

²³ *Schoonover*, 116 Wn.App. at 181, 64 P.3d 677 (2003).

comparison of the two statutes creates different classes of tort plaintiffs and raises equal protection issues.

The purpose of statutory interpretation is to determine and give effect to legislative intent, which is primarily determined from the statutory language. We will “assume[] that the legislature means exactly what it says” and not construe unambiguous language. Further, we cannot read into a statute what we believe the legislature has omitted, be it an intentional or inadvertent omission. And “[e]very provision must be viewed in relation to other provisions and harmonized if at all possible.” Statutes relating to the same subject “are to be read together as consisting a unified whole, to the end that a harmonious total statutory scheme evolves which maintains the integrity of the respective statutes.

Here, although RCW 4.96.020 does not expressly require verification of a tort claim against a local governmental agency, it does contain language from which we can infer such a requirement. The language describing the requirements for tort claims is identical in RCW 4.96.020 and RCW 4.92.100. Both statutes require verification by the claimant of the claim unless the claimant meets one of the three statutory exceptions. *Reviewing the statutory scheme as a whole to the end of maintaining the integrity of the respective statutes, we conclude that RCW 4.96.020 has the same verification requirements as RCW 4.92.100*

²⁴

Therefore, applying *Schoonover*, it cannot be disputed that RCW 4.96 requires personal verification by the claimant.

²⁴ *Id.* at 183-84 (citations omitted) (emphasis added).

III. CONCLUSION

The Port sought a ruling from the trial court based upon overwhelming evidence that Gates failed to provide the Port with a personally verified claim at least sixty days prior to filing a civil action. Despite the overwhelming evidence, the trial court denied the Port's motion. Gates' argument that equitable estoppel should be applied to deny the Port's affirmative defense is not supported by existing case law or precedent. The only Washington State application of equitable estoppel of one governmental agency by another is in the context of property rights, a distinct area of law not implicated by the facts of this case. There is no precedent for applying equitable estoppel to excuse a claimant's failure to comply with a notice requirement, which is jurisdictional and set out by the legislature.

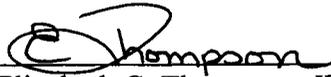
The trial court's conclusion that Gates is entitled to bring suit against the Port, a governmental entity, without complying with the requirements of RCW 4.96.020(3) is erroneous and an abuse of the trial court's discretion.

The Port's summary judgment motion was a simple one and, ultimately, asked a simple question: did Gates comply with the requirements of RCW 4.96.020? Even the trial court did not dispute that Gates failed to comply with the statute. The Port was entitled to summary adjudication and the trial court's erroneous order should be reversed. The Port respectfully requests that this Court reverse the trial court's order.

DATED this 18th day of November, 2008.

Respectfully submitted,

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I, Susan D. Walters, legal assistant to Elizabeth C. Thompson, counsel for Petitioner Port of Kalama, hereby certify that on November 18, 2008, a copy of the Brief of Appellant was forwarded via overnight mail, to be delivered no later than November 21, 2008, to Respondent's counsel at the address below:

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and via ABC Legal Services, Inc., to be delivered no later than November 20, 2008, to counsel for LAM Management at the address below:

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DATED this 18th day of November, 2008.

By *Susan D. Walters*
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