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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. 290735

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DIVISION III

KELLY JAMES PAULLUS and TRISTA SOPHIA PAULLUS,
individually and as a marital community, and GEOFFREY MICHAEL
MITCHELL, individually,

Appellant.

v.

COUNTY OF YAKIMA,

Respondent.

BRIEF OF APPELLANTS GEOFFREY MITCHELL, KELLY JAMES
PAULLUS AND TRISTA SOPHIA PAULLUS

Sam B. Franklin, WSBA No. 1903
Dan J. Von Seggern, WSBA No. 39239
Of Attorneys for Appellants

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A. INTRODUCTION

Appellants Geoffrey Mitchell and Kelly and Trista Paullus, plaintiffs below (hereinafter collectively Mitchell), appeal from a decision of the Yakima County Superior Court, granting summary judgment to defendant-respondent Yakima County. Mitchell *et al.* were injured on September 2, 2005 when a guardrail on a county road split during an auto accident and penetrated their van. They allege that the defective guardrail resulted from the County's negligence. Pursuant to RCW 4.96.020, Mitchell properly filed a tort claim with Yakima County in April, 2008, before filing suit in August 2008. The claim form described a claim for personal injury, provided the date, time, and exact location of the accident, stated that Mitchell's injuries were due to the guardrail's having split, gave the names and addresses of all claimants, and specified the amount of damages sought.

The County proceeded as though it was responding to the claim for almost two years after it was filed. It acknowledged receipt of the claim, requested Mitchell's medical records, corresponded with Mitchell's attorney, discussed the case with Mitchell's attorney, and associated outside counsel to handle the matter. The County made no mention of any alleged deficiency in the claim form until February 2010, long after the statute of limitations expired, when the County moved for summary

judgment on the grounds that the claim form was deficient.

Yakima County Superior Court Judge David A. Elofson granted the County's motion for summary judgment, finding that the claim form did not substantially comply with RCW 4.96.020(3)'s content requirements, in that it did not sufficiently allege that the County was negligent or that it owned the highway or guardrail involved. Judge Elofson also ruled that the County had not waived the right to assert the affirmative defense of a deficient claim form, despite having proceeded as though it was litigating the claim for almost two years and never having raised the alleged deficiencies in that time. Mitchell appeals from the trial court's rulings and respectfully requests that the grant of summary judgment be reversed.

B. ASSIGNMENTS OF ERROR

Assignment of Error

1. The trial court committed reversible error when it granted summary judgment for the County.

Issues Pertaining to Assignment of Error

1. Whether the trial court erred in granting summary judgment, where there were, at a minimum, genuine questions of material fact regarding the issues both of substantial compliance and of waiver.

2. Whether the trial court erred when it found that Mitchell

had not substantially complied with the claims statute, when:

a. The claim as filed fulfilled the purposes of the statute and placed the County on notice of the claim;

b. The County was able to investigate and evaluate the claim based on the information provided;

c. It was not necessary to explicitly allege negligence, where the language of RCW 4.96.020 does not require an express allegation or description of negligence;

d. It was not necessary to explicitly allege county ownership of the road, where the claim form submitted specified the exact location of the accident, and geographic facts such as location of roads are non-controversial; and

e. There were, at a minimum, genuine questions of material fact regarding whether Mitchell substantially complied with the statute's requirement for the content of a claim.

3. Whether the trial court erred when it found that the County had not waived the defense of insufficiency of the claim, when:

a. The County held itself out as going forward with defense of the claim for almost two years;

b. The County did not raise the issue of insufficiency of the claim until long after the statute of limitations ran, and;

c. There were, at a minimum, genuine questions of material fact regarding whether the County's actions amounted to waiver.

C. STATEMENT OF THE CASE

1. Mitchell properly submitted a claim form for personal injuries pursuant to RCW 4.96.020.

On September 2, 2005, Jacob Depauw was driving a van belonging to his employer, Michael Durnal of Durnal Construction Company, on Konnowac Pass Road, a county highway, near Moxee in Yakima County. CP 45. His passengers were plaintiffs/appellants Kelly J. Paullus and Geoffrey M. Mitchell, Julio Cesar Garcia Gomez and Christopher Lealand Crabb.

Mr. Depauw lost control of the van, and struck the highway guardrail. CP 45. Rather than remaining intact and keeping the van from leaving the road, the guardrail unexpectedly split. *Id.* A portion of the guardrail pierced the passenger compartment of the van and injured Paullus and Mitchell as well as fellow passenger Crabb. *Id.* Paullus and Crabb sustained serious injuries to their legs, while Mitchell suffered primarily psychological injuries from seeing the metal guardrail pierce through the van and shatter the knees of his cousin Kelly Paullus.

At issue in this appeal are the claims filed by plaintiffs/appellants Geoffrey Mitchell, Kelly Paullus, and his wife Trista S. Paullus against

defendant/respondent Yakima County.¹ CP 44.

