

**FILED**

SEP 22 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 289826

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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TIFFANI WILLIAMS, Appellant and Cross-Respondent,

v.

RICHLAND SCHOOL DISTRICT, Respondent and Cross-Appellant.

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**APPELLANT'S REPLY BRIEF  
AND  
BRIEF IN OPPOSITION TO RESPONDENT'S CROSS APPEAL**

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The appellant and cross-respondent herein, Tiffani Williams (“MS. WILLIAMS”), presents her reply brief of appellant – and brief in opposition to the Richland School District’s cross appeal – below.

**1. The RSD’s Cross Appeal Is Absolutely Without Merit**

With its cross appeal, the RSD alleges MS. WILLIAMS failed to comply with the non-judicial claim notice statute, RCW chapter 4.96 because MS. WILLIAMS’ submittal “(a) does not contain any statement of damages, (b) lacks addresses for [MS. WILLIAMS], and (c) omits a verified signature.” The pertinent facts are as follows.

In 1993, the legislature amended RCW 4.96.020. This new amendment **removed** the previous requirement for a claimant to verify her signature on the non-judicial claim notice form. [ Public record ] See also, Gates v. Port of Kalama, 152 Wn.App. 82, 90, 215 P.3d 983 (2009).

Effective **July 22, 2001**, the legislature amended the 1993 version of RCW 4.96.020. This amendment set forth new requirements for the local governmental entity to (1) appoint its agent to receive the non-judicial claim notice, (2) provide the identity and address of the agent, and (3) record such information at the county Auditor’s office (so it is a matter of public record). [ Public record ]

On **February 3, 2003**, the RSD recorded its *Appointment of Agent*. See **Exhibit A** to MS. WILLIAMS' *Response to Motion for Discretionary Review* filed in an earlier Division III case (no. 281663) involving these same parties in this same controversy, a copy of which is attached in the Appendices hereto as pp. A-10 to A-11. That agent was the then-Secretary to the RSD Board of Directors, Richard W. Semler ("Mr. Semler").

On **April 12, 2006**, MS. WILLIAMS suffered the injury which is the subject of these cross appeals. [ undisputed ]

The RSD wrote MS. WILLIAMS a **misdated** letter, with which it provided her the non-judicial claim notice form addressed in the following paragraph. [ CP 157 ]

On **May 6, 2006**, MS. WILLIAMS filed with the RSD her non-judicial claim notice, pursuant to RCW 4.96.020, in the form of the *Richland School District GENERAL LIABILITY LOSS NOTICE* form the RSD provided MS. WILLIAMS for that purpose. [ CP 151 - 155 and 165 - 166 ] The RSD's form does not ask for a monetary amount of the damages MS. WILLIAMS would be seeking. It also doesn't ask for MS. WILLIAMS' verification signature. It does ask for MS. WILLIAMS' "address," however, MS. WILLIAMS omitted to provide that information.

On **June 6, 2006**, the RSD's Claims Administrator, Canfield & Associates ("Canfield"), responded by letter to MS. WILLIAMS, **addressed to her at her residence address**, denying her claim for damages. [ CP 159 ]

Effective in **June of 2006**, the legislature amended the 2001 version of RCW 4.96.020. With respect to the statute's 2001 requirements for the local governmental entity to (1) appoint its agent to receive the non-judicial claim notice, (2) provide the identity and address of the agent, and (3) record such information at the county Auditor's office (so it is a matter of public record), this amendment added the following words (with emphasis added):

The failure of a local governmental entity to comply with the requirements of this section **precludes that local governmental entity from raising a defense under this chapter.** [ Public record ]

On **October 23, 2006**, MS. WILLIAMS' attorney wrote Canfield a *Demand Letter*, in which he set forth the monetary damages MS. WILLIAMS was seeking (= \$81,432.52). [ CP 161 - 162 ] From MS. WILLIAMS' perspective, this letter legally operates as a supplement to the non-judicial claim notice she filed with the RSD on **May 6, 2006**. See Gates, supra, at 85, fn. 5, 215 P.3d 983 ("Here, Gates filed her claims before and after June 2006 but, throughout the opinion, we cite to the June

2006 version of the statute.”).

On **October 30, 2006**, Canfield wrote MS. WILLIAMS’ attorney, again denying her claim for damages. [ CP 164 ]

Effective **June 30, 2008**, the RSD’s appointed agent for receiving non-judicial claim notices, Mr. Semler, terminated his employment with the RSD. See **Exhibit B** to MS. WILLIAMS’ *Response to Motion for Discretionary Review* filed in an earlier Division III case (no. 281663) involving these same parties in this same controversy, a copy of which is attached in the Appendices hereto as pp. A-13 to A-14. On information and belief, the RSD did not thereafter appoint a new agent. Thus, for the last nine (9) months and twelve (12) days of the statutory limitation period for this case (which would end April 12, 2009), **the RSD did not have an appointed agent for MS. WILLIAMS to direct an updated non-judicial claim notice.**

[ The paragraph which originally appeared here has been removed per telephone conversation with Sherry from Division III on September 29, 2010. ]

On **April 6, 2009**, MS. WILLIAMS filed her lawsuit against the RSD. [ CP 141 - 144 ]

Effective **July 26, 2009**, the legislature amended the 2006 version of RCW 4.96.020. This new amendment **reinstated** the requirement for the claimant to verify her signature on the non-judicial claim notice form. [ Public record ] See, also, Gates, supra, at 90, 215 P.3d 983.

