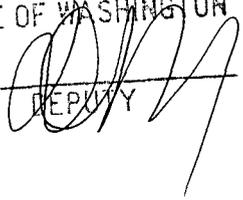


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STATE OF WASHINGTON

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No. 42622-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KATHERINE E. MORSMAN, Plaintiff/Appellant,

v.

CLARK COUNTY, Defendant/Respondent

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

 A. County’s Counterstatement of the Case Ignores Findings 2

 B. Issues Not Raised in Trial Court 3

 C. Strict Compliance Standard Under Former Statute 4

 D. County’s Argument that “Equitable Estoppel Does Not Apply”. 5

 E. County’s Argument Based on Elements of Estoppel Is
 Unavailing 9

III. CONCLUSION 12

TABLE OF AUTHORITIES

Cases

<i>Chemical Bank v. Washington Public Power Supply System</i> , 102 Wn 2d 874, 905, 691 P2d 524 (1984).....	8, 9
<i>Gerean v. Martin-Joven</i> , 108 Wn App 963, 974, 33 P3d 427 (2001)	6
<i>M. Gwyn Myles v. State of Washington, et al.</i> , Court of Appeals No. 41915-7; 170 Wash. App. 521, 2012 WL 3870424 (September 5, 2012)	1, 4, 5, 12
<i>State v. Villarreal</i> , 97 Wn App 636, 643, 984 P2d 1064 (1999)	7
<i>Stieneke v. Russi</i> , 145 Wn App 544, 559, 190 P3d 60 (2008)	7

Rules

RAP 10.3(b).....	2
RAP 2.5(a)	3
RCW 4.96.010	4, 5
RCW 4.96.020	1, 4, 5, 7
RCW 4.96.020(5).....	13

I. INTRODUCTION

The issue raised by appellant Katherine E. Morsman (“Morsman” or “plaintiff”) in the Opening Brief is whether the trial court’s conclusions of law numbers 2, 4 and 5, in which it concluded that information contained on Clark County’s Tort Notice form, along with representations made by the County’s staff, did not amount to an “affirmative statements, acts or admissions” that were inconsistent with the County’s later asserted defense of failure to comply with Tort Notice delivery requirements.

After Clark County filed its Respondent’s Brief, Morsman moved this Court to consider an argument arising from the recent decision in *M. Gwyn Myles v. State of Washington, et al.*, Court of Appeals No. 41915-7; 170 Wash. App. 521, 2012 WL 3870424 (September 5, 2012). The *Myles* case involves facts that are nearly identical to the instant case. The holding in *Myles* is instructive. This Court held that, when a trial court considers a motion for summary judgment relating to the procedural aspects of Washington’s Tort Notice statute, RCW 4.96.020, it should apply the statute as it exists on the date of the motion hearing, even if the statute was written differently on the date a Tort Notice was filed. In light of this new ruling, and its clear application to the facts of this case, Morsman moved this Court to allow her to raise an additional argument based on *Myles*. This Court has not yet had the opportunity to address the

motion. Therefore, all arguments in this brief that are directed to that issue are conditional on the Court's decision.

Setting that issue aside, with regard to the Answering Brief filed by Respondent County, it must be noted that the brief was required to "answer the brief of appellant" Morsman. RAP 10.3(b). A review of the brief, however, reveals that the County failed to engage the argument raised by Morsman, and instead directs argument to other points, none of which support affirmance of the Judgment below.

II. ARGUMENT

A. County's Counterstatement of the Case Ignores Findings

The County's counterstatement of the case is generally accurate, but insists on adding descriptive language belittling Morsman's claim, none of which is supported by the record (for example, that Morsman's accident was supposedly "minor" and caused "little" damage to the vehicle in which Morsman was riding), *County's Brief p. 1*. Such embellishment is improper, so Morsman will refrain from commenting on its accuracy.

The County's counterstatement actually strays from the record in its treatment of the testimony of Morsman's attorney's legal assistant, Sheryl Harney. The County summarizes the testimony as though its

veracity was in controversy, implying that Harney may not actually have spoken to the County's Risk Management office, from which she obtained the Tort Notice form, and even that no Tort Notice was filed at all. The trial court's Findings of Fact, however, are to the contrary:

7. On August 8, 2008, Harney contacted the Risk Management Division by telephone, and spoke to someone at the office. The person at the office faxed the notice of tort claim form to Harney, and advised her that the form was to be returned to 1300 Franklin Street.