Pursuant to the local government tort claim filing statute, RCW 4.96.010 *et seq.*, attorney Christopher Childers of Smart, Connell, and Childers, P.S., filed a Statement of Claim for each plaintiff/appellant with defendant/respondent Yakima County on April 4, 2008. CP 41-3. The notices of claim were on a form provided by Yakima County. *Id.* The forms were completely filled out, including the date, time, and exact location of the accident, and provided the names of all persons involved in the accident, including the responding Yakima County Sheriff's officers. *Id.* The forms were signed by the claimants under penalty of perjury, and gave their complete addresses. *Id.*

A document attached by Mr. Childers to the county's form provides a description of the accident, states that claimants were injured as a result of the accident, and states that injuries suffered by the claimants include "medical bills, out-of-pocket expenses, future medical damages, wage loss, loss of earning capacity, loss of consortium, and general damages." CP 44-5. The total amount of damages sought is given as \$3,500,000. CP 45. This document also recites that the plaintiffs' addresses given were their residences at the time of filing the claim, and states their residence

¹ Claims against Mr. Depauw, Mr. Durnal, and Durnal Construction were previously dismissed and are not at issue in this appeal.

addresses for the six months preceding the September 2, 2005 accident.

Id. The claims were properly filed with the Clerk of the Yakima County Commissioners, who acknowledged receipt of the claim form in an April 8, 2008 letter. CP 54.

2. The County proceeded as though it was defending against the tort claim for nearly two years.

In a May 15, 2008 letter, the law office of Smart, Connell & Childers inquired of the County as to whether they had retained the damaged guardrail or whether any photos of the guardrail or the accident site existed. CP 55. In a May 29, 2008 response to this inquiry, the Yakima County Prosecuting Attorney's Office confirmed that "the Public Services Department did not save any of the damaged guardrail," and that the County did not have photos of the guardrail or the accident scene. *Id.*

The correspondence from the Yakima County Prosecuting Attorney's Office did not express any confusion over the location of the accident, deny in any way that the accident took place on a County highway, or in any way suggest that the guardrail was not County property. *Id.* The May 29 letter also requested that Mr. Childers' office forward copies of all the plaintiffs' medical treatment records. *Id.* The County again requested copies of appellants' medical records on July 22, 2008, in separate correspondence. CP 56.

Mr. Childers filed Mitchell's Summons and Complaint in Yakima County Superior Court on August 12, 2008. CP 47. Larry Peterson of the Yakima County Prosecutor's office entered a notice of appearance on September 23, 2008 (CP 105), and called Mr. Childers to discuss the case by telephone on September 29, 2008. CP 72. Per Mr. Peterson's request, Mr. Childers provided him with a summary of the appellants' claims (CP 73), the name of appellants' consulting expert, and the fact that the expert had not completed a draft report yet. *Id.* Mr. Peterson related that the guardrail had been discarded, and provided the names of the County's designated witnesses. *Id.* The two attorneys discussed discovery requests and the dates that they might be available for depositions. *Id.*

3. The County first raised the issue of a deficient claim form in a summary judgment motion 22 months after the claim was filed.

On December 10, 2009, more than a year later, and long after the statute of limitations had expired on September 2, 2008, Mark Watson of Meyer, Fluegge, & Tenney filed a Notice of Association as outside counsel for the County. CP 57. The County, through Mr. Watson, moved for summary judgment on February 8, 2010. CP 80. The County's motion argued that the notice of claim was deficient in that it did not make an allegation that the County was negligent or that the County owned or controlled the highway or the guardrail. CP 87. The County further

argued that there was nothing on the face of the claim that would have allowed it to determine the nature of the tortious conduct alleged. *Id.*

This was the first time that the issue of sufficiency of the claim had been raised. Mr. Peterson stated in his Declaration in support of the County's Motion for Summary Judgment that as late as September 29, 2008, it "had not occurred to me" that the notice of claim might be defective (CP 26), and that he had been too busy to work up the claim. CP 25. The County answered the Complaint on April 5, 2010, some 20 months after the Complaint was filed and 19 months after the statute of limitations had run out. CP 75.

At a May 6, 2010 hearing, Superior Court Judge David A. Elofson heard oral argument and granted the County's motion for summary judgment. CP 6. Judge Elofson issued an oral ruling, stating that he did not believe that substantial compliance with the statute had been met. RP 19:22-4. He also stated that "there is no allegation of negligence or any wrongdoing on the part of the County," that there was "no reference to any claim that the County owned any of the property that was involved in this case," and that "I can't find that there is substantial compliance." RP 19:16-8; *id.* at 20:8.

The trial court further held that the County had not waived its right to the statutory notice defense, saying that "I think there has to be some

investment that would make it unfair for the defendant to assert that the claim was invalid” and that “I don’t find that the mere passage of time is enough.” RP 21:5-8. Mitchell now appeals the trial court’s grant of summary judgment.

D. SUMMARY OF ARGUMENT

1. Summary judgment is appropriate only if reasonable minds could reach but one conclusion.

In ruling on a motion for summary judgment the court must view the evidence, and all reasonable inferences from the evidence, in the light most favorable to the non-moving party. Summary judgment should be denied if reasonable minds could reach different conclusions regarding whether a genuine issue of material fact exists.