**A. The RSD Is Legally Prohibited From Raising Any Defense Under RCW Chapter 4.96**

MS. WILLIAMS' three submittals which comprise her non-judicial claim notice to the RSD pursuant to RCW Chapter 4.96 are properly characterized as follows:

**May 6, 2006:** Although MS. WILLIAMS omitted to submit this first iteration of her non-judicial claim notice to the RSD's appointed agent, Mr. Semler, she did submit it to the person the RSD directed her to submit it to.

**October 23, 2006:** Although MS. WILLIAMS omitted to submit this second iteration of her non-judicial claim notice to

the RSD's appointed agent, Mr. Semler, she did submit it to the RSD's agent who responded to her first submittal, Canfield.

**March 3, 2009:** By the time MS. WILLIAMS attorneys began taking a closer look at this issue in late 2008, the RSD's appointed agent – Mr. Semler – no longer was with the RSD. So, as with the second iteration, MS. WILLIAMS submitted this third iteration of her non-judicial claim notice to the RSD's agent who responded to both of her first submittals, Canfield.

The issue which is the focus of this subsection is whether MS. WILLIAMS submitted the three iterations of her non-judicial claim notice to the appropriate person pursuant to RCW 4.96.020. With the first two iterations, she did not. By the time she endeavored to correct that discrepancy during the last 9 months and 12 days of her statutory limitation period, the appropriate person – the RSD's appointed agent, Mr. Semler – no longer was with the RSD. In Woods v. Bailet, 116 Wn.App. 658, 67 P.3d 511 (2003), Ms. Woods alleged injury against doctors who performed surgery on her without her consent. **Although she filed her lawsuit on the very day the statute of limitation expired, Woods had not earlier submitted an RCW 4.96.020 non-judicial claim notice.** After her suit against the doctors was dismissed on that ground, on appeal, she argued the 2001 amendment to the statute – which, again, for the first time required local municipalities to appoint agents to receive claims – should be applied retroactively (because the municipal corporation which employed the doctors had no appointed agent during her statutory

limitation period). The Woods Court declined to apply that new requirement retroactively for Woods' benefit. In so declining, the Court held as follows:

. . . . . this is not a case in which the plaintiff attempted to file a claim but sent it to the wrong office or agent. Cf. Kleyer v. Harborview Med. Ctr. of Univ. of Wash., 76 Wn.App. 542, 545-46, 887 P.2d 468 (1995). . . . .

However, the instant case clearly is one in which, during that last 9 months and 12 days, MS. WILLIAMS wanted to submit another iteration of her non-judicial claim notice to the RSD, however, by then, she could not comply with the statute because the RSD's appointed agent, Mr. Semler, essentially didn't exist with respect to the RSD anymore.

Of course, by the time MS. WILLIAMS submitted the third iteration of her non-judicial claim notice to the RSD's agent, Canfield, on **March 3, 2009**, the 2006 amendment amendment to RCW 4.96.020 – which, again, added the words “The failure of a local governmental entity to comply with the requirements of this section **precludes that local governmental entity from raising a defense under this chapter**” (with emphasis added) – already was in place (so MS. WILLIAMS raises no issue of retroactivity on this issue). That said, as the emphasized portion of the preceding sentence reveals, because (1) MS. WILLIAMS did, indeed, submit the third iteration of her non-judicial claim notice to the

RSD during that period and, (2) yet, the RSD during that period no longer had a legitimate appointed agent to receive the same, **the RSD is legally prohibited from raising any defense under RCW Chapter 4.96** as to alleged defects with the content of MS. WILLIAMS' non-judicial claim notice submittals – including each of the three defenses the RSD has raised in its cross appeal briefing (which respectively are additionally addressed in the following three subsections). See Estate of Connelly v. Snohomish County PUD #1, 145 Wn.App. 941, 947, 187 P.3d 842 (2008) (“The statute unambiguously provides that the district is precluded from raising defenses under the chapter, and arguing that the estate served the wrong person is a defense under the chapter”). In its cross appeal briefing, the RSD shrewdly has declined to address this issue, in order to avoid its obvious consequence.

**B. The RSD's Specific Asserted Defense – That MS. WILLIAMS' Non-Judicial Claim Notices Do Not Contain Any Statement Of Damages – Is Neither Factually Correct Nor Legally Availing**

This defense asserted by the RSD is nonmeritorious for the reasons set forth in subsection 1.A, above.

In addition, the Court properly may reject this asserted defense of the RSD's on the ground it waived this defense by responding to each of the first two iterations of MS. WILLIAMS' non-judicial claim notice

submittals without asserting any defects to their content.

Further, MS. WILLIAMS' non-judicial claim notices were delivered to the RSD, as mentioned above, on **May 6, 2006, October 23, 2006, and March 3, 2009**. These all occurred before the running of the original 3-year statute of limitation on **April 12, 2009**. The latter two of those three expressly stated a monetary amount of damages. Thus, it is not factually correct for the RSD to claim MS. WILLIAMS' submittals "do[] not contain any statement of damages."

