

No 41915-7-II

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STATE OF WASHINGTON  
BY  COUNTY

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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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M. GWYN MYLES, individually and as Personal Representative of the  
Estate of WILLIAM LLOYD MYLES, deceased.

Appellant,

STATE OF WASHINGTON, a governmental entity; JOHN DOE  
EMPLOYEE(s) and JANE DOE EMPLOYEE(s), employees of the  
STATE OF WASHINGTON; CLARK COUNTY; a municipality; JOHN  
DOE EMPLOYEE(s) and JANE DOE EMPLOYEE(s), employees of  
CLARK COUNTY; CARLOS VILLANUEVA-VILLA and JANE DOE  
VILLANUEVA-VILLA, husband and wife, and the marital community  
composed thereof; and R.H. BRUSSEAU and JANE DOE BRUSSEAU,  
husband and wife, and the marital community composed thereof,

Respondents.

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APPEAL FROM SUPERIOR COURT OF CLARK COUNTY  
HONORABLE RICHARD MELNICK  
CLARK COUNTY CAUSE NO. 09-2-00347-9

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BRIEF OF APPELLANT

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**I. ASSIGNMENT OF ERRORS**

**A. ASSIGNMENT OF ERRORS**

1. The trial court erred in granting Defendant's motion for summary judgment.

**B. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS**

1.1 Did the trial court err as a matter of law by granting Defendant's Motion for Summary Judgment when the claim-filing procedures of RCW 4.96 violate the doctrine of separation of powers and are thus unconstitutional?

1.2 Did the trial court err as a matter of law by granting Defendant's Motion for Summary Judgment because the Legislature's amendment of RCW 4.96.020 is retroactive?

1.3 Did the trial court err as a matter of law by granting Defendant's Motion for Summary Judgment when Defendant waived its right to assert the defense that Plaintiff failed to comply with the tort claim-filing procedures?

1.4 Did the trial court err as a matter of law by granting Defendant's Motion for Summary Judgment when it was equitably estopped from asserting that Plaintiff failed to comply with the tort claim-filing procedures?

1.5 Did the trial court err as a matter of law in granting Defendant's Motion for Summary Judgment because equitable tolling applies thus allowing Plaintiff to cure any defect in its tort claim-filing?

## **II. STATEMENT OF CASE**

### **A. Procedural History of the Case**

M. Gwyn Myles as Plaintiff and Personal Representative of the Estate of her deceased husband, William Myles, at the trial level and as Appellant herein, filed a tort claim on October 30, 2008 with Clark County, Washington Risk Management Division, Defendant at the trial court level and now the Respondent herein, by sending the claim via certified mail to the specified address on Defendant Clark County's tort claim form. (CP 64 – 72). On Monday November 3, 2008, Plaintiff received a letter dated, October 31, 2008, from Mark K. Wilsdon, Risk Manager for Defendant, acknowledging receipt of Plaintiff's tort claim notice. (CP 75). In his letter of October 31, 2008, Mr. Wilsdon denied Plaintiff's claim "for both liability and indemnity." (CP 75). Mr. Wilsdon further explained the basis for his denial of Plaintiff's tort claim and advised Plaintiff of other avenues available to her in order to obtain settlement proceeds. (CP 75). On November 6,

2008, Plaintiff received yet another letter dated November 5, 2008, from the Risk Manager's office assigning a tort claim number (No. 08134) to Plaintiff's claim and acknowledging Defendant's receipt of the tort claim notice. (CP 76). This letter advised Plaintiff that it may take as many as 60 days or more to "assess the liability, damages, injury and other factors." (CP 76). On January 29, 2009, Plaintiff filed a complaint against Defendant in Clark County Superior Court. (CP 1). Plaintiff did not receive any further communication from the Defendant subsequent to the letter of November 5, 2008 until Plaintiff received a copy of Defendant's Answer to the Complaint on or about May 8, 2009.

On October 30, 2009, Defendant filed its Motion for Summary Judgment. (CP 27). On November 25, 2009, Plaintiff filed her response to Defendant's Motion for Summary Judgment. (CP 49). On December 4, 2009, Defendant filed its Rebuttal Memorandum in Support of Motion for Summary Judgment. On May 24, 2010, Plaintiff filed a Supplemental Response to Defendant's Motion for Summary Judgment. (CP 95). On June 23, 2010, Defendant filed a Reply Memorandum in Support of its Motion for Summary Judgment. On July 6, 2010, Plaintiff filed a Motion for Order Allowing Additional Briefing and Argument,

which was granted by the Court on August 27, 2010. (CP 118, 142). On July 29, 2010, Plaintiff filed her Second Supplemental Response to Defendant's Motion for Summary Judgment. (CP 120). On August 10, 2010, the Court issued its First Opinion in regards to Defendant's Motion for Summary Judgment, siding with Defendant but delaying the entry of any order until the pending motion regarding issues of constitutionality could be heard by the Court. (CP 128-132).