2. Mitchell substantially complied with the requirements of the tort claims statute.

The tort claim filing statute, RCW 4.96.010 *et seq.*², provides that governmental entities are liable for their torts to the same extent as private entities. The statute requires that a claim form providing information about the claimants, the type of claim, the circumstances under which it arose, and damages sought be submitted at least 60 days prior to filing suit. The purpose of the requirement is to allow the government to

² Unless otherwise specified, all references to the claims statute, RCW 4.96.010 *et seq.*, are to the version in effect in 2008.

investigate, and perhaps settle, a claim before suit is filed. Courts apply a “substantial compliance” standard to the content of a claim. A claim substantially complies if it is sufficient to put government on notice and allow them to investigate and perhaps settle the claim.

Mitchell submitted a claim form providing the required information. The County acknowledged receipt of the claim, and proceeded as though it were defending the case. Because the claim form accomplished the statutory purpose of placing the County on notice and allowing investigation and evaluation of the claim, Mitchell substantially complied with the statute’s requirements.

3. The County waived the defense of insufficiency of the claim form through its own actions.

A defendant may waive an affirmative defense through conduct that is dilatory or inconsistent with later assertion of the defense. Asserting a defense only after the statute of limitations had expired also can constitute waiver.

The County acknowledged receipt of the claim, requested Mitchell’s medical records, responded to Mitchell’s request for information about the damaged guardrail, discussed the matter with Mitchell’s attorney, and associated outside counsel to handle the matter. The issue of a deficient claim form was not raised until the County moved for summary judgment, 22 months after the claim form was received and

17 months after the statute of limitations had expired.

4. Because there are genuine questions of material fact, the trial court erred in granting summary judgment.

The record demonstrates that there are, at a minimum, genuine questions of material fact regarding whether Mitchell substantially complied with the claims statute and whether the County waived the defense of insufficiency of the claim form. Because there are genuine questions of fact, the trial court erred when it granted summary judgment for Yakima County.

E. ARGUMENT

1. If reasonable minds could reach different conclusions based on the evidence, summary judgment should be denied.

“Trial court rulings in conjunction with a motion for summary judgment are reviewed de novo.” *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 416, 150 P.3d 545 (2007); *see Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). When reviewing a grant of summary judgment, an appellate court therefore engages in the same inquiry as the trial court. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). Summary judgment is appropriate only when, considering the pleadings, affidavits, depositions, and admissions on file, and the reasonable inferences flowing from them, in the light most favorable to the non-moving party, there is no genuine issue of material

fact, reasonable persons could reach but one conclusion, and the movant is entitled to judgment as a matter of law. CR 56(c); *Marincovich*, 114 Wn.2d at 274; *VersusLaw, Inc. v. Stoel Rives*, 127 Wn. App. 309, 319, 111 P.3d 866 (2005); *Island Air v. LaBar*, 18 Wn. App. 129, 136, 566 P.2d 972 (1977). If reasonable minds could reach different conclusions, the motion should be denied. *Klinke v. Famous Recipe Fried Chicken*, 94 Wn.2d 255, 256-7, 616 P.2d 644 (1980).

A party moving for summary judgment has the burden of producing factual evidence showing that it is entitled to judgment as a matter of law. *Hash by Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). Only after the movant has produced such evidence does the burden shift to the non-moving party to set forth facts showing that there is a genuine issue of material fact. If the moving party does not sustain its burden, summary judgment should be denied regardless of whether the non-moving party has submitted affidavits or other evidence in opposition. *Id.*

2. **Mitchell substantially complied with the claim filing statute's content requirement and fulfilled the statute's purpose.**
 - a. **The purpose of the claim filing statute is to notify the government of the claim and allow investigation, evaluation, and settlement of claims.**

A local government entity, such as a county, is liable for its

tortious conduct to the same extent as a private person or a corporation would be. RCW 4.96.010(1). However, a plaintiff must file a claim with the governmental entity at least 60 days prior to filing suit. RCW 4.96.020(4). The purpose of the tort claim requirement is “to allow government entities time to investigate, evaluate, and settle claims” before a suit is filed. *Renner v. City of Marysville*, 168 Wn.2d 540, 545, 230 P.2d 569 (2010)(citing *Medina v. PUD No. 1 of Benton County*, 147 Wn.2d 303, 310, 53 P.3d 993 (2002)).

b. It is undisputed that Mitchell strictly complied with the statute’s timing and address requirements.

RCW 4.96.020(4) provides that no tort action may be commenced against a government entity “until sixty calendar days have elapsed after the claim has first been presented to the agent of the governing body thereof.” Mitchell’s claim was filed on April 4, 2008. CP 38. It is undisputed that the claim was filed with the clerk of the County Board of Commissioners as required. CP 54. Suit was filed in Yakima County Superior Court on August 12, 2008, 130 days after the claim was filed. CP 49. The time requirement was therefore met.

A claim must provide “a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six months immediately prior to the time the claim arose.” RCW

4.96.020(3). The claim forms submitted by Mitchell *et al.* gave their addresses as of the time the claim was presented, and further provided their addresses for a period of six months prior to the date of the accident (September 2, 2005). CP 44. This, too, unquestionably complied with the statute's requirements.

c. Substantial compliance with the content requirement for a claim suffices.