Moreover, as for the first of those three (in which she did not provide a monetary amount of damages), MS. WILLIAMS set forth as follows on the section of the form (provided her by the RSD) titled "Describe Injury/Injuries":

broken front tooth, cracked front tooth, pushed in 2 lower front teeth. jaw fracture; cut lower lip requiring stitches. split upper lip requiring internal and external stitches, concussion, trauma to sinus

In this regard, see Renner v. City of Marysville, 168 Wn.2d 540, 546-48, 230 P.3d 569 (2010), in which the Supreme Court held as follows (with emphases added):

The purpose underlying the claimant's statement of his "amount of damages" is to provide the government notice of the type of relief

sought. Renner argues that the information he provided constituted adequate notice. He described his damages as “[w]ages and benefits . . . since termination,” as well as “emotional damages, costs, fees and such other damages as determined.” . . . .

...  
The city’s position, that a claimant must provide a reasonable estimate of damages prior to any discovery, is inconsistent with the statutory directive of **liberal construction**. Under some circumstances, the exact dollar amount sought will be known. In other cases, such precision is not possible. Because the purpose of providing a description of the damages claimed is to give the government general notice and the opportunity to investigate, negotiate, and possibly settle claims, and based on the statute’s liberal construction directive, a general description of damages sought fulfills the statute’s purpose.

...  
The proper inquiry is whether the information the claimant provided fulfills the purposes of the requirement and the claim filing statute, **liberally construed**. The damages information Renner provided to the city fulfilled the statutory purposes. We hold Renner **substantially complied** with the “amount of damages” requirement of . . . RCW 4.96.020(3).

Likewise, the information provided by MS. WILLIAMS was sufficient to fulfill the statutory purpose of providing the RSD “general notice and the opportunity to investigate, negotiate, and possibly settle [her] claims.”

**C. The RSD’s Specific Asserted Defense – That MS. WILLIAMS’ Non-Judicial Claim Notices Lack Residence Addresses For MS. WILLIAMS – Is Not Legally Availing**

This defense asserted by the RSD is nonmeritorious for the reasons set forth in subsection 1.A, above.

In addition, the Court properly may reject this asserted defense of

the RSD's on the ground it waived this defense by responding to each of the first two iterations of MS. WILLIAMS' non-judicial claim notice submittals without asserting any defects to their content.

Further, Renner v. Marysville, supra, Mr. Renner did not provide his residence addresses for the six-month period preceding the filing of his non-judicial claim notice; instead, he provided only a single address at which he lived during only the two months preceding his filing. The Supreme Court held this to be in substantial compliance with the statute, as follows:

The claim filing statute's requirement for a statement of residence is intended to give the municipality "an opportunity to investigate the claimant as well as his claimed injuries." Nelson v. Dunkin, 69 Wn.2d 726, 728, 419 P.2d 984 (1966). In other words, the notice must identify the person making the claim and provide the information necessary to conduct an investigation of the claimant. If the claimant provides information that fulfills this purpose, he substantially complies with the requirement. The Court of Appeals concluded that the address provided by Renner, where he lived for two months prior to his discharge, fulfilled this purpose and thus could be found to be in substantial compliance with . . . RCW 4.96.020. Renner, 145 Wn.App. at 456-57, 187 P.3d 283. We agree.

Id. at 548-49.

In the instant case, although MS. WILLIAMS did not provide her residence address in any of her non-judicial claim notices, the RSD didn't need her to. That is because her three children each were enrolled in the RSD. It was one of her daughters' Middle School softball games at which

MS. WILLIAMS suffered her injury. In other words, the RSD **already knew** MS. WILLIAMS' residence address. This is evidenced by the fact that, in response to the first of MS. WILLIAMS' three iterations of her non-judicial claim notices, the RSD's agent – Canfield – responded by letter to MS. WILLIAMS, **addressed to her at her residence address**, denying her claim for damages. On these facts, MS. WILLIAMS' non-judicial claim notices did not fail for lack of substantial compliance with the residence address prescription of the statute.

**D. The RSD's Specific Asserted Defense – That MS. WILLIAMS' Non-Judicial Claim Notices Omit A Verified Signature From MS. WILLIAMS – Is Not Legally Availing**

This defense asserted by the RSD is nonmeritorious for the reasons set forth in subsection 1.A, above.

In addition, the Court properly may reject this asserted defense of the RSD's on the ground it waived this defense by responding to each of the first two iterations of MS. WILLIAMS' non-judicial claim notice submittals without asserting any defects to their content.

Further, this issue was the sole issue in Gates v. Port of Kalama, supra. In Gates, Division 2 of the Court of Appeals essentially held (1) prior to the 1993 amendment to the statute, it contained a requirement for

the claimant to verify her non-judicial claim notice, (2) that requirement was removed by the legislature with the 1993 amendment to the statute, (3) that requirement was reinstated by the legislature with the 2009 amendment to the statute, and, (4) consequently, from 1993 to 2009, **the statute did not require a claimant to verify her non-judicial claim notice.**<sup>1</sup>

**2. The RSD's Brief Illuminates Material Distinctions Of Fact Which Support MS. WILLIAMS' Position That Summary Judgment Should Not Have Been Granted**

On pp. 8-9 of her opening brief, citing to "CP 105-106," MS.