8. Harney completed the form, using information previously provided by Morsman. Gutzler reviewed the form and signed it. Rather than send the form by mail, he directed Harney to arrange for a courier to hand deliver the form. The completed form was delivered to the Risk Management Division office, on the sixth floor of the Public Service Center, 1300 Franklin, Vancouver, Washington, on August 8, 2008. A letter from Gutzler accompanied the form, advising the County that he represented Morsman. CP 153.

The County does not call these findings of fact into question, and elsewhere relies on them for argument. Its attempt to ignore these findings, and to construct an alternate scenario, is improper.

B. Issues Not Raised in Trial Court

The County's first section of substantive argument asserts, without explaining the context, that issues not tried below are not before this Court. *County's Brief* p. 7. While this may be generally true, it is a rule that is subject to this Court's discretion. RAP 2.5(a). The County does

not so state, but its argument is likely directed to avoid this Court's application of its recent decision in *Myles v. State of Washington, et al.*, 170 Wash. App. 521, 2012 WL 3870424 (2012). The County was anxious for the Court to abate this case pending the *Myles* decision when it thought the decision would inure to its benefit, not Morsman's, but now acts as though the case does not exist. Under the circumstances, it would be entirely equitable for the Court to apply the *Myles* decision, for the reasons explained in Morsman's pending Motion to Consider Additional Issue on Appeal.

C. Strict Compliance Standard Under Former Statute

County's next argument rehashes an issue that is not before this Court – unless the Court grants Morsman's Motion to consider the new issue raised by *Myles*. That is, whether Morsman's Tort Notice complied with the "strict compliance" rules applicable under former RCW 4.96.010 and RCW 4.96.020.

Morsman does not question that trial courts were required to apply the Tort Notice statutes strictly before the July 2009 amendment of RCW 4.96.020. The holding by this Court in *Myles*, however, was that determination of "compliance" with the Tort Notice requirements is to be governed, not by how the statute was written at the time Notice was

served, but instead by how the statute was written on the date a trial court considers a motion that challenges the adequacy of a Tort Notice. *Myles*, 2012 WL 3870424, slip op at 6. Here, the legislative amendment to RCW 4.96.020 became effective on July 26, 2009, and the hearing on Clark County's Motion for Summary Judgment occurred on February 22, 2011. *Id.*, CP 116. Therefore, the undisputed facts in this case demonstrate the holding from *Myles* applies.

That said, the County's argument directed to the former version of RCW 4.96.010 and RCW 4.96.020 is entirely irrelevant. If this Court grants Morsman's pending Motion, and decides the *Myles* holding can be applied, it should remand so the trial court can determine whether Morsman's filing with the Risk Management Division constituted "substantial compliance" in accordance with RCW 4.96.010 and RCW 4.96.020 as they existed in February, 2011.

D. County's Argument that "Equitable Estoppel Does Not Apply"

The County's next argument, "equitable estoppel does not apply," ignores the trial court's Findings Of Fact And Conclusions Of Law. Further, it dips independently into the record to assert that equitable estoppel does not apply because Morsman's counsel, Michael Gutzler ("Gutzler") had an "equal opportunity to determine the truth of the facts

represented” (citing *Gerean v. Martin-Joven*, 108 Wn App 963, 974, 33 P3d 427 (2001)). The County’s argument is that, since Gutzler researched the Tort Notice issue and found the governing statute and a case that discussed the strict compliance standard, he had equal means of determining the facts, and estoppel should not lie. *County’s Brief*, 9-11.