The claim filing statute provides that “[t]he laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.” RCW 4.96.010(1). The requirements for the **content** of a claim are thus distinguished from the **timing** requirement that the claim be filed at least 60 days prior to filing a lawsuit, and courts have treated the two very differently. While strict compliance with the 60 day time period is required, courts have consistently applied the “substantial compliance” standard to the content requirement. *Medina v. PUD No. 1 of Benton County*, 147 Wn.2d 303, 317, 53 P.3d 993 (2002); *Lewis v. Mercer Island*, 63 Wn. App. 29, 33, 817 P.2d 408 (1991)(“[s]ubstantial compliance is authorized for the *content*, not for the *filing*.”)(emphasis in original).

Substantial compliance has been defined as “actual compliance in respect to the substance essential to every reasonable objective of the statute.” *In re in re Santore*, 28 Wn. App. 319, 327, 623 P.2d 702 (1981)

(quoting *Stasher v. Harger-Haldeman*, 58 Cal. 2d 23, 29, 372 P.2d 649 (1974).). The *Santore* court further stated that the question was whether a statute “has been followed sufficiently so as to carry out the intent for which the statute was adopted.” *Id.*

d. A claim substantially complies with the statute if it puts government on notice of the claim and its contents.

The Washington Supreme Court has recently addressed the meaning of “substantial compliance” in the precise context of the claim filing statute. In its en banc *Renner v. Marysville* opinion, filed April 1, 2010, the Court explained that “exact specificity is not required; the claimant simply must provide enough information to put the government on notice of the claim and its contents.” *Renner*, 168 Wn.2d at 546. This is a re-affirmation of a long-established principle. Almost 100 years ago, our Supreme Court stated that “where there is a bona fide effort to comply with the law, and the notice filed actually accomplished the purpose of notice as to the place and character of the defect in the street, it is sufficient though defective[.]” *Lindquist v. Seattle*, 67 Wn. 230, 232, 121 P. 449 (1912). More recently, courts have stated that a claim notice from which the required information could be determined by reasonable diligence may suffice, and that a “bona fide but inept attempt” to comply with the statute can be sufficient. *Nelson v. Dunkin*, 69 Wn.2d 726, 731,

419 P.2d 984 (1966); *Brigham v. Seattle*, 34 Wn.2d 786, 789, 210 P.2d 144 (1949) (citing *Wagner v. Seattle*, 84 Wn. 275, 146 P. 621 (1916)).

On the other hand, a notice which describes a completely different type of claim is not sufficient, as it fails to put the government on notice of what it is that it should investigate, evaluate, and perhaps settle. In *Medina, supra*, the Washington Supreme Court held that a claim for property damage did not suffice to give the County notice of a personal injury claim arising out of the same incident. *Medina*, 147 Wn.2d at 310. Similarly, a claim that provides no evidence at all about the nature of the defect has been held insufficient. *Hanan v. Wenatchee*, 117 Wash. 279, 281, 201 P. 5 (1921) (“injuries caused by defective sidewalk”); *Mears v. City of Spokane*, 22 Wn. 323, 326, 60 P. 1127 (1900) (“defects and obstruction in the sidewalk of the said city”).

A claim need not give all details of a claimant’s injuries or damages, as a claimant may not have all the information required to prosecute his suit at the time that the claim is presented. As the *Renner* court stated, “the claim filing requirement of a damages statement is not intended to ask the impossible, and the requirement is not equivalent to a final request for relief. In some cases, the exact amount of damages may be uncertain at the time the notice is prepared.” *Renner*, 168 Wn.2d at 546-7 (noting that plaintiff was unable to quantify damages at time claim

filed).

- e. **Mitchell's claim forms located and described the "conduct and circumstances which brought about the injury" in as much detail as possible.**

The County argued to the trial court that Mitchell's claim forms were deficient in that they lacked an express allegation of negligence, and failed to allege that the guardrail was on a County road or that it belonged to the County.

Neither of these arguments negates the fact that Mitchell complied with both the statute and the controlling case law in providing notice to the County. The statute in effect in 2008 required that certain information be provided as part of the claim:

All claims for damages arising out of tortious conduct must locate and describe the conduct and circumstances which brought about the injury or damage, describe the injury or damage, state the time and place the injury or damage occurred, state the names of all persons involved, if known, and shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six months immediately prior to the time the claim arose...

Former RCW 4.96.020(3) (2006).

In this case, the "conduct and circumstances" leading to the injury were located and described in as much detail as was possible. The date, time and location of the accident were explicitly set forth, as were the

identities of the claimants and other witnesses, the claimants' addresses at the required times, and the amount of damages claimed. CP 44. The form clearly indicates that the claim is for personal injury. CP 44-5.

Mitchell provided all the information available regarding how the injury occurred: the driver of Mitchell's vehicle lost control and hit a guardrail, identified by its exact location on a County road, which unexpectedly split on impact and penetrated the van. CP 45. As contemplated by the *Renner* court, Mitchell was unable to provide further details of the defect causing the injury, as the guardrail was not retained by the County and was therefore not available for inspection. *Renner*, 168 Wn.2d at 546; CP 55.