WILLIAMS explains as follows:

- c. MS. WILLIAMS' was located twenty eight feet three inches (28'-3") from the 3<sup>rd</sup> base line (this measurement is not shown on the drawing, to avoid clutter).
- d. MS. WILLIAMS' was located forty six feet three inches (46'-3") from home plate (this measurement is not shown on the drawing, either, for the same reason).

However, on p. 3 of its brief, the RSD asserts "[MS. WILLIAMS] sat between home plate and third base, back from the foul line probably five to six feet. CP 19." These are material distinctions of fact, precluding summary judgment.

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<sup>1</sup> In Gates, Division 2 acknowledged Division 1 had held contrarily in Johnson v. King County, 148 Wn.App. 220, 226-27, 198 P.3d 546 (2009). MS. WILLIAMS urges Division 3 to side with Division 2 on this split of authority.

**3. The RSD's Claim – That Certain Facts Relied Upon By MS. WILLIAMS In Her Opening Brief “Come From A Brief” Rather Than From A Declaration From MS. WILLIAMS – Is False**

On pp. 3-4 of its brief, the RSD falsely alleges certain facts contained in MS. WILLIAMS' opening brief “come from a brief,” rather than from a declaration of MS. WILLIAMS. The “briefs” the RSD is referring to are as follows:

- MS. WILLIAMS' *Plaintiff's Supplemental Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and Declaration of Tiffani Williams in Opposition to Defendant's Motion for Summary Judgment* [ CP 47 - 67 ]and
- MS. WILLIAMS' *Plaintiff's Second Supplemental Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, Declaration of Tiffani Williams in Opposition to Defendant's Motion for Summary Judgment, and Declaration of John C. Bolliger in Opposition to Defendant's Motion for Summary Judgment.* [ CP 75 - 124 ]

As the titles to those documents make clear, they each contain a *Declaration of Tiffani Williams in Opposition to Defendant's Motion for Summary Judgment* – in which MS. WILLIAMS swears under penalty of perjury that the facts set forth in the “brief” part of the documents are true and correct.

**4. The RSD's Assertion – That MS. WILLIAMS' Attorney's Taking Of Measurements From The Ball Field In Question Is Improper – Is Not Legally Correct**

On p. 5 of its brief, the RSD asserts as follows:

Beginning on page 8 and through page 13 of [MS. WILLIAMS'] brief, she asserts more purported facts that are inadmissible. Her attorney, after the court [orally] granted [the RSD's] summary judgment on February 26, asserted himself as a witness in the case and, based upon [MS. WILLIAMS'] hearsay statements, took measurements of the baseball field on February 26, 2010, nearly four years from the date of injury.

First, as to the taking of measurements “nearly four years from the date of injury,” the RSD has proffered nothing which would suggest the field had somehow grown or shrunk – so that measurements taken four years later would not be the same as measurements taken on the date of the injury.

Second, this is not a case, say, of a collision between cars at an intersection – where the issue is which party had the green light – and the attorney for one of the parties is purporting to testify that he personally (and subjectively) saw the green light was in his own client's favor. Rather, MS. WILLIAMS' attorney's testimony about the ball field measurements is objectively verifiable – and has not been refuted by the RSD. So, it is not the kind of testimony which should be objectionable to the Court.

Third, the attorney's testimony in question appeared in MS. WILLIAMS' *Plaintiff's Second Supplemental Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, Declaration of Tiffani Williams in Opposition to Defendant's Motion for Summary*

*Judgment, and Declaration of John C. Bolliger in Opposition to Defendant's Motion for Summary Judgment.* [ CP 75 - 124 ] That document was filed on **April 8, 2010**. However, on **April 22, 2010**, when the RSD filed its own second supplemental memorandum of law, it declined to raise the issue. As such, the Court should deem the RSD to have waived the issue.

Fourth, CR 43(g) sets forth as follows (with original emphasis):

**Attorney as Witness.** If any attorney offers himself as a witness on behalf of his client and gives evidence on the merits, he shall not argue the case to the jury, unless by permission of the court.

Clearly, that civil rule does not state any prohibition against an attorney providing testimony on behalf of his client. Indeed, its language infers precisely the opposite. The only prohibition stated in that civil rule – and it is only a provisional prohibition – relates to whether the attorney later may argue the case to the jury. That issue is not before the Court.

**5. The RSD's Cases Offered In Support Of Its Motion For Summary Judgment Are Inapposite To The Facts Of This Case**

**A. Leek v. Tacoma Baseball Club**

The RSD cites Leek v. Tacoma Baseball Club, Inc., 38 Wn.2d 362, 229 P.2d 329 (1951) in support of its motion for summary judgment. In Leek, Mr. Leek was a paying customer who sat in the grand stand. Mr. Leek's "reserved seat was in the fourth row from the front and a little to the left of center" (i.e., behind home plate). His seat was behind a vertical wire screen which was 26 feet high and 34 feet wide. The grand stand was not roofed and there was no overhead screen. A high, foul ball eventually occurred, clearing the 26-foot-high screen which separated Mr. Leek from the batter, and dropped onto his head. Mr. Leek was rendered unconscious and was taken to a hospital by police officers. In his lawsuit against the Tacoma Baseball Club, judgment was entered in favor of the Tacoma Baseball Club. On appeal, the Supreme Court of Washington affirmed. However, their holding was as follows (with original emphasis):

It is uniformly held that the operator of a baseball park although not an insurer of the safety of its patrons, is bound to exercise reasonable care, or that care commensurate to the circumstances, to protect its patrons against injury. [Citations omitted.]