On August 16, 2010, Defendant filed its Second Supplemental Reply Memorandum in Support of its Motion for Summary Judgment. On August 24, 2010, Plaintiff filed her Response to Defendant's Supplemental Reply Memorandum in Support of Defendant's Motion for Summary Judgment. (CP 133). On September 24, 2010, Plaintiff filed her Third Supplemental Response to Defendant's Motion for Summary Judgment specifically addressing the issue of severability should the statute at issue be declared unconstitutional. (CP 144). On September 27, 2010, Defendant filed its Memorandum regarding Severability. On January 6, 2011, the Court issued its Opinion regarding the Constitutionality issue in favor of Defendant and entered its

Second Order Granting Defendant's Motion for Summary Judgment. (CP 151, 156).

On March 10, 2011, Plaintiff filed a Motion for Order Supplementing the Order Granting Defendant Clark County's Motion for Summary Judgment which was granted on March 17, 2011. (CP 159, 162). Plaintiff filed her Notice of Appeal on March 18, 2011.

**B. STATEMENT OF FACTS**

This lawsuit concerns the wrongful death of William Lloyd Myles. (CP 1). The Complaint was filed by his wife, M. Gwyn Myles, personally and as Personal Representative of his estate, seeking to recover damages for his wrongful death. (CP 1). One of the named Defendants in the Complaint is Clark County and John and Jane Doe employee(s). (CP 1). On October 30, 2008, Plaintiff filed a tort claim with Clark County, Washington Risk Management Division by sending the claim via certified mail to the specified address on Defendant's form. (CP 64-72). The address specified on Defendant's tort form was: 1300 Franklin, Sixth Floor, P.O. Box 5000, Vancouver, WA 98666-5000. (CP 65-66, 73-74). At the top of this claim form in bolded capital letters are the words "**RISK MANAGEMENT DIVISION.**" (CP 65,

73). There was absolutely no indication on Defendant's tort claim form that indicated the form was to be sent to any other address other than the one on the form. (CP 65-66, 73-73). In addition, at the time Plaintiff filed her tort claim form with Defendant, there were no additional instructions located with the tort claim form provided by Defendant.

On November 3, 2008, Plaintiff received a letter dated October 31, 2008, from Mark K. Wilsdon, Risk Manager for Defendant, acknowledging receipt of Plaintiff's tort claim notice. (CP 75). In this letter, Mr. Wilsdon denied Plaintiff's claim "for both liability and indemnity." (CP 75). Mr. Wilsdon further explained the basis for his denial of Plaintiff's tort claim and advised Plaintiff of other avenues available to her in order to obtain settlement proceeds. (CP 75). On November 6, 2008, Plaintiff received yet another letter, dated November 5, 2008, from the Risk Manager's office assigning a tort claim number (No. 08134) to Plaintiff's claim and acknowledging Defendant's receipt of the tort claim. (CP 76). This letter advised Plaintiff that it may take as many as 60 days or more to "assess the liability, damages, injury, and other factors." (CP 76).

The physical mailing address for the Clark County Risk Management Office and the Board of Clark County Commissioners, where Ms. Louise Richards works, are exactly the same. (CP 51). Both mailing addresses are the same address as located on the tort claim notice form filed by Plaintiff, 1300 Franklin, Sixth Floor, Vancouver, Washington, 98666-5000. (CP 51) In addition, the offices of the Clark County Risk Management office and the office of the Clark County Commissioners are both on the sixth floor in the same building and only steps apart. (CP 51).

### **III. ARGUMENT**

#### **A. STANDARD OF REVIEW**

Appellate courts review decisions on motions for summary judgment de novo.<sup>1</sup> Summary judgment is only affirmed when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.<sup>2</sup> All facts and reasonable inferences are considered in the light most favorable to the nonmoving party, and summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one

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<sup>1</sup> *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

<sup>2</sup> *Id.*; CR 56(c).

conclusion.<sup>3</sup> The moving party has the burden to show that there is no genuine issue of material fact.<sup>4</sup> Once the moving party satisfies that burden, the nonmoving party must present evidence showing that material facts are in dispute.<sup>5</sup> Summary judgment is proper if the nonmoving party fails to do so.<sup>6</sup>

**B. THE TRIAL COURT ERRED BY GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT BECAUSE THE CLAIM-FILING PROCEDURES OF RCW 4.96 VIOLATE THE SEPARATION OF POWERS OF DOCTRINE AND ARE THEREFORE UNCONSTITUTIONAL.**

The trial court erred in granting Defendant’s Motion for Summary Judgment because the claim-filing requirements of former RCW 4.96.020 are unconstitutional because they violate the separation of powers doctrine. The sixty day notice requirement under RCW 4.96.020 violates the separation of powers doctrine because it is in direct conflict with CR 3(a), thus making it unconstitutional.

The Washington State Constitution does not contain a formal separation of powers clause, but “the very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine.”<sup>7</sup> The doctrine of separation of powers divides power

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009).

into three coequal branches of government: executive, legislative, and judicial.<sup>8</sup> The doctrine does not “depend on the branches of government being hermitically sealed off from one another” but ensures “that the fundamental functions of each branch remain inviolate.”<sup>9</sup> If “the activity of one branch threatens the independence or integrity or invaded the prerogatives of another,” it violates the separation of powers.<sup>10</sup>

Some fundamental functions are within the inherent power of the judicial branch, including the power to promulgate rules for its practice. If a statute appears in conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court will prevail in procedural matters and the statute will prevail in substantive matter.<sup>11</sup>

CR 3(a), in pertinent part, states that “[e]xcept as provided in Rule 4.1, a civil action is commenced by service of a copy of a summons together with a copy of a complaint, as provided in rule 4 or by filing a complaint.” In contrast the pertinent language of former RCW 4.96.020 (4) states that “[n]o action subject to the claim filing requirements of this section shall be *commenced* against any local government entity, or against any local government entities. . . for damages arising out of tortious conduct until sixty calendar days have elapsed after the claim has first been

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<sup>8</sup> *City of Fircrest v. Jensen*, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006).