Mitchell would also have been unable to describe exactly what action or inaction by respondent led up to the guardrail splitting, or to make precise allegations of negligence, without investigating the County's actions. The guardrail and the persons responsible for maintaining it were in the County's control, so formal discovery rather than pre-suit investigation would most likely have been required. As the County's own attorney stated at oral argument, interrogatories could not have been issued until the claim was rejected and suit filed. RP 4:25-5:1. Just as in *Renner*, all the relevant information simply could not have been known when the claim was filed. *Renner*, 168 Wn.2d at 546.

f. An express allegation of negligence was not necessary.

Contrary to the County's arguments to the trial court (CP 87; RP 6:7-8), the plain language of the Washington statute in effect in 2008 did not demand an express statement of negligence in the claim. The statute required that "claims for damages arising out of tortious conduct must locate and describe the conduct and circumstances which brought about the injury or damage. . ." Former RCW 4.96.020(3). The statute does **not** require that the claimant state that the government was negligent, or state that any particular act or omission constituted negligence. It is worth noting that some claims statutes do ask for more specific allegations. For example, the Seattle Municipal Code section dealing with claims against the city provides that a claim:

"must name the claimant, include the claimant's address, specify the date and location of the alleged loss, **describe any alleged act or omission on the part of the City and the basis upon which liability is being asserted against the City**, identify any known witnesses, detail the nature and extent of the injury or damage sustained and state the amount being claimed."

SMC 5.24.005(A) (emphasis added).

Surely the Legislature was capable of drafting a statute requiring a specific allegation of negligence, if that was what it intended. However, the statute applicable here did not require such specificity.

Further, the claim form's recitation of the facts of this accident is

the functional equivalent of an allegation of negligence. After the County's summary judgment motion in this case was granted by the Superior Court, the Washington Supreme Court revisited the doctrine of res ipsa loquitur in its recent *Curtis v. Lein* decision. *Curtis v. Lein*, 2010 Wash. LEXIS 809 (2010). The *Curtis* Court held that "when res ipsa loquitur applies, it provides an inference as to the defendant's breach of duty." *Curtis*, 2010 Wash. Lexis 809 at 10 (negligence could be inferred where wooden dock unexpectedly collapsed under plaintiff). The facts of *Curtis* are in some ways very similar to those of this case, where a guardrail unexpectedly split and caused injury. Just as the plaintiff in *Curtis* was unable to investigate the cause of the accident because the dock had been destroyed, Mitchell was prevented from investigating the nature of the defect in the guardrail because it was not retained by the County. *Id.* at 3, CP 55.

g. It was unnecessary to specifically allege that the road and the guardrail belonged to the county

The trial court considered, and cited in its ruling, the County's argument that Mitchell's claim form did not specifically allege that the accident occurred on a County road. RP 19:17-21. Geographical facts are well known to be non-controversial. For example, in *United States v. Piggie*, the Tenth Circuit Court of Appeals noted that:

Geography has long been peculiarly susceptible to judicial notice for the obvious reason that geographic locations are facts which are not generally controversial and thus it is within the general definition contained in Fed.R.Evid. 201(b) ...

United States v. Piggie, 622 F.2d 486, 488, 1980 U.S. App. LEXIS 17388 (10th Cir. 1980)(judicial notice taken of fact that Leavenworth Federal Prison was Federal property). The Washington Rule of Evidence regarding judicial notice is worded identically to the Federal rule as to the kinds of facts that may be judicially noted. Fed. R. Evid. 201(b); ER 201(b). By the same logic, then geographic facts should be equally non-controversial under the Washington court rules.

The claim form specified that the accident occurred at “Konnowac Pass, Block Number 3692.00 50 Feet South of 3692 Konnowac Pass, Moxee, WA.” CP 44. “3692 Konnowac Pass” is readily found by reference to a map of addresses. The County is surely aware of what roads it owns. Mitchell respectfully submits that stating that the accident occurred on Konnowac Pass [Road] is equivalent to a statement that it occurred on a county road, and no further allegation was necessary.

Further, the Yakima County Code **identifies** Konnowac Pass Road as a county road. The section of the Code specifying speed limits provides in part: “fifty miles per hour on the following county roads . . . Konnowac Pass Road[.]” YCC 9.36.032(7). It seems improbable that the County

Prosecutor's Office, the very agency charged with enforcing the laws (including the County Code) on county roads, would be unaware of what is and is not a county road. It cannot seriously be doubted that the claim put the County on notice that the accident took place on a county road.

h. Mitchell provided enough information for the County to investigate the claim, and substantially complied with the statute's content requirements.