Applying this rule to factual situations of the kind here presented, it is now settled that the proprietor has the duty of screening some grandstand seats. [Citations omitted.]

....  
.... The question thus comes down to this: Did the proprietor, in providing a perpendicular screen [26] feet high in front of the seats immediately behind home plate, fulfill his duty to provide some screened seats, or was it necessary to also provide overhead protection for such seats?

....  
In our opinion, under the facts of this case, [the Tacoma Baseball Club] did not have reason to believe that the lack of overhead protection involved an unreasonable risk of injury to [Mr. Leek]. It

was not uncommon for foul balls to drop over the vertical screen into this section of the stand. However, there is nothing in the record, aside from this one incident, or in common experience, to indicate that foul balls of this kind cause serious injuries with sufficient frequency to be considered an unreasonable risk.

So-called foul tips, going into adjacent stands without gaining any considerable elevation, are known to be dangerous, because their speed makes avoidance difficult and serious injury more likely.

Foul balls which go high enough to clear a [26]-foot screen, however (and the ball in question apparently went much higher), take longer to reach the seats, and are therefore easier to dodge or catch. If unsuccessful in this, the spectator is usually not seriously injured, because the driving force of the ball is gone and there is left only the force of gravitation. The fact that in this case a serious injury did result is not controlling. The question is whether the proprietor had reason to believe, *before the accident happened*, that lack of overhead protection would unreasonably endanger [Mr. Leek].

....

... we conclude that [the Tacoma Baseball Club] was not, with respect to [Mr. Leek], under a duty to provide overhead protection on the occasion in question.

Id. at 364-67.

The Leek decision clearly is inapposite in terms of being supportive of the RSD's motion for summary judgment. First, it holds that a ballfield proprietor **has an affirmative duty** to protect its patrons from the risk of unreasonable harm relating to foul balls. (On this point, then, the Leek decision actually is supportive of MS. WILLIAMS' opposition to the motion for summary judgment.) Second, the ballfield proprietor in Leek actually did provide a wire screen behind which Mr. Leek was seated to view the game – however, in the instant case, the RSD provided no such

screen protection. Finally, although the Leek Court held in favor of the ballfield proprietor, it did so on grounds that the proprietor, having provided adequate screening to prevent a “straight-back” foul ball from injuring its patrons, did not also have a duty to protect its patrons from high-flying foul balls with overhead screening. In the instant case, of course, MS. WILLIAMS was not hit with such a high-flying foul ball; rather, she was hit with a line-drive foul ball – a danger which clearly was reasonably foreseeable for the RSD.

**B. Perry v. Seattle School District No. 1**

The RSD also cites Perry v. Seattle School District No. 1, 66 Wn.2d 800, 405 P.2d 589 (1965) – the only “school district” decision cited by the RSD – in support of its motion for summary judgment. In Perry, Mrs. Perry was “seriously, painfully, and permanently injured” while standing along the sideline at a football game – when a “sweep” running play resulted in two defensive players tackling the running back just out of bounds – and into Mrs. Perry. The Supreme Court of Washington held the school district was not liable for Mrs. Perry’s injuries. That said, the Perry decision isn’t particularly pertinent to the instant case for several reasons.

First, the fact pattern involves a football game, not a baseball game.

Second, the numerous findings of fact set forth in the decision appear to abundantly support an opposite holding from the Court. This view is gleaned from the decision itself, as follows:

The trial court, after hearing all of the evidence, entered a judgment of dismissal.

Id. at 801. In other words, although trial was held, the case never made it to the jury. On this topic, the Perry Court further elaborated as follows (with emphases added):

From these findings of fact the [trial] court concluded: (a) that the defendant was not negligent; (b) that the plaintiff was contributorily negligent; and (c) that the plaintiff voluntarily assumed the risk of being injured by standing in close proximity to the side lines.

**These, in themselves, are the ultimate issues upon which a jury might be required, under proper instructions, to make a finding.** (If the defendant was found to be not negligent, no other finding would be necessary.) **Negligence, contributory negligence, and assumption of the risk were all issues to be determined by the trier of the facts.** [Citations omitted.]

.....

**On each issue considered by the trial court, it seems to us that reasonable minds might, on the basis of the evidence as set out by the court in the quoted findings, have disagreed.**

Id. at 804-05. In other words, after suggesting in its holding the case was probably one that should have gone to the jury, the Perry Court curiously ended up affirming the trial court's dismissal of Mrs. Perry's case without

submitting it to the jury.

