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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 43583-7

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JENNIFER GREGERSEN, Personal Representative of the ESTATE OF
DOUGLAS GREGERSEN,

Appellant,

v.

STEVEN SKILES and "JANE DOE" SKILES, and their marital
community, and THURSTON COUNTY PUBLIC UTILITY DISTRICT,
a Municipal Corporation,

Respondents.

BRIEF OF RESPONDENTS

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I. IDENTITY OF RESPONDENTS

The Respondents in this appeal are Thurston County Public Utility District and Steven Skiles, an employee of the PUD. For the sake of brevity, the Respondents are referred to collectively herein as “Thurston County PUD.”

II. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

Thurston County PUD believes that the issues pertaining to the plaintiff’s assignment of errors may best be stated as follows:

A. Whether the Washington “non-claim” statute, RCW 4.96.020 requires strict compliance with its standing and jurisdictional requirements.

B. Whether a personal representative of an estate is the person with standing to pursue claims on behalf of the estate.

C. Whether a claim for damages filed by an attorney under RCW 4.96.020 is deficient where (1) it purports to file the claim on behalf of an individual who died two years earlier; and where (2) the attorney was not representing the estate or the personal representative of the estate; and where (3) the estate had not even been probated when the claim for damages was submitted.

III. STATEMENT OF THE CASE

This lawsuit was filed in October 2011 by Jennifer Gregersen as Personal Representative of the Estate of Douglas Gregersen. The Complaint sought recovery in negligence against Steven Skiles and his

employer Thurston County PUD, arising from a rear-end auto accident on September 30, 2008 involving Douglas Gregersen and Steven Skiles. The Complaint asserts that Mr. Gregersen suffered bodily injuries as a result of the accident. The Complaint also asserts that Douglas Gregersen died on July 2, 2009. Mr. Gregersen's death was not related in any way to the minor auto accident which is the subject of this lawsuit. (CP 18-19).

The Complaint also incorrectly asserts that "on or about June 21, 2011, plaintiff served a Notice of Claim upon defendant Thurston County Public Utility District." (CP 3). In reality, neither the Estate of Douglas Gregersen nor Jennifer Gregersen as Personal Representative of the Estate submitted any such claim against the PUD. (CP 19-21). To the contrary, the only Claim for Damages received by Thurston County PUD was one filed by attorney Steve Alvarez as "attorney for Douglas Gregersen" in April 2011. (CP 33). That Claim for Damages made no reference to the fact that Mr. Gregersen was not a living person at the time the Claim was served, but had been deceased for nearly two years. Indeed, the Claim for Damages purported to list Mr. Gregersen's current home address and phone number.

The Estate of Douglas Gregersen was probated in September 2011 and Mrs. Gregersen was appointed Personal Representative of the Estate. (CP 2). No Claim for Damages was ever served on the PUD by or on behalf of the Estate. (CP 21).

Based on the above undisputed facts, Thurston County PUD moved for entry of a summary judgment of dismissal, due to the failure of the plaintiff to submit a timely Claim for Damages under RCW 4.96.020 within the three year statute of limitations and before commencing this lawsuit.

The trial court granted the PUD's Motion for Summary Judgment. (CP 55-56). A Motion for Reconsideration was subsequently denied. This appeal followed.

IV. ARGUMENT

A. RCW 4.96.020 Mandates Submittal of a Claim for Damages by the Plaintiff At Least 60 Days Before Commencing Suit Against a Local Government.

In Washington, an action for bodily injuries must be brought within three years following the date of the accident. RCW 4.16.080. And if a suit for negligence is being brought against a local governmental entity, such as a public utility district, the claimant/plaintiff must first serve a Claim for Damages on the local jurisdiction, identifying the claimant's name and contact information, and describing the incident and the damages. RCW 4.96.020. In this case, the plaintiff is Jennifer Gregersen, Personal Representative of the Estate of Douglas Gregersen. Neither the Estate of Douglas Gregersen nor Ms. Gregersen acting as Personal Representative served a Claim for Damages on Thurston County PUD before initiating this lawsuit.

Instead, attorney Steven Alvarez submitted a Claim for Damages in April 2011, identifying Douglas Gregersen as the claimant and providing Douglas Gregersen's (purported) address and phone number. (CP 33). But Mr. Gregersen was not a living person at the time the Claim for Damages was filed, nor at the time the lawsuit was commenced. Indeed, Mr. Gregersen had been dead for approximately two years.

The Alvarez law firm had no standing to bring a Claim for Damages on behalf of a deceased individual. The Claim for Damages was a legal nullity and did not satisfy the strict standing and jurisdictional requirements of RCW 4.96.020. Therefore, summary dismissal of the Estate's lawsuit was appropriate.