The County’s argument ignores its own statement of the scope of review, which it says is focused on whether the Findings Of Fact And Conclusions Of Law are supported by substantial evidence. *County’s Brief*, 6-7. The County’s argument is also inconsistent with those trial court findings – which the County does not question. While the trial court noted in its findings that Gutzler performed the noted research, *CP 152*, it also found that Gutzler and his assistant relied on the County’s misleading information. The trial court did not conclude that Gutzler – or Morsman – were precluded from relying on an “affirmative representation” by County, only that the form itself (combined with County’s “practices”) was not such a “representation.” *CP 153-154, 156*. The trial court also determined that the County’s form, combined with its “peculiar policies:”

[C]reated the potential that tort claimants would be affirmatively deceived by the County, in a manner would might justify estoppel. A decision to accept an original hand-delivered notice, without making any comment as to the propriety of that service, is the type of inconsistent

action which could lead to the later application of equitable estoppel. CP 156 (emphasis supplied).

This suggests the trial court was prepared to find for Morsman on the equitable estoppel defense, but for its determination that there was no “affirmative misrepresentation” by the County to the courier who hand delivered Morsman’s Tort Notice form. *Id.*, 156-157.

Additionally, even conceding that this Court has discretion to affirm the judgment on any basis supported by the record (*Stieneke v. Russi*, 145 Wn App 544, 559, 190 P3d 60 (2008)), the Court should not do so unless the record is sufficiently developed to consider the alternative ground for affirmance fairly. *State v. Villarreal*, 97 Wn App 636, 643, 984 P2d 1064 (1999). That is not the case here.

The County, despite devoting more than two pages of argument to the alternative ground for affirmance, focuses entirely on a single piece of evidence: showing that Gutzler reviewed the Tort Notice statutes and downloaded a Washington case on the subject.¹ The County seems to believe this is a sufficient record for this Court to make a *de novo* determination that Gutzler had “equal means” of obtaining the correct knowledge. It is not.

¹ The trial court made a finding to that effect: “Gutzler gathered medical records and other documentation concerning the claim, and researched the proper method of commencing a lawsuit against a government agency in Washington State. Gutzler reviewed RCW 4.96.020, and cases interpreting that statute.” CP 152.

The County mentioned the “equal means of knowledge” principle on which it bases its argument in its trial memorandum, citing *Chemical Bank v. Washington Public Power Supply System*, 102 Wn 2d 874, 905, 691 P2d 524 (1984). *CP 123, 126, 129*. However, the County’s argument on the point (in the memorandum) is just a statement of the proposition, which was combined with the argument that the underlying issue involves a “representation of law,” something the County does not argue on appeal.

At trial, the County’s counsel had the opportunity to question Gutzler about his “means of knowledge” and give him an opportunity to address the issue, but did not. *RP 22-24*. All the County’s counsel did was confirm that Gutzler reviewed the Tort Claim Notice statutes. Counsel did not ask Gutzler about the Washington case the County notes in its brief. *Id.*

In its closing, the County again mentioned the *Chemical Bank* case, and the “equal means of knowledge” principle, once, but devoted no focused argument to it, and did not tie it by argument to Gutzler’s knowledge. *CP 155*. In the remainder of its argument, the County focused on Gutzler’s “expertise” as an attorney, which is a different issue from equal means of knowledge, (“equal means of knowledge” is a general rule, and not one special to attorneys. *CP 134-157, passim*).

In short, the County's argument is inconsistent with the trial court findings that suggest the issue of whether equitable estoppel could apply was resolved in Morsman's favor, and was not sufficiently developed to serve as an alternative basis for affirmance of the judgment herein. This Court should reject the County's argument. In the event the Court considers the argument to have some merit, it should defer to the trial court and remand the issue for further consideration in the event the judgment is reversed.

E. County's Argument Based on Elements of Estoppel Is Unavailing

Continuing to ignore the issues actually raised by Morsman, the County next argues that the Judgment should be affirmed because Morsman failed to prove the elements of estoppel by "clear, cogent and convincing" evidence as required by Washington law. *Chemical Bank*, 102 Wn 2d at 905; County's Brief 11-19.