Third, the Perry decision was authored by Justice Hill – the selfsame Justice who concurred in the Barnecut, infra decision. The Barnecut decision – the decision (of all the decisions cited by both parties with respect to the RSD’s motion for summary judgment) which is most directly on point with the facts of the instant case – is fatal to the RSD’s motion for summary judgment.

**C. Simpson v. May**

The RSD also cites Simpson v. May, 5 Wn.App. 214, 486 P.2d 336 (Div. 3 1971) in support of its motion for summary judgment. In Simpson, Mr. Simpson was the guardian ad litem for a 16½-year-old boy, Bruce, who sustained a permanent eye injury while voluntarily engaging with friends in throwing cattail heads at each other. Mr. Simpson sued the parents of the boy who threw the cattail head which caused the injury. The trial court granted the parents’ motion for a nonsuit and dismissal with prejudice. Mr. Simpson appealed. Division III affirmed. In so affirming, Division III held as follows:

In the present case, the obvious purpose of those engaged in the “game” was to hit each other with a cattail head. The risk reasonably to be expected by any of the participants was the risk of being struck. . . . We are of the opinion

reasonable minds cannot differ that the risk of being struck did not constitute an extraordinary risk within the meaning of [previously-discussed cases]. On the contrary, the risk was so obvious that all those voluntarily participating, including Bruce, must be presumed to have comprehended it.

Id. at 221-22.

It should be clear the Simpson decision, too, should not have been cited by the RSD in support of its motion for summary judgment. MS. WILLIAMS and the batter whose foul ball struck her in the face were not engaged in some voluntary, mutual “game” of purposely hitting baseballs at each other.

**D. The Barnecut Decision Is Fatal To The RSD’s Motion For Summary Judgment**

In Barnecut v. Seattle School District No. 1, 63 Wn.2d 905, 389 P.2d 904 (1964), Mr. Barnecut was a spectator at a high school baseball game played on the Hiawatha playfield, which is a public playground owned by the City of Seattle. While he was sitting in the stand (near the third base area), Mr. Barnecut was struck on the left side of his face by a baseball thrown by a member of one of the high school teams. Mr. Barnecut’s upper full-plate denture was broken into three pieces, his mouth and face were cut through, and, subsequently, he suffered severe pain and swelling in his mouth, jaw, and face. Mr. Barnecut sued the Seattle School District for its negligence which led to his injuries.

The trial court dismissed Mr. Barnecut's complaint on the ground that his action was barred by the provisions of RCW 28.58.030. (As revealed in Section 2 above, RCW 28.58.030 was repealed 3 years after (in 1967) the Barnecut decision was rendered (in 1964).) The Supreme Court of Washington reversed the trial court's dismissal of Mr. Barnecut's complaint – and remanded the case for trial.

The Supreme Court's analysis of the facts of Barnecut as applied to RCW 28.58.030 is not itself interesting with respect to the instant case – because RCW 28.58.030 was repealed some 43 years ago. Suffice it to say that, given the then-existence of that statute (which had the effect of substantially limiting a school district's liability for its tortious acts), the Supreme Court declined to hold that RCW 28.58.030 was applicable to the facts of the Barnecut case. **More to the point, given the facts of Mr. Barnecut's case, having dispensed with then-existing RCW 28.58.030 as a means of foreclosing Mr. Barnecut's negligence lawsuit against the Seattle School District, the Supreme Court held Mr. Barnecut was otherwise entitled to a trial.**

Of course, the facts of the instant case are nearly identical to those of Mr. Barnecut's case. The only difference is that, whereas Mr. Barnecut was inadvertently hit in the face with a baseball which was **thrown** by one of the game's players, MS. WILLIAMS was inadvertently hit in the face

with a baseball which was **fouled off the bat** of one of the game's players. No rationally-thinking person can conclude this minor distinction renders Barnecut somehow inapposite. Rather, the Supreme Court's holding in Barnecut is squarely on point. The Barnecut decision never has been reversed, overturned, abrogated, disapproved of, or modified<sup>2</sup> – i.e., it is still good law.

DATED this 21 day of September, 2010.

**BOLLIGER LAW OFFICES**

By: \_\_\_\_\_

  
John C. Bolliger, WSBA No. 26378  
Attorneys for the Appellant and Cross  
Respondent

---

<sup>2</sup> Westlaw's Keycite® service indicates Barnecut was “distinguished” by Division III’s 1973 decision in Nerbun v. State of Washington, 8 Wn.App. 370, 506 P.2d 873 (1973). However, a review of that decision reveals Keycite® should be indicating the Barnecut decision was merely “mentioned” in Nerbun, not “distinguished” in Nerbun – and, in any event, Nerbun’s reference to Barnecut has nothing whatsoever to do with the issues surrounding the instant case or the RSD’s motion for summary judgment.

**DECLARATION OF JOHN C. BOLLIGER**

I, John C. Bolliger, declare as follows:

I am the attorney for the appellant and cross respondent in this matter, I have personal knowledge of the facts set forth above (which aren't attributable to others), and, if called to testify about the same, I can and will competently do so. I swear under penalty of perjury under the laws of the state of Washington the facts set forth above are true and correct.

DATED this 21 day of September, 2010.