The claim filed by Mitchell was sufficient to place the County on notice of the claim and its contents, and the record shows that it did exactly that. It provided the required information regarding the accident, and was sufficient to allow the County to evaluate the claim. As required by *Medina*, the claim stated that it was for personal injury. CP 45. It identified the injured parties (CP 44), gave the precise location of the accident (*id.*), and informed the County that the injuries were caused by the guardrail, which split and entered the claimants' vehicle. CP 45. This clearly provided the "notice as to place and character of the defect" contemplated by *Lindquist*. *Lindquist*, 67 Wn. at 232. The amount of damages sought was explicitly stated. (CP 45), and the names of all those involved in the accident were provided. (CP 44). The County therefore had all of the information that it needed to investigate, negotiate and perhaps settle the claim. *Renner*, 168 Wn.2d at 546. Reasonable diligence

on the County's part would have revealed all of the circumstances of the accident and of the damages suffered by plaintiffs. *Nelson*, 69 Wn.2d at 731.

In the trial court proceedings, the County cited numerous cases, mostly from other jurisdictions, involving defective sidewalks (CP 88-90) or auto accidents (CP 91) to support its argument that Mitchell's description of the accident was not sufficient. However, all of these are readily distinguishable from the case at bar. In each of the sidewalk cases cited by the County, the claim filed stated at most that the injury was the result of a "defective sidewalk" or "negligent maintenance," with no other information about the defect. *Hanan v. Wenatchee*, 117 Wash. 279, 281, 201 P. 5 (1921) ("injuries caused by defective sidewalk"); *Mears v. City of Spokane*, 22 Wn. 323, 326, 60 P. 1127 (1900) ("defects and obstruction in the sidewalk of the said city"); *City of Louisville v. O'Neill*, 440 S.W.2d 265, 266, 1969 Ky. LEXIS 338 (1969)("defects in the sidewalk and negligent maintenance by the City of Louisville"); *Ross v. New London*, 3 Conn. Cir. Ct. 644, 648, 222 A.2d 816 (1966) ("neglect of the city in the maintenance and repair of the sidewalk"); *Collins v. Meriden*, 41 Conn. Supp. 425, 427, 580 A.2d 549 (1990) ("a defective and improper condition on a sidewalk"). Details of what the defect was, or how it caused injury, are lacking from these claims.

The auto accident cases cited by the County involved claims that were even less specific. In *DiMenna v. Long Island Lighting*, the Supreme Court of New York, Appellate Division, held that a claim which merely stated the plaintiff “was a pedestrian at said location and was struck by an automobile due to, among other things, the negligence, carelessness, and recklessness of the Town of Islip in the creation, operation, and maintenance of said roadway” was deficient. *DiMenna v. Long Island Lighting Co.*, 209 A.D.2d 373, 374, 618 N.Y.S.2d 425 (N.Y. App. Div. 1994). See also *Altmayer v. New York*, 149 A.D.2d 638, 639, 540 N.Y.S.2d 459 (N.Y. App. Div. 1989) (claim stating “in ambiguous terms where a collision, claimed to be the result of the city's negligence, occurred” held deficient).

In contrast, Mitchell’s claim explicitly described the defect in the guardrail and how it caused injury: it “split in half and pierced through the van.” CP 45. This is vastly different than simply stating that there were unspecified “defects and obstructions” on a sidewalk, or a “defective sidewalk” that is not further described. *Mears*, 22 Wash. at 326; *Hanan*, 117 Wash. at 281.

Without further investigation, this was the extent of the description that it was possible for Mitchell to give the County. Yakima County had no trouble determining that this was a claim for personal injuries, as

shown by its requests for medical records. CP 55; CP 56. The County had no difficulty in determining that the guardrail had not been preserved (CP 55), indicating that it had notice of the nature and location of the accident. The County's argument that the claim form was insufficient, even though it allowed them to investigate the claim, (RP 18:12-19) is simply contrary to the long-established position of our State's courts. *Renner*, 168 Wn.2d at 548; *Lindquist*, 67 Wn. at 232.

Because Mitchell's claim provided "enough information to put the government on notice of the claim and its contents," it substantially complied with the statute's content requirements. *Renner*, 168 Wn.2d at 546. It was therefore error to hold that there was not substantial compliance.

i. *Caron v. Grays Harbor County* is distinguishable from the instant case.

The County's briefing and argument to the trial court, and apparently the court's ruling as well, relied heavily on *Caron v. Grays Harbor County*, 18 Wn.2d 397, 139 P.2d 626 (1943). CP 14-7; RP 6:3-12; *Id.* at 19:24-20:2. This reliance was misplaced, as *Caron* is readily distinguishable both from the instant case and from *Renner v. Marysville*, the most recent guidance from the Supreme Court on this issue. *Renner*, 168 Wn.2d 540. The facts here are much more closely aligned with those

of *Renner*.

The County argued that *Caron* stands for the proposition that a claim form is deficient if it does not state how the County was negligent. CP 17; RP 6:7-8. With all due respect to the County, this is simply incorrect. The *Caron* court's ruling that the claim form was deficient was based not on lack of any allegation of negligence, but on the claim form's failure to comply, in two aspects, with the relevant statute: "it did not state the amount of damages claimed and did not set forth 'in detail the defects which caused the accident.'" *Caron*, 18 Wn.2d at 405. Neither defect cited by the *Caron* court is applicable to this case.