The County's argument is an invitation to this Court to try the case *de novo*. It restates the County's arguments from its trial memorandum, and refers to the same evidence noted by the trial court in making its own determinations. The County ignores the actual record in regurgitating this argument, as shown by the fact the argument is at odds with the trial court's findings in some respects, particularly its assertion that Morsman

failed to prove the elements of “injury” and “lack of impairment of government functions.” *County’s Brief*, p. 13. The trial court found in Morsman’s favor as to both elements. *CP 157*. Much of the remainder of this portion of the County’s argument (i) reiterates the County’s earlier argument that Gutzler’s had “equal means of knowledge” and (ii) repeats the County’s pretrial arguments, disregarding of the actual trial court findings.

Ultimately, however, this final part of the County’s Brief boils down to the assertion that the trial court got it right, since it had the ability to consider all the evidence, the credibility of witnesses and to weigh the evidence and arguments of the parties. *County’s Brief*, p. 16. This, the County argues, is reflected in the trial court’s Findings of Fact and Conclusions of Law. *Id.*, 17-19.

The County’s final argument, therefore, ends up raising no independent ground for affirmance beyond repetition of arguments made to the trial court. It is essentially just an abstract defense of the final outcome. The County’s re-hashing of argument is not a proper alternative basis for affirmance because the argument was not sufficiently developed in the trial record to justify this Court’s making determinations *de novo*, in contravention of the trial court’s findings.

The bench trial focused on testimony and evidence showing that the County's Tort Notice form and practices are "affirmative acts" on which Morsman, her counsel and his employee could reasonably rely. The Findings of Fact and Conclusions of Law specifically addressed these issues, and constitute the issue raised by Morsman's Brief. The other "elements" of estoppel were found to exist by the trial court. As noted, the trial court found specifically that Morsman would be "injured" if relief were not granted, and that estoppel would not impair any governmental function. *CP 157*. "Manifest injustice," as noted in Morsman's Brief, is an issue of law. *Opening Brief, p. 14*.²

The County's approach to the evidence during the bench trial focused on the "reliance" issues, which were the subject of the trial court's findings. The County did not mention the other elements of estoppel, even in argument, except in passing. *RP 22-24* (cross-examination of Gutzler); *RP 134-156* (closing argument by County's counsel). These issues were before the trial court, which was charged with resolving them and issuing findings – and it did. The record is not conducive to this Court's conducting a *de novo* trial in the guise of an "alternative basis for affirmance."

² County's closing argument concerning the elements of "injury" and "manifest injustice" was brief and bore no resemblance to its arguments here. *RP 150*.

Ultimately, therefore, County's final argument: (i) improperly invites this Court to retry the case *de novo*, including on those issues on which the trial court found in Morsman's favor; (ii) ignores the trial court's findings in Morsman's favor without providing any basis for questioning those findings; and (iii) re-hashes the argument, addressed earlier, that estoppel is not available because Gutzler had "equal means of knowledge." None of this is sufficient to support affirmance of the judgment in this case.

III. CONCLUSION

The County's Brief ignores the sole issue raised by Morsman on this appeal. Did the trial court err in determining, based on undisputed facts, that the County's Tort Notice form, combined with its deceptive practices in handling submission of those forms, was not an "affirmative representation for purposes of equitable estoppel." Since that argument is un rebutted, this Court should reverse the judgment herein and remand the matter for further proceedings.

Additionally, Morsman asks the Court to grant her motion to consider the issue created by its decision in *Myles v. Clark County*; that is, the adequacy of Morsman's delivery of her Tort Notice under the currently-applicable "substantial compliance" standards of RCW

4.96.020(5). Should the Court do so, the judgment should be reversed on that basis, and the matter remanded for determination of the adequacy of Morsman's Tort Notice.

In any event, the Court should reject the arguments raised in County's Brief in favor of affirmance. To the extent they were preserved below, and/or are actually consistent with the trial court's findings, the arguments raised by County are insufficiently developed in the trial record to justify this Court's adopting them as alternative bases for affirmance of the judgment.

Dated: December 20, 2012.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that I filed the foregoing APPELLANT'S REPLY BRIEF with the Court of Appeals of the State of Washington, Division II by U.S. mail on December 20, 2012.

I also certify that I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF on Lawrence C. Watters, respondent's attorney by e-mail and by regular U. S. Mail at PO Box 5000, Vancouver, WA 98666-5000, and Lawrence.watters@clark.wa.gov, on December 20, 2012.



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