Kennwick, WA  
City, state where signed

  
\_\_\_\_\_  
John C. Bolliger

**DECLARATION OF SERVICE**

STATE OF WASHINGTON )  
COUNTY OF BENTON ) ss.

I, John C. Bolliger, declare as follows:

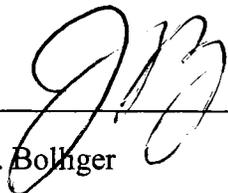
On the date set forth below, I caused a true and correct copy of this brief to be sent to the following persons and entities in the manner shown:

<u>Andrea J. Clare</u>	<input type="checkbox"/>	regular mail
Leavy, Schultz, Davis & Fearing, P.S.	<input type="checkbox"/>	certified mail, RRR no. _____
2415 W. Falls Avenue	<input type="checkbox"/>	facsimile no. 736-1580
Kennewick, WA 99336	<input checked="" type="checkbox"/>	Pronto Process & Messenger Service, Inc.
	<input type="checkbox"/>	hand-delivery by _____
	<input type="checkbox"/>	Federal Express _____

I swear under penalty of perjury under the laws of the state of Washington the foregoing is true and correct.

DATED this 21 day of September, 2010.

Kennewick, WA  
City, state where signed

  
John C. Bolliger

# **Appendices**

FILED

JUL 31 2009

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

No. 281663

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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TIFFANI WILLIAMS,

Respondent,

vs.

RICHLAND SCHOOL DISTRICT #400,

Petitioner.

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RESPONSE TO MOTION FOR DISCRETIONARY REVIEW

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509-736-1300  
Attorneys for Petitioner

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IV. ARGUMENT WHY REVIEW SHOULD BE DENIED ...	3
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**TABLE OF AUTHORITIES**

**Cases:**

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**Reyes v. City of Renton,**  
121 Wn.App. 498, 502, 86 P.3d 155 (2004) ..... 1

**Statutes:**

**RCW 4.96.020** ..... 1,3,4

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### I. ISSUE PRESENTED FOR REVIEW

Is Petitioner precluded from raising a defense under the Notice of Claim statute, RCW 4.96.020, because Petitioner has failed to comply with the express statutory requirement of identifying a current agent to be served with the Notice of Claim?

### II. STANDARD OF REVIEW

A motion for summary judgment is reviewed de novo considering all facts in the light most favorable to the nonmoving party. Reyes v. City of Renton, 121 Wn.App. 498, 502, 86 P.3d 155 (2004).

### III. STATEMENT OF THE CASE

Tiffani Williams suffered a severe injury to her face while at a softball game on Richland School District property. While seated down the third base line, a line drive foul ball struck her in the face. The injuries that Ms. Williams suffered were substantial. Due to there being no fence protecting spectators down either base line, Ms. Williams and other spectators were unprotected from foul balls.

Additionally, due to the fire lanes on the school property not being properly marked and the school not enforcing such parking restrictions,

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emergency vehicles had great difficulty reaching Ms. Williams to treat her for her severe injuries.

After being released from the hospital, Ms. Williams contacted the Richland School District for it to pay for her injuries. In response, Gayla Davis, who is the Financial Services Secretary for the Richland School District, contacted Ms. Williams through the mail with a letter stating that for Ms. Williams to file her claim that she needed to fill out the form that was included with the letter. This letter was sent directly to Ms. Williams' mailing address. Ms. Williams then filled out the form and mailed it back to Gayla Davis.

A letter dated June 6, 2006, from the Schools Insurance Association of Washington, was sent directly to Ms. Williams at her mailing address in response to her filed claim. This letter denied coverage to Ms. Williams.

Subsequently, a demand letter dated October 23, 2006, was sent by one of Ms. Williams' attorneys. This letter detailed the extensive damage suffered by Ms. Williams, the medical expenses associated with the damage, and the amount that Ms. Williams was requesting from the Richland School District.

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In response, the Schools Insurance Association of Washington sent a letter dated October 30, 2006, to Ms. Williams' attorneys which once again denied liability on the part of the Richland School District.

Consequently, on April 16, 2009, Ms. Williams filed a lawsuit against the Richland School District in Benton County Superior Court.

#### IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

**Discretionary review should be denied because Petitioner is statutorily precluded from raising a defense under RCW 4.96.020 due to not identifying a current agent who can be served with the Notice of Claim.**

RCW 4.96.020 reads in part (emphasis added),

(1) The provisions of this section apply to claims for damages against all local governmental entities and their officers, employees, or volunteers, acting in such capacity.

(2) The governing body of each local governmental entity shall appoint an agent to receive any claim for damages made under this chapter. *The identity of the agent and the address where he or she may be reached during the normal business hours of the local governmental entity are public records and shall be recorded with the auditor of the county in which the entity is located.* All claims for damages against a local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, shall be presented to the agent within the applicable period of limitations within which an action must be commenced. *The failure of a local governmental entity to comply with the requirements of this section precludes that local governmental entity from raising a defense under this chapter.*

Petitioner, Richland School District No. 400, lists Dr. Richard Semler, Superintendent, as the agent to receive a claim for damages (See Exhibit A); however, Dr. Semler retired in June of 2008 (See Exhibit B). Consequently, Petitioner has failed to properly identify an agent to receive a claim for damages for almost ten months prior to the statute of limitations date on this case. Therefore, because Petitioner has failed to comply with the express statutory requirements of RCW 4.96.020, petitioner is "precluded[ed] . . . from raising a defense under this chapter."