Plaintiff *Caron* was injured when she fell from a ladder in the Grays Harbor County courthouse. The claim form stated that plaintiff "was on a ladder extracting a file case when the case failed to hold causing the ladder to slip and the said Blanch Caron to fall the [sic] injure her back." *Caron*, 18 Wn.2d at 404. The complaint that was eventually filed went into much more detail and was in many ways contradictory to the claim. *Id.* at 405. Among the allegations were that the County was negligent in allowing the ladder itself to become loose, maintaining a highly polished floor where the ladder could slip, and failing to provide adequate space between the ladder and the filing cabinets. *Id.* at 404-5. According to the court, the evidence presented "followed and tended to

support the allegations of [Caron's] complaint.” *Id.* The court noted that the claim form failed to comply with the statute’s requirements in two ways.

- i. **The claim form in Caron failed to comply with a specific statutory requirement not relevant here.**

The claim filing statute applicable to *Caron* required that “[a]ll such claims for damages must **locate and describe the defect** which caused the injury, describe the injury, and contain the **amount of damages claimed.**” Rem. Rev. Stat § 407 (emphasis added). The court noted that “the claim as presented merely stated that the *file case failed to hold*, causing the ladder to slip, but described no *defect* in either the file case or the ladder...It is apparent that the claim as filed did not comply with the essential requirements of the statute above set forth ...” *Caron*, 18 Wn.2d at 404-5 (italics in original).

Because the claim did not “locate and describe the defect,” the court found that it did not substantially comply with the statute. *Id.* However, this part of the *Caron* holding is simply irrelevant to the case at bar. RCW 4.96.020, the statute applicable here, does not contain the language calling for a claimant to “locate and describe” the defect leading to the injury. RCW 4.96.020(3). Because it does not, a description of the defect is not required for substantial compliance.

ii. **The claim form in Caron failed to provide any information about damages claimed**

Second, the claim filed in *Caron* did not state the amount of damages claimed, in violation of the then-applicable statute. *Caron*, 18 Wn.2d at 405. Here, too, *Caron* is readily distinguished from both *Renner* and the instant case. Where a statute expressly requires that the amount of damages be stated, not providing **any** information about damages is a clear violation. Rather than an arguable case of substantial compliance, the *Caron* claim provided **no compliance at all** on this point, so that the claim filed by Caron was flatly deficient for that reason alone. *Id.* This is quite different from the information provided by Renner (“[w]ages and benefits as well known to the City plus front pay, emotional damages, costs, fees, and such other damages as determined”) which the Court held represented substantial compliance. *Renner*, 168 Wn.2d at 548. This is also inapplicable to the instant case, as the claim filed with Yakima County by Mitchell expressly stated that damages in the total amount of \$3,500,000 were claimed. CP 45.

Further, in addition to the defects in the claim filed, the *Caron* court cited the discrepancy between the theory contained in the claim notice and the theory eventually tried to the court. *Caron*, 18 Wn.2d at 410. The court noted that the “defects and acts of negligence on which

appellant based her cause of action ... are radically different from the verified claim.” *Id.* at 405. In other words, the claim filed by Ms. Caron did not put defendant Grays Harbor County on notice of the actual subject of the suit, so it did not have the benefit of the 60 day waiting period in order to investigate the alleged defect.

The *Renner* court distinguished *Caron*, noting that Ms. Caron’s claim “did not provide the County with the information necessary to investigate the claim” because of the “failure to provide correct information regarding the equipment defects underlying her accident.” *Renner*, 168 Wn.2d at 572. In this respect, *Caron* is much more analogous to the facts of *Medina*, where the plaintiff put the County on notice of a property damage claim but not of the associated personal injury claim, than to either *Renner* or this case. *Medina*, 147 Wn.2d at 310. In both *Caron* and *Medina*, the claims presented did not “[provide] enough information to put the government on notice of the claim and its contents.” *Renner*, 168 Wn.2d at 546. This defeated the purpose of the statute and was therefore not substantial compliance as described by *Renner* and *Lindquist*. *Id.*; *Lindquist*, 67 Wn. at 232.

Here again, the facts of this case are more similar to those of *Renner* than of *Caron*. Unlike the *Caron* plaintiff, Mitchell *et al.* not only correctly identified the type of claim and the subject of the suit, but they

provided as much information to the County about the defective guardrail as they themselves were in possession of. CP 45. The County was informed of personal injury claims, filed by the indicated persons, based on injuries caused by a guardrail which split at an indicated place and time. CP 44-5. This case further differs from *Caron* in that there is nothing in the record to suggest that the theory of the case set forth in Mitchell's claim form is not, or will not be, the actual subject of the suit.

Mitchell's claim form amply fulfilled the purpose of the statute by allowing the County to investigate the claim, just as in *Renner*. *Renner*, 168 Wn.2d at 548. To the extent that the *Caron* holding was based on the lack of an accurate description of the **nature** of the claim, it is simply inapplicable here. *Caron*, 18 Wn.2d at 405.