<sup>9</sup> *Hale v. Wellpiniy Sch. Dist. No. 49*, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009).

<sup>10</sup> *Jensen*, 158 Wn.2d at 394.

<sup>11</sup> *Putnam v. Wenatchee Valley Med. Ctr.* 166 Wn.2d 974, 980, 216 P.3d 374 (2009)

presented to the agent of the governing body thereof.” (Emphasis added).

In *Waples v. Yi*<sup>12</sup> the State Supreme Court ruled on an identical issue involving RCW 7.70.100 (1), the statute that requires a ninety day notice requirement for medical malpractice claims. In *Waples* the Court examined whether RCW 7.70.100 (1) conflicted with CR 3(a) and whether the notice provision encroached upon the judiciary’s power to set court rules. The Court ruled that “[r]equiring notice adds an additional step for *commencing* a suit to those required by CR 3(a). (Emphasis added). And, failure to provide notice required by RCW 7.70.100(1) results in a lawsuit’s dismissal . . . even where the complaint was properly filed and served pursuant to CR 3(a).”<sup>13</sup> The Court went on to hold that “[t]he conflict between RCW 7.70.100(1) and CR 3(a) cannot be harmonized and both cannot be given effect. If a statute and a court rule cannot be harmonized, the court rule will generally prevail in procedural matters and the statute in substantive matters.<sup>14</sup> “Substantive law ‘creates, defines, and regulates primary rights,’ while procedures involve the

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<sup>12</sup> 169 Wn.2d 152, 234 P.3d 187 (2010).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

‘operations of the courts by which substantive law, rights and remedies are effectuated.’”<sup>15</sup> RCW 7.70.100(1) does not address the primary rights of either party and deals only with the procedures to effectuate those rights. Therefore, RCW 7.70.100(1) involves procedural law and will not prevail over CR 3(a).”<sup>16</sup> Because RCW 7.70.100(1) conflicts with the judiciary’s power to set court procedures it is unconstitutional.

In *Putnam*, the Court case that *Waples* is based upon, the State Supreme Court ruled that RCW 7.70.150, which required a certificate of merit for medical malpractice claims, was also unconstitutional, because it conflicted with CR 8 and 11, that this conflict involved procedural law and not substantive law, and that the certificate of merit requirement thereby encroached upon the judiciary’s power to set rules.<sup>17</sup>

Our case is identical to those of *Waples* and *Putnam*. Plaintiff was required, pursuant to RCW 4.96.020(4), to file notice with Defendant prior to *commencing* its lawsuit. The claim notice requirement in RCW 4.96.020(4) is almost identical to the claim notice requirement in RCW 7.70.100(1). RCW 4.96.020(4) is

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<sup>15</sup> *Id.*, citing *Putnam*, 166 Wn.2d at 984 (quoting *Jensen*, 158 Wn.2d at 394); *Bennett v. Seattle Mental Health*, 241 P.3d 1220 (Wash 2010).

<sup>16</sup> *Id.*

<sup>17</sup> *Putnam*, 166 Wn.2d 974.

procedural in nature, as it does not create, define, or regulate primary rights; rather it functions as an operation of the courts by which substantive law, rights and remedies are effectuated. RCW 4.96.020(4) directly conflicts with the requirements of CR 3(a) and conflicts with the judiciary's power to set court procedures and therefore is unconstitutional. Therefore, the court erred in granting Defendant's Motion for Summary Judgment and ruling that RCW 4.96.020(4) is not unconstitutional.

The Court should strike only the notice provisions of RCW 4.96.010 because it contains a severability clause and therefore it is apparent that the legislature would have enacted this statute without the notice requirement. Striking the notice provision contained in RCW 4.96.010 would render RCW 4.96.020 inapplicable. "Ordinarily the part of an enactment that is constitutionally infirm will be invalidated, leaving the rest intact."<sup>18</sup> Only when the provisions connection to the remaining portions of the statute is so strong "that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purpose

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<sup>18</sup> *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 67, 109 P.3d 405 (2005), citing *Guard v. Jackson*, 83 Wn. App. 325, 333, 921 P.2d 544 (1996).

of the legislature.”<sup>19</sup> If the court concludes that the Legislature would have passed the statute without the unconstitutional provision, then the proper remedy is to strike only that unconstitutional provision.<sup>20</sup> The presence of an applicable severability clause is even greater evidence that the legislature would have enacted the constitutional portions of the statute without the unconstitutional portions.<sup>21</sup>

RCW 4.96.010 contains a severability clause. The severability clause states that “[i]f any provision of this act or its application to any person or circumstances is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.” (CP 150) The inclusion of a severability clause in RCW 4.96.010 demonstrates that the legislature did not want the entire statute stricken if a portion of it was found to be unconstitutional. Further, the inclusion of a severability clause demonstrates that the notice requirement of RCW 4.96.010 is not so intimately connected with the balance of the statute to make it useless to accomplish the purpose of the

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<sup>19</sup> *Id.*

<sup>20</sup> *C.A.M.A.*, 154 Wn.2d at 67, citing *Griffin v. Eller*, 130 Wn.2d 58, 69-70, 922 P.2d 788 (1996).