#### V. CONCLUSION

Due to the Richland School District failing to appoint a current agent to accept a claim for damages, it is statutorily precluded from raising a defense under RCW 4.96.020, and therefore, Petitioner's motion for discretionary review should be denied.

Dated this 29 day of July, 2009.

BOLLIGER LAW OFFICES



John C. Bolliger, WSBA #26378  
David M. Bingaman, WSBA #40586  
Andrea M. Salinas, WSBA #40057  
Attorneys for Defendant



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EXHIBIT

“A”

A-9

Return Name and Address:  
Tim Dickerson  
Rice Law Firm  
7303 W. Canal Dr.  
Kennesaw, Ga 30144

PLEASE PRINT OR TYPE INFORMATION:

Document Title(s) (or transactions contained therein): 1. Resolution 566 Appointment of Agent 2. 3. 4.
Grantor(s) (Last name first, first name, middle initials): 1. John Steach 2. James L. Peterson 3. Richard Sansons 4. Carolyn Kathleen Joyce Additional names on page <u>1</u> of document.
Grantee(s) (Last name first, first name, middle initials): 1. Dr. Richard W. Semler 2. 3. 4. Additional names on page _____ of document.
Legal description (abbreviated: ie. lot, block, plat or section, township, range, qtr./qtr.)  Additional legal is on page _____ of document.
Reference Number(s) of documents assigned or released: Additional numbers on page _____ of document.
Assessor's Property Tax Parcel/Account Number  Property Tax Parcel ID is not yet assigned. Additional parcel numbers on page _____ of document.
The Auditor/Recorder will rely on the information provided on the form. The staff will not read the document to verify the accuracy or completeness of the indexing information.

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**RICHLAND SCHOOL DISTRICT NO. 400**  
**Benton County - Richland, Washington**  
**Resolution No. 566**  
**Appointment of Agent**

Whereas, RCW 4.96.020, effective July 22, 2001, requires the Board to appoint an agent for purposes of receiving claims for damages; and

Whereas, The Board has appointed Dr. Richard Semler, Superintendent of the Richland School District No. 400, to assume the role of agent for purposes of receiving claims for damages under RCW 4.96.020; and

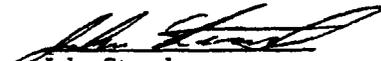
Therefore be it resolved that the Board of Directors of Richland School District No. 400 hereby appoints to act on behalf of the Board as agent for receiving notice of claims of damages under RCW 4.96.020 and WAC 180-40-205(6):

**Dr. Richard Semler**  
**Superintendent**  
**615 W. Snow Avenue**  
**Richland, WA 99352**

Be it further resolved that the above appointment shall be recorded with the Benton County Auditor.

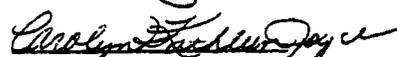
Adopted this 28<sup>th</sup> day of January 2003 at a regular meeting of the Board of Directors of Richland School District No. 400.

**BOARD OF DIRECTORS:**

  
**John Steach**  
**President**

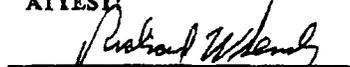
  
**James L. Peterson**  
**Vice President**

  
**Richard Jansons**  
**Director**

  
**Carolyn Kathleen Joyce**  
**Director**

  
**Phyllis J. Strickler**  
**Director**

**ATTEST:**

  
**Richard W. Semler**  
**Secretary, Board of Directors**

**EXHIBIT**  
**“B”**

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**SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF BENTON**

TIFFANI WILLIAMS, an unmarried woman,

**Plaintiff,**

v.

RICHLAND SCHOOL DISTRICT #400,

**Defendant.**

Case No. 09-2-00916-1

**DECLARATION OF  
LORI ALVAREZ**

**DECLARATION**

I, Lori Alvarez, declare as follows:

I am the legal assistant to David M. Bingaman. On July 20, 2009, at around 10:30 a.m. I called the Richland School District and spoke to Della. Della is the assistant of Jean Lane, superintendent of the Richland School District. Della told me that Jean Lane began her position

*Declaration of Lori Alvarez  
Page 1 of 2*

**BOLLIGER LAW OFFICES**

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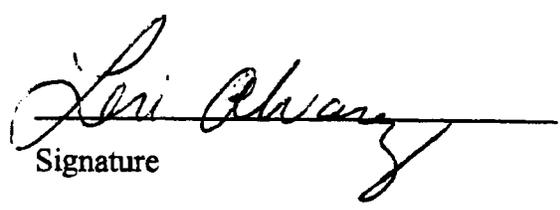
**A-13**

1 with the Richland School District on July 1, 2008, and that Dr. Richard Semler retired  
2 June 30, 2008.

3  
4 I swear under penalty of perjury under the laws of the state of Washington that the foregoing  
5 is true and correct.

6  
7  
8 DATED this 28<sup>th</sup> day of July, 2009.

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11 Kennewick, WA  
12 City, state where signed

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Signature

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