B. Only an Estate Has Standing to Take Legal Action on Behalf of a Deceased Person.

The lawsuit was properly dismissed because plaintiff Jennifer Gregersen, Personal Representative of the Estate of Douglas Gregersen did not file a timely Claim for Damages prior to filing her Complaint in Superior Court. The Estate apparently takes the position that the requirements of the non-claim statute (RCW 4.96.020) were satisfied because a Claim for Damages was filed by Steven Alvarez, claiming to be an attorney for Douglas Gregersen, two years after Mr. Gregersen's death. But that filing was a legal nullity because Mr. Gregersen was not a living person with standing to submit a claim or initiate a lawsuit. Indeed, the

Estate of Douglas Gregersen had not even been probated, nor a Personal Representative appointed at the time the Claim for Damages was served.

RCW 4.96.020 expressly provides that the tort claim form must be signed by either (1) the claimant; or (2) an attorney or guardian on behalf of the claimant. RCW 4.96.020(3)(b). In this case, the only potential claimant (after Mr. Gregersen's death) was the Estate. Yet a claim was neither submitted nor signed by the personal representative of the Estate, nor by an attorney for the Estate. Mr. Alvarez' claim represented that Douglas Gregersen was the "claimant" and that he was the attorney for Mr. Gregersen. (CP 33). Yet Gregersen was a deceased individual, whom Alvarez could not have been representing. Nor was Alvarez an attorney for the Estate. Indeed, Mr. Alvarez could not have been an attorney for the Estate because the Estate had not even been created at the time of the purported filing. No Claim for Damages was ever submitted by or on behalf of the Estate. Under these circumstances, the plaintiff did not comply with the requirements of RCW 4.96.020, and the lawsuit was properly dismissed.

It is settled that an estate is a legal entity, separate from individual claimants. Wood v. Dunlop, 83 Wn.2d 719, 723, 521 P.2d 1177 (1974). The right to bring an action on behalf of a decedent passes to the estate upon death. RCW 4.20.046. Only the personal representative may recover damages on behalf of the estate. Woodall v. Avalon Care Center, 155 Wn. App. 919, 931, 231 P.3d 1252 (2010). Washington law does not

permit heirs to bring claims on behalf of a deceased without first obtaining appointment as a personal representative. Masood v. Saleemi, 309 Fed. Appx. 150, 151 (9th Cir. 2009). Once an estate is probated, the personal representative is authorized to prosecute any actions and initiate suits to collect debts owed to the estate. RCW 11.48.010. The personal representative is the only entity who may bring a survival action for bodily injuries suffered by the decedent prior to death. RCW 4.20.046; Tait v. Wahl, 97 Wn. App. 765, 772, 987 P.2d 127 (1999).

Thus, after the death of Douglas Gregersen in 2009, the only entity who could pursue a legal Claim for Damages under RCW 4.96.020 and a civil lawsuit for bodily injuries was the Personal Representative of the Estate. But as noted above, the Personal Rep did not submit a Claim for Damages to the PUD. Indeed, the Personal Representative was not even appointed until some time after the purported filing of a Claim for Damages (on behalf of Mr. Gregersen) in April 2011.

Because the Estate of Douglas Gregersen did not submit a Claim for Damages before initiating this lawsuit, the lawsuit was properly dismissed.

C. “Substantial Compliance” With the Non-Claim Statute Does Not Apply to Substantive Filing Requirements and Standing.

During the past 25 years, there have been many challenges to the constitutionality and enforceability of the governmental non-claim statutes (RCW 4.96.020 and its companion for actions against the state, RCW

4.92.110). Such challenges have often been based on seemingly harsh results which sometimes follow from strict enforcement of the statute. But the Washington Supreme Court has consistently rejected such claims, holding that the non-claim statutes are valid and constitutional. See, Daggs v. City of Settle, 110 Wn.2d 49, 57, 750 P.2d 626 (1988); Castro v. Stanwood School Dist., 151 Wn.2d 221, 86 P.3d 1166 (2004).

It is true that the legislature and the courts have stated that with regard to the *contents* of claims and purely procedural requirements of the statute, a standard of “substantial compliance” will be applied. Indeed, the statute itself explicitly provides for the same. RCW 4.96.020(5). But the courts have made it equally clear that with regard to substantive filing provisions, i.e., who may file and the timing of the filing, strict compliance is required. Medina v. PUD No. 1 of Benton County, 147 Wn.2d 303, 316, 53 P.3d 993 (2002).

Plaintiff argues that the 2009 amendments to RCW 4.96 changed the entire standard for statutory compliance from “strict compliance” to “substantial compliance.” This is inaccurate. Since the original enactment of the non-claim statute in 1967, it has always provided for a standard of “substantial compliance” with regard to the *contents* of a claim. See, prior 4.96.010(1). On the other hand, strict compliance has always been required with respect to substantive standing and filing requirements. The courts have consistently stressed that, while substantial compliance suffices with regard to the contents of a claim (the date, time, location, etc.

of a claim), the substantive filing requirements (who may file and the timeliness of the filing) are subject to strict compliance:

... Washington courts have consistently held that strict compliance with the requirements of notice and claim statutes is a condition precedent to recovery.