<sup>21</sup> *C.A.M.A.*, 154 Wn.2d at 67-68, citing *State v. Anderson*, 81 Wn.2d 234, 236, 501 P.2d 184 (1972).

legislature, which was to waive sovereign immunity for local governments, such as Defendants.

Further, in *Waples*, the case that is directly on point with our case, the Supreme Court only struck down the notice provision of RCW 7.70.100(1). RCW 7.70.100(1) is similar to RCW 4.96.010 in that the statute contains numerous other provisions in addition to the notice requirement. In both statutes the notice requirement is only a small portion of the overall statute. The purpose behind RCW 4.96.010 was the waiver of sovereign immunity for local government agencies, like Defendant. Similar to the action the Supreme Court took in *Waples*, the Court in this case should rule the tort notice claim provision to be unconstitutional and strike only the notice requirement of RCW 4.96.010, thus rendering RCW 4.96.020 inapplicable, and leaving the remainder of RCW 4.96.010 intact.

**C. THE TRIAL COURT ERRED BY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE LEGISLATURE'S 2009 AMENDMENT OF RCW 4.96.020 IS RETROACTIVE.**

The trial court erred as a matter of law in finding that the Legislature's 2009 amendment to RCW 4.96.020, HB 1553 did not apply retroactively. In 2009, the Legislature amended RCW

4.96.020 with HB 1533, requiring that claims under this section, and all procedural requirements in this section, be construed liberally so that substantial compliance with claim filing procedures is satisfactory. This amendment is curative and remedial and therefore should apply retroactively to Plaintiff's claim.

Although statutory amendments are presumed to be prospective only,<sup>22</sup> “[t]his presumption can be overcome if (1) the legislature specifically provides for retroactivity, (2) the amendment is curative, or (3) the amendment is remedial.”<sup>23</sup> A “curative” statutory amendment is one that clarifies or technically corrects an ambiguous statute.<sup>24</sup> A “remedial” change is one that relates to practice, procedures, or remedies and does not affect a substantive or vested right.<sup>25</sup> When the legislature does not expressly indicate that the amendment applies retroactively the question becomes whether the amendments are either remedial or

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<sup>22</sup> *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 47, 785 P.2d 815 (1990).

<sup>23</sup> *Woods v. Bailet*, 116 Wn. App. 658, 669, 67 P.3d 511 (2003), citing *State v. T.K.*, 139 Wn.2d 320, 332-33, 987 P.2d 63 (1999).

<sup>24</sup> *Woods*, 116 Wn. App. at 669-70, citing *State v. Smith*, 144 Wn.2d 665, 674, 30 P.3d 294 (2001).

<sup>25</sup> *Woods*, 116 Wn. App. at 670, citing *State v. Humphrey*, 139 Wn.2d 53, 63, 983 P.2d 1118 (1999).

curative.<sup>26</sup> The courts have consistently used legislative history in determining how to apply the tort claim notice statutes.<sup>27</sup>

In 2001, the Legislature amended the claim-filing statute to require local governmental entities to appoint an agent to receive claims.<sup>28</sup> “According to the Senate Judiciary Committee report that accompanied that bill it was intended to be a ‘technical fix’ that would ‘lower the transactional costs for litigants.’”<sup>29</sup> The testimony in favor of the bill was summarized as follows: “the current law is confusing as to how a claim for damages is to be served on a local government. The concept in the bill is the same as having a registered agent receive process for a corporation.”<sup>30</sup> The 2001 amendments to the claim-filing statute are remedial and should be applied retroactively to cases in which retroactive application would promote their remedial purpose.<sup>31</sup>

The 2009 passing of HB 1553 by the Legislature amended RCW 4.96.020. (CP 77-87). This amendment, amongst other things, made substantial compliance with the procedural

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<sup>26</sup> *Woods*, 116 Wn. App. at 670.

<sup>27</sup> See *Gates v. Port of Kalama*, 152 Wn. App. 82, 90, 215 P.3d 983 (2009).

<sup>28</sup> *Woods*, 116 Wn. App. at 669, LAWS OF 2001, ch. 119, § 2.

<sup>29</sup> *Woods*, 116 Wn. App. at 669, citing SENTA COMM. ON JUDICIARY REP., H.B. 1530 (March 27, 2001).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

requirements of the claim filing statutes satisfactory. (CP 77-87).

The amendment, in relevant part, provides that:

- (5) With respect to the content of claims under this section and **all procedural requirements** in this section, this section **must be liberally construed so that substantial compliance will be deemed satisfactory.**<sup>32</sup>

If a local government's tort claim incorrectly lists the agent to whom the claim is to be filed, the local government is deemed to have waived any defense related to the failure to file with the proper agent.<sup>33</sup> "The claim filing statutes are to be liberally construed with respect to the procedural requirements of the statute and substantial compliance will be deemed satisfactory."<sup>34</sup>

To comply with this amendment, which states that:  
(3)(c) Local governmental entities shall make available the standard tort claim form described in this section **with instructions on how the form is to be presented and the name, address, and business hours of the agent of the local governmental entity...**

Laws of 2009, ch. 433, § 3 (emphasis added), Defendant dramatically changed its tort claim form. (CP 88). The new tort claim form specifically states where the form is to be mailed or delivered and to whom. (CP 88). In addition, the only address that

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<sup>32</sup> Laws of 2009, ch. 433, § 1 (emphasis added).

