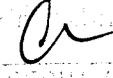


No 41915-7-II

COURT OF APPEALS
DIVISION II

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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY  DEPUTY

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.

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

SUPPLEMENTAL BRIEF OF APPELLANT

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I. INTRODUCTION

Plaintiff submits the following additional briefing to her previously filed Brief of Appellant and Reply Brief pursuant to the Court's order granting supplemental briefing.

II. 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. 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?

III. ARGUMENT

A. A. STANDARD OF REVIEW

Appellate courts review decisions on motions for summary judgment de novo.¹ 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.² All facts and reasonable inferences are

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

² *Id.*; CR 56(c).

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

B. The legislature’s amendment of Chapter 4.96 RCW in 2009 applies retroactively because it is procedural in nature and was enacted during this controversy.

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. As noted in Plaintiff’s earlier reply brief, “remedial and procedural statutes are often retroactive.”⁷ In addition, courts “often apply statutory amendments retroactively if the legislature acted during a controversy regarding the meaning of the law because the legislature’s timing reflects its intent to cure or clarify a statute.”⁸

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Franklin County Sheriff’s Office v. Parmelee*, ___ Wn.App. ___, 253 P.3d 1131 (2011), citing *In re Pers. Restraint of Mota*, 114 Wn.2d 42, 47, 785 P.2d 815 (1990).

⁸ *Franklin County*, ___ Wn.App. at ___, citing *West v. Thurston County*, 144 Wn.App. 573, 583, 183 P.3d 346 (2008).

In *Franklin County*, the Court of Appeals analyzed whether a “trial court erred in not considering the identity of a Public Records Act (PRA), chapter RCW 42.56, requester in a situation where an inmate requested public information disclosure for employees of the Franklin County Sheriff’s Office, Franklin County Correctional Center, and Franklin County Prosecuting Attorney’s Office.”⁹ Mr. Parmelee, an inmate, submitted numerous public-record requests to Franklin County for employment and personnel records, security operations records, photos, metadata and identification numbers.¹⁰ In response, on June 20, 2008, Franklin County successfully petitioned for a permanent injunction to enjoin the release of records.¹¹ Mr. Parmelee then argued that he had not had an opportunity to respond and therefore the trial court set aside the permanent injunction but issued a preliminary injunction.¹² In making this decision, the trial court stated “[T]he court finds it may not consider the identity of the requester and such is not relevant to the issue of whether documents may be withheld.”¹³ Franklin County appealed.

In a preliminary motion to the appeal, Mr. Parmelee moved for additional briefing on whether RCW 42.56.565 should apply retroactively.

⁹ *Franklin County*, ___ Wn.App. at ___.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

RCW 42.56.565 concerns the inspection or copying of public records by persons serving criminal sentences.¹⁴ The statute sets the necessary procedure for an individual or agency to obtain an injunction.¹⁵ The effective date was March 20, 2009 (almost one year from the date Franklin County was granted the permanent injunction).¹⁶

In analyzing RCW 42.56, the Court in *Franklin* looked at what was occurring during the enactment of RCW 42.56.565 and found that it was “a procedural statute enacted as a result of the disputes surrounding inmates’ PRA requests” and was therefore treated as being retroactive.¹⁷ Therefore, the Court reversed the trial court’s ruling that it could not consider the identity of the PRA requester.¹⁸

Our case is similar to *Franklin County* in that we have a statute enacted after Plaintiff filed her lawsuit to specifically address disputes regarding compliance with RCW 4.96. Testimony in support of the 2009 amendment to RCW 4.96 shows that this amendment was enacted during a dispute regarding compliance.

Injured plaintiff’s claims are being denied because of the strict claim filing statutes. The original intent of the statutes was to provide notice so that the government can get the facts of the claim and investigate. They were not meant to be “gotcha” statutes.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

Some of the procedural requirements are tricky. Cases are being dismissed on technical interpretations of the statute. The bill is aimed at restoring the original intent. It corrects historical unfairness and makes the statute functional. It requires notice to the government, but eliminates the barnacles of judicial bureaucracy. The current statutes reward deception hidden in claim forms. If the purpose is to provide notice, the form should be simple. This bill will make filing claims against local government consistent with state filings. Local governments all have different claim forms.¹⁹

Plaintiff filed her claim with Defendant on October 30, 2008.

Plaintiff filed her lawsuit against Defendant on January 20, 2009. The Judiciary Committee of the House of Representatives first reviewed the proposed 2009 amendments to RCW 4.96 on February 2, 2009 and then again on February 12, 2009. The 2009 amendments to RCW 4.96 was first read before the House of Representatives on February 17, 2009 and passed by the House of Representatives on April 24, 2009 and then by the Senate on May 22, 2009. It was approved by the Governor on May 11, 2009 and became effective on July 26, 2009. The trial court entered its order granting Defendant's motion for summary judgment on February 17, 2011. Based upon these dates it is evident that the controversy involving deceptive local government "gotcha" claim forms was occurring during the exact time Plaintiff began litigating her claim.

¹⁹ HB 1553 Report, pg. 4.

The 2009 amendments to RCW 4.96 makes it a procedural statute enacted as a result of the disputes surrounding the filing of claims against local government entities and must be treated as being retroactive. Therefore, the trial court erred in granting Defendant's Motion for Summary Judgment and this decision should be reversed.

IV. 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 the 2009 amendments to RCW 4.96 are retroactive.

RESPECTFULLY SUBMITTED this 6th day of October, 2011.



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

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2011, I served the foregoing SUPPLEMENTAL 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 October 6, 2011, I served the foregoing SUPPLEMENTAL 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 6th day of October, 2011.



KAREN M. MANKER