Hardesty v. Stenchever, 82 Wn. App. 253, 259, 917 P.2d 577 (1996), rev. denied, 130 Wn.2d 1005. Accord, Lewis v. Mercer Island, 63 Wn. App. 29, 33, 817 P.2d 408 (1991), rev. denied, 117 Wn.2d 1024. Strict compliance with the substantive filing requirements of the non-claim statute is mandatory even if the results seem harsh and technical. Shannon v. State, 110 Wn. App. 366, 40 P.3d 1200 (2002).

It is true that the 2009 amendments clarified the standard for compliance by stating that the “substantial compliance” standard applies to the content of claims and the purely procedural requirements of the statute. RCW 4.96.020(5). But the 2009 changes do not affect the outcome in this case, because the deficiencies in the Gregersen claim for damages are not procedural, but rather substantive and jurisdictional. The Supreme Court has stressed on numerous occasions that standing is a jurisdictional issue. Lane v. City of Seattle, 164 Wn.2d 875, 885, 194 P.3d 977 (2008).

Here, the only person with standing to pursue a personal injury claim on behalf of the Gregersen Estate would have been the Personal Representative. Federated Services v. Estate of Norberg, 101 Wn. App. 119, 125, 4 P.3d 844 (2000). Mr. Alvarez had no standing to bring a

Claim for Damages on behalf of a deceased person, without any involvement by the estate and, indeed, without even the creation of an estate and the appointment of a personal representative. Importantly, the Personal Representative of the Gregersen Estate has never filed a Claim for Damages under 4.96.020. Indeed, the Estate had not even been probated at the time the April 2011 Claim for Damages was submitted by Mr. Alvarez, purporting to represent Mr. Gregersen (who was deceased). The claim could not be deemed to have been filed by or on behalf of the estate, because the estate had not been legally established for purposes of estate administration by the filing of a probate action and appointment of a personal representative.

The doctrine of standing prohibits a litigant from asserting another's legal right. Miller v. U.S. Bank of Washington, 72 Wn. App. 416, 424, 865 P.2d 536 (1994); Marriage of Dugan-Gaunt, 82 Wn. App. 16, 20, 915 P.2d 541 (1996). Standing is placed in issue when the party requesting adjudication of a claim is not the proper party. Lakewood v. Pierce County, 144 Wn.2d 118, 129, 30 P.3d 446 (2001).

The absence of standing is clear in this case because of the strict requirements of the applicable statute under which the lawsuit is filed, i.e., the Washington General Survival Statute – RCW 4.20.046. The survival statute provides that it is the personal representative who has standing to pursue claims on behalf of the decedent's estate. Damages recovered under the statute are included in the assets of the decedent's estate.

Causes of action based on survival statutes are creations of the legislature. Such claims were not recognized at common law. Wilson v. Grant, 162 Wn. App. 731, 735, 258 P.3d 689 (2011).

When a statute creates a cause of action not recognized at common law and expressly states who is entitled to bring the action, the statute is to be read narrowly as to who may sue. U.S. v. Burlington Northern, Inc., 500 F.2d 637 (9th Cir. 1974). For standing to be conferred, the court must find that the plaintiff has been granted the right to sue by the statute under which the suit is brought. Lake Washington School Dist. No. 414 v. Office of Superintendent of Public Instruction, 634 F.3d 1065, 1067 (9th Cir. 2011). Standing is a question of law for determination by the court. West v. Thurston County, 144 Wn. App. 573, 578, 183 P.3d 346 (2008).

In this case, Douglas Gregersen's heirs had more than two years after his death within which to file a probate action and appoint a personal representative, who could then submit a Claim for Damages under RCW 4.96.020 arising from Gregersen's rear-end auto accident. The Estate's failure to submit such a claim prior to initiating this lawsuit is a bar to recovery. The trial court properly dismissed the lawsuit as a matter of law.

V. CONCLUSION

For all of the above reasons, Thurston County PUD respectfully asks the Court to affirm the summary judgment order entered by the trial court.

DATED this 11th day of January, 2013.

KARR TUTTLE CAMPBELL

By:



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) ss.
COUNTY OF KING)

STATE OF WASHINGTON

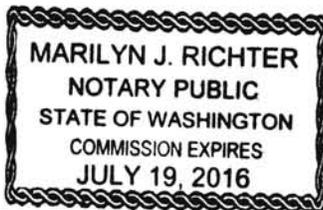
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The undersigned, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America; State of Washington, employed at Karr Tuttle Campbell, 1201 Third Avenue, Suite 2900, Seattle, WA 98101. I am over the age of 18 years and am not a party to this action. I certify under penalty of perjury under the laws of the State of Washington that on January 14, 2013, a true copy of Brief of Respondents was served to the following by Legal Messenger:

Steve Alvarez
Attorney at Law
705 South 9th Street, #304
Tacoma, WA 98405

Nancy Randall
Nancy Randall



SUBSCRIBED TO AND SWORN before
me this 14th day of January, 2013

Marilyn J. Richter
Marilyn J. Richter

NOTARY PUBLIC in and for the State of
Washington, residing in Bothell, WA

My Commission Expires: July 19, 2016