<sup>33</sup> HB 1553 Report, pg. 3.

<sup>34</sup> *Id.*

was on the prior tort claim form prior to the 2009 amendments, 1300 Franklin, Sixth Floor, P.O. Box 5000, Vancouver, Washington has been removed. (CP 88).

The 2009 amendments made by the Legislature to the claim-filing procedure relate to practice, procedures, and remedies and do not affect a substantive or vested right and are therefore remedial and curative. The testimony in support of the 2009 amendments was almost exactly the same as that of the testimony in support of the 2001 amendments. The 2009 amendments were made for the exact same reason that the 2001 amendments were made, to restore the original intent of the statutes of providing notice so that the government can get the facts of the claim and investigate.<sup>35</sup> The claim-filing statutes were not meant to be “gotcha” statutes.<sup>36</sup> In making these amendments, the Legislature relied on testimony about cases being dismissed based upon technical interpretations of the statutes and the fact that prior to these amendments local governments were being rewarded for deception hidden in the claim forms.<sup>37</sup> It is apparent that the 2001

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<sup>35</sup> HB 1553 Report, pg. 4.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

amendments did not remedy the confusion and additional amendments were required.

The pre-2009 amended Clark County tort-claim form clearly rewards the Defendant for hidden deception because it allowed the Defendant to list the wrong address for serving the claim on Clark County, thus resulting in individuals failing to strictly comply with RCW 4.96.020. (CP 73-74). To further mislead claimants, this form on its face states that it conforms with RCW 4.96.020. (CP 73-74). This statement has since been removed from the newly revised form currently provided by Defendant. (CP 88-90). The City of Vancouver, Washington's tort-claim form, designed in September of 2004, clearly makes no attempt at deception by listing exactly on the tort claim form the address the claim is to be sent too. (CP 91-92). The tort claim form created for the State of Washington in June of 2004 also makes no attempt to deceive or mislead a claimant and clearly provides the address where the form is to be mailed. (CP 93-94).

Defendant argued in its motion for summary judgment that HB 1553 is not remedial or curative and should only apply prospectively because the bill had an effective date of July 26, 2009 and because language in the bill states that it is to apply to

claims presented after July 26, 2009. Defendant further argued that in applying HB 1553 retroactively would give the Legislature authority to overrule the courts. Defendant's arguments are without merit. As noted above, the Court of Appeals has previously determined that amendments to RCW 4.96.020 are remedial and should be applied retroactively when the retroactive application would promote their remedial purpose. This is the exact situation we have in this case. If in fact Plaintiff did not strictly comply with the prior claim-filing procedures it is evident she substantially complied with the statute and that retroactive application of the 2009 amendments would promote the amendments remedial purpose. Defendant should not be rewarded for their hidden deception and misleading form. It is quite apparent that other jurisdictions, such as the City of Vancouver and State of Washington, did not find it necessary to use a deceptive form to trick individuals into believing they had complied with the claim-filing procedures.

In its opinion, the trial court determined that because "[t]he strict interpretation of RCW 4.96.020's procedural requirements have been in existence for years and the Legislature did not seek to change them when the cases were decided; therefore, the changes

are not remedial or curative.” (CP 131). This statement is in direct contradiction to the Appellate Court’s ruling that the 2001 amendments were to be retroactively applied. The 2009 amendments are further attempts of the Legislature to remedy and cure the problems with RCW 4.96. Genuine issues of material fact exist because the 2009 amendments to RCW 4.96.020 are retroactive and would promote their remedial purpose. Therefore, the trial court erred in granting Defendant’s Motion for Summary Judgment and this decision should be reversed.

**D. THE TRIAL COURT ERRED BY GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT BECAUSE DEFENDANT HAD WAIVED ITS RIGHT TO ASSERT THE DEFENSE THAT DEFENDANT FAILED TO COMPLY WITH THE CLAIM-FILING PROCEDURES.**

The trial court erred as a matter of law in finding that Defendant had not waived its right to assert the defense that Plaintiff failed to properly file her tort claim because Defendant did take litigious action in this case and induced defendant into thinking it would defend the case on the merits and not the claimed procedural defect. Defendant has waived its right to assert the defense that Plaintiff failed to comply with the claim filing provisions because the assertion of this defense is inconsistent with

Defendant's prior behavior and Defendants were dilatory in asserting the defense. The general purpose of the claim-filing statute is "to allow government entities time to investigate, evaluate, and settle claims" before they are sued.<sup>38</sup> Under the doctrine of waiver certain affirmative defenses, such as insufficient service of process, may be considered to have been waived by a defendant as a matter of law.<sup>39</sup> The Courts have concluded that a defendant waives an affirmative defense if " (1) assertion of the defense is inconsistent with defendant's prior behavior or (2) the defendant has been dilatory in asserting the defense."<sup>40</sup> A defendant's conduct is dilatory when he knows or should know the necessary facts and fails to act earlier.<sup>41</sup>

The reasoning behind the doctrine of waiver is "to reduce the likelihood that the 'trial by ambush' style of advocacy, which has little place in our present day adversarial system, will be employed."<sup>42</sup> "A defendant cannot justly be allowed to lie in wait, masking by misnomer its contention that service of process has been insufficient, and then obtain a dismissal on the ground only

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<sup>38</sup> *Medina v. Public Dist. No. 1*, 147 Wn.2d 303, 310, 53 P.3d 993 (2002).

<sup>39</sup> *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (1999).

<sup>40</sup> *Brevick v. City of Seattle*, 139 Wn.App. 373, 160 P.3d 648, *citing King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002).

<sup>41</sup> *Blakenship v. Kaldor*, 114 Wn. App. 312, 320, 57 P.3d 295 (2002).

<sup>42</sup> *Lybbert*, 141 Wn.2d at 40.

after the statute of limitations has run, thereby depriving plaintiff of the opportunity to cure the service defect.<sup>43</sup> “If litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind the procedural rules may be compromised.”<sup>44</sup>

In this case, Plaintiff filed a tort claim with the Clark County Risk Management Division on October 30, 2008, by sending the claim via certified mail to the specified address on Defendant’s tort claim form. (CP 64-72). On November 3, 2008, Plaintiff received a letter dated October 31, 2008, from Mark K. Wilsdon, Risk Manager for Defendant, acknowledging receipt of Plaintiff’s tort claim notice. (CP 75). In this letter, Mr. Wilsdon denied Plaintiff’s claim “for both liability and indemnity.” (CP 75). Mr. Wilsdon further explained the basis for his denial of Plaintiff’s tort claim and advised Plaintiff of other avenues available to her in order to obtain settlement proceeds. (CP 75). On November 6, 2008, Plaintiff received yet another letter, dated November 5, 2008, from the Risk Manager’s office assigning a tort claim number (No. 08134) to Plaintiff’s claim and acknowledging Defendant’s receipt of the tort claim. (CP 76). This letter advised

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<sup>43</sup> *Lybbert*, 141 Wn.2d at 40 (quoting *Santos v. State Farm Fire and Cas. Co.*, 902 F.2d 1092, 1096 (2d Cir. 1990)).

<sup>44</sup> *Lybbert*, 141 Wn.2d at 39.

Plaintiff that it may take as many as 60 days or more to “assess the liability, damages, injury, and other factors.” (CP 76).

Having heard nothing further from Defendants, on January 20, 2009, Plaintiff filed a complaint for damages against Defendant in Clark County Superior Court. (CP 1). The statute of limitations for Plaintiff’s claim expired on January 27, 2009. Defendant did not file their answer for over three months until May 8, 2009, six months from the date of the letters received by Plaintiff. Plaintiff mailed its first set of discovery request to Defendants on October 6, 2009. Plaintiff then mailed a second set of discovery requests to Defendants specifically inquiring as to the handling of Plaintiff’s claim form filed with Defendants.

The Courts have concluded that a defendant waives an affirmative defense if “(1) assertion of the defense is inconsistent with defendant’s prior behavior or (2) the defendant has been dilatory in asserting the defense.” Both of these situations apply in this case. The assertion of the defense that Plaintiff failed to comply with the tort claim provisions of RCW 4.96 is inconsistent with Defendant’s prior behavior and Defendant was dilatory in asserting this defense upon receipt of the claim form and the filing of the complaint. Defendant knew all of the necessary facts and

failed to act. The evidence in this case strongly suggests that the action by Defendant were intentional. Defendant sent two letters to Plaintiff, both of which acknowledge receipt of her claim. (CP 75 & 76). The first letter denied Defendant's liability and the second letter assigned a claim number to Plaintiff's claim and stated it would take as many as 60 days or more to process the claim. (CP 75 & 76). There is nothing in these letters indicating that Defendant did not receive Plaintiff's tort claim or indicating that the tort claim had been mailed to the improper party. Both of these letters led Plaintiff to believe that she had complied with the tort claim provisions of RCW 4.96 and that no further action on Plaintiff's behalf would be warranted. Such deception cannot be allowed.

Defendant further led Plaintiff to believe she had complied with this statute by waiting until May 8, 2009, along after the statute of limitations had expired on Plaintiff's claim, to file its answer. This answer is the first time that Defendant alleged that Plaintiff had not complied with RCW 4.96. In addition, a portion of the interrogatories that Plaintiff served upon Defendant were specifically designed to ascertain the reasoning behind the affirmative defenses set forth in Defendant's answer. These

misleading actions by Defendant and waiting until after the statute of limitations had expired lulled Plaintiff into the belief that she had complied with RCW 4.96. Defendant should not be allowed to send two conflicting letters from its Risk Management Office that acknowledge receipt of Plaintiff's claim, one denying and one stating that the claim was being processed, and then wait until the statute of limitations has expired on Plaintiff's claim to assert the affirmative defense that Plaintiff failed to comply with RCW 4.96. As noted above, "[a] defendant cannot justly be allowed to lie in wait, masking by misnomer its contention that service of process has been insufficient, and then obtain a dismissal on the ground only after the statute of limitations has run, thereby depriving plaintiff of the opportunity to cure the service defect."

Based upon Defendant's dilatory and inconsistent prior behavior in this matter the doctrine of waiver should apply to Defendant's assertion that Plaintiff failed to comply with RCW 4.96. Genuine issues of material fact exist and therefore the trial court erred as a matter of law in finding that Defendant had not waived its right to assert the defense that Plaintiff failed to properly file her tort claim because Defendant did take litigious action in this case and induced defendant into thinking it would

defend the case on the merits and not the claimed procedural defect.

**E. THE TRIAL COURT ERRED BY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE IT WAS EQUITABLY ESTOPPED FROM ASSERTING THE DEFENSE THAT PLAINTIFF FAILED TO COMPLY WITH THE CLAIM-FILING PROCEDURES.**

The trial court erred as a matter of law in finding that Defendant was not equitably estopped from asserting the defense that Plaintiff failed to comply with the claim provisions of RCW 4.96 and Clark County Code §2.95.060 and granting Defendant's Motion for summary Judgment. Defendant is equitably estopped from asserting the defense that Plaintiff failed to comply with the claim filing provisions because allowing for the assertion of this defense would allow for a manifest injustice.<sup>45</sup>

Equitable estoppel may apply where an admission, statement or act has been detrimentally relied upon by another party.<sup>46</sup> Equitable estoppel against the government is established when there is proof by clear, cogent, and convincing evidence of an admission, act or statement that is inconsistent with a later claim, another party's reasonable reliance on the admission, act or

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<sup>45</sup> *In re Decertification of Martin*, 154 Wn. App. 2582 (2009).

<sup>46</sup> *Id.*, citing *Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002).

statement, and injury to the other party would result if the first party is permitted to repudiate or contradict the earlier admission, act, or statement.<sup>47</sup> This doctrine can be asserted against the government when it is necessary to manifest injustice and it does not impair the exercise of a government function.<sup>48</sup>

In our case, Plaintiff filed a tort claim with the Clark County Risk Management Division on October 30, 2008, by sending the claim via certified mail to the address specified on Defendant's own tort form (which has subsequently been revised to direct mailing to the proper addressee and address). (CP 104-112, 113-115). On Friday October 31, 2008, Mr. Wilsdon, Risk Manager for Defendant sent a letter to Plaintiff acknowledging receipt of Plaintiff's tort claim notice. (CP 116). In this letter, Mr. Wilsdon denied Plaintiff's claim "for both liability and indemnity" and further explained the basis for the denial and advised Plaintiff of other avenues available to her in order to obtain settlement proceeds. (CP 116). On November 5, 2008, Defendant sent a second letter from its Risk Manager's office assigning a tort claim number (No. 08134) and acknowledged Defendant's receipt of the tort claim notice. (CP 117). This letter advised Plaintiff that it

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<sup>47</sup> *Id.*, citing *Campbell v. Gwinn, LLC*, 146 Wn.2d at 20.

<sup>48</sup> *Id.*

may take as many as 60 days or more to “assess the liability, damages, injury and other factors.” (CP 117).

Plaintiff, having heard nothing further from Defendant, on January 20, 2009, filed a complaint against Defendant in Superior Court. (CP 1). The statute of limitations for Plaintiff’s claim expired on January 27, 2009. Defendant did not file their answer for over three months until May 8, 2008. Plaintiff mailed its first set of discovery requests to Defendant on October 6, 2009 and to date has not received a response. Plaintiff mailed her second set of discovery requests to Defendant specifically inquiring as to the handling of Plaintiff’s claim form filed with Defendant.

Equitable estoppel applies where there is an admission, statement or act that has been detrimentally relied on by another party. In this case we have exactly that. Defendant made two statements by sending two separate letters to Plaintiff, one rejecting her claim and one acknowledging receipt of the claim. (CP 116-117). The letters are cogent, convincing evidence of Defendant’s statement and Plaintiff’s reliance upon these statements that she had properly filed her claim with Defendant is reasonable. By applying equitable estoppel in this case, the Court would be preventing a manifest injustice, the dismissal of

Plaintiff's claim against Defendant. Further, the application of equitable estoppel against Defendant in no way would impair the exercise of any government function.

In its opinion, the trial court stated that Plaintiff's assertion of equitable estoppel was more difficult for it but it is not place of the trial to make new law. (CP 131). Plaintiff asserts that this Court is in the position to do so and that based upon the justifiable reliance of Plaintiff on Defendant's statements that her claim had been received and was being reviewed, Defendant should be equitably estopped from asserting the defense that Plaintiff failed to comply with the claim filing requirements. Therefore, the trial court erred in granting Defendant's Motion for Summary Judgment and its decision should be reversed on the basis of equitable estoppel.

**F. THE TRIAL COURT ERRED BY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE EQUITABLE TOLLING APPLIES AND THEREFORE PLAINTIFF SHOULD BE GIVEN TIME TO CURE ANY ALLEGED DEFECT.**

The trial court erred in granting Defendant's Motion for Summary Judgment because it was barred from asserting the defense of failing to comply with the tort-claim notice procedures

under the doctrine of equitable tolling thus allowing Plaintiff to re-file her claim against Defendant. A court may toll the statute of limitations when justice requires such tolling.<sup>49</sup> “The predicates of equitable tolling are bad faith, deception or false assurance by the defendant and the exercise of diligence by the plaintiff.”<sup>50</sup>

Plaintiff filed a tort claim with the Clark County Risk Management Division on October 30, 2008, by sending the claim via certified mail to the address specified on Defendant’s own tort form. (CP 104-112, 113-115). On Friday October 31, 2008, Mr. Wilsdon, Risk Manager for Defendant sent a letter to Plaintiff acknowledging receipt of Plaintiff’s tort claim notice. (CP 116). In this letter, Mr. Wilsdon denied Plaintiff’s claim “for both liability and indemnity” and further explained the basis for the denial and advises Plaintiff of other avenues available to her in order to obtain settlement proceeds. (CP 116). On November 5, 2008, Defendant sent a second letter from its Risk Manager’s office assigning a tort claim number (No. 08134) and acknowledged Defendant’s receipt of the tort claim notice. (CP

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<sup>49</sup> *Mellish v. Frog Mountain Pet Care*, 154 Wn. App. 395 (2010), citing *State v. Duvall*, 86 Wn. App. 871, 875, 940 P.2d 671 (1997), *reviewed denied*, 134 Wn.2d 1012 (1998); *Finkelstein v. Sec. Props., Inc.*, 76 Wn. App. 733, 739, 888 P.2d 161, *reviewed denied*, 127 Wn.2d 1002 (1995).  
<sup>50</sup> *Mellish*, 154 Wn. App. 395, quoting *Millay v. Cam*, 135 Wn.2d 1963, 206, 955 P.2d 791 (1998).

117). This letter advised Plaintiff that it may take as many as 60 days or more to “assess the liability, damages, injury and other factors.” (CP 117).

Plaintiff, having heard nothing further from Defendant, on January 20, 2009, filed a complaint against Defendant in Superior Court. (CP 1). The statute of limitations for Plaintiff’s claim expired on January 27, 2009. Defendant did not file its answer for over three months until May 8, 2008. Plaintiff mailed its first set of discovery requests to Defendant on October 6, 2009 and to date has not received a response. Plaintiff mailed her second set of discovery requests to Defendant specifically inquiring as to the handling of Plaintiff’s claim form filed with Defendant.

In our case, all the predicates for equitable tolling exist. First, Defendant made false assurances, the two letters sent to Plaintiff acknowledging receipt of the claim and denying the claim. Second, Plaintiff exercised due diligence throughout this litigation process by mailing her tort claim to Defendant to the address listed on its form, waited the required 60-days before filing a lawsuit, and then filed her lawsuit within the statute of limitations period. Plaintiff should not be punished for the false assurances given by Defendant. Therefore, the trial court erred in granting Defendant’s

Motion for Summary Judgment and its decision should be reversed on the doctrine of equitable tolling and Plaintiff should be allowed to cure any defect.

It appears that neither of the opinions issued by the trial court specifically addressed the issue of equitable tolling. (CP 128, 151) Therefore, at a minimum, Plaintiff asks the Court to remand this issue back to the trial court for a decision.

#### **IV. REQUEST FOR ATTORNEY'S FEES**

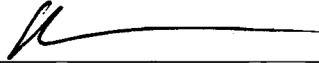
Lastly, Plaintiff asks the appellate court to award her attorney fees and costs incurred during the appeal of the trial court's orders granting Defendant's Motion for Summary Judgment at the appellate level pursuant to RAP 18.1.

#### **V. CONCLUSION**

In conclusion, Plaintiff requests that the appellate court reverse the trial court's orders granting Defendant's Motion for Summary Judgment on the basis that (a) the claim-filing notice requirements violate the separation of powers doctrine thus making them unconstitutional, (b) the 2009 Legislative amendments to RCW 4.96 are retroactive, (c) Defendant waived its right to assert the defense that Plaintiff failed to comply with the claim-filing provisions, (d) Defendant is equitably estopped from asserting the

defense that Plaintiff failed to comply with the claim-filing provisions, and (e) equitable tolling applies in this case and Plaintiff should be given additional time to cure any alleged defect in her claim-filing with Defendant.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of June, 2011.



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**RONALD W. GREENEN**, WSB #6334  
of Attorneys for Appellant

CERTIFICATE OF SERVICE

11 JUN -2 11 9:40  
STATE OF WASHINGTON  
DEPUTY

I hereby certify that on June 1, 2011, I served the foregoing BRIEF OF APPELLANT by delivering via Vancouver Legal Courier Service to:

E. Bronson Potter  
Clark County Prosecuting Attorney's Office  
Civil Division  
604 W. Evergreen Blvd.  
PO Box 5000  
Vancouver, WA 98666-5000

by serving a copy thereof certified by me as such, contained in a sealed envelope, to said offices at their regular address as noted above.

I further certify that on June 1, 2011, I served the foregoing BRIEF OF APPELLANT by regular US Mail to:

Mark Jobson, Torts Division  
Assistant Attorney General  
7141 Cleanwater Drive, SW  
PO Box 40126  
Olympia, WA 98504-0126

by serving a copy thereof certified by me a such, contained in a sealed envelope, to said offices at their regular address as noted above.

Dated this 1st day of June, 2011.

  
KAREN M. MANKER