- j. At a minimum, the record raises a question of material fact as to whether the claim form substantially complied with the statute.**

In order to be granted summary judgment, the moving party (here, Yakima County) must show that there is no genuine question of material fact, and that considering the facts in the light most favorable to the non-moving party, reasonable persons could reach but one conclusion. *Marincovich*, 114 Wn.2d at 274. In this case, the purpose of the claim form was to put the County on notice of the type of claim and the

circumstances, so that it could investigate, evaluate, and perhaps settle the claim. *Renner*, 168 Wn.2d at 546. The County's actions show that it did receive such notice: it acknowledged receipt of the claim and directed it to the Prosecutor's office to be investigated. CP 54.

In contrast to *Medina*, the County was unquestionably given notice that this was a personal injury claim, as evidenced by the claim form itself (CP 44) and the County's requests for Mitchell's medical records. CP 55; CP 56. The County was also explicitly told that this was a claim arising out of an auto accident (CP 44), told the precise location of the accident (*id.*), and told that the instrumentality of injuries was the guardrail (CP 45). Considered in the light most favorable to Mitchell, the letter explaining that the damaged guardrail had not been kept demonstrates that Yakima County had actual notice of these facts. CP 55. The claim form also undisputedly provided the names of the persons involved in the incident. CP 41-3.

Reasonable minds could readily have concluded that the County was given notice adequate to allow it to investigate and perhaps settle the claim. This is the very definition of "substantial compliance" as outlined by the case law. *Renner*, 168 Wn.2d at 546; *Lindquist*, 67 Wn. at 232. Because reasonable minds could have reached this conclusion, it was error for the court to have held that, as a matter of law, "I don't believe that

substantial compliance has been met here” and for the court to have granted summary judgment. RP 19:23-24.

3. The County waived the defense of an insufficient claim by its conduct.

a. An affirmative defense may be waived by conduct that is sufficiently dilatory or inconsistent with later assertion of the defense.

It is well-established that a defendant may waive affirmative defenses by its conduct. In *Lybbert v. Grant County*, the defendant County was found to have waived the affirmative defense of defective service of process where it filed a Notice of Appearance, associated counsel, issued discovery requests, and failed to respond to discovery requests regarding its affirmative defenses until after the statute of limitations had run. *Lybbert v. Grant County*, 93 Wn. App. 627, 633, 969 P.2d 1112 (1999). The *Lybbert* court noted that the County had “held itself out as going forward in defending the tort claim for approximately 10 months.” *Id.* at 632-3.

Where Snohomish County requested further information from a tort claimant and continued to litigate the case for 45 months, failed to clarify affirmative defenses when asked, and issued discovery inconsistent with the defense, it waived the defense of failure to comply with the claim filing requirements. *King v. Snohomish County*, 146 Wn.2d 420, 427, 47

P.3d 563 (2002). Where defense counsel appeared in a case, served interrogatories, and failed to correct plaintiff's mistaken impression that the defendant had been served, the defense of untimely service was held waived. *Romjue v. Fairchild*, 60 Wn. App. 278, 282, 803 P.2d 57 (1991). Engaging in "substantial litigation" without raising the claims issue was held to waive the claim filing defense, even where it was undisputed that **no claim was ever filed**. *Miotke v. Spokane*, 101 Wn.2d 307, 337, 678 P.2d 803 (1984).

b. Whether the statute of limitations has run is an important factor considered by the courts.

Whether a defendant's dilatory or misleading behavior results in the statute of limitations running against the plaintiff has been a critical factor in the courts' inquiries. Requesting additional time to answer, and asking to continue the matter, then answering the complaint only after the statute of limitations had run was held to have waived the defense of insufficient service of process. *Raymond v. Fleming*, 24 Wn. App. 112, 115, 600 P.2d 614 (1979). Where a defendant city initially conceded that a claim was properly filed, the suit was dismissed and re-filed, and the city then asserted the defense of non-compliance with the claim filing requirements after the statute had run, the Court of Appeals found that the defense was waived. *Brevick v. Seattle*, 139 Wn. App. 373, 382, 160 P.3d

648 (2007) Conversely, where the defendant raised the defense of insufficient service of process shortly **before** the statute of limitations ran out, giving the plaintiff time to correct the defect, the court found there had been no waiver of the defense. *Meade v. Thomas*, 152 Wn. App. 490, 495, 217 P.3d 785 (2009) (Order Granting Motion to Publish September 29, 2009).

In *Dyson v. King County*, the Court of Appeals held that the City of Seattle had waived its defense of failure to file a claim by not raising the defense until after the statute of limitations expired, despite the fact that “substantial litigation had not occurred.” *Dyson v. King County*, 61 Wn. App. 243, 245, 809 P.2d 769 (1991). In response to the City’s assertion that no Washington case had “specifically disapproved” of the tactics employed by the City when substantial litigation had not occurred, the *Dyson* court explicitly stated: “We take the opportunity to do so in this case.” *Id.*

c. Yakima County “held itself out as going forward” in this case.

Mitchell’s claim was properly filed with the County Clerk April 4, 2008. CP 54. For almost two years, the County gave no indication that it was not proceeding with the investigation and defense of the tort claim. Shortly after receiving the claim, the County Clerk acknowledged its

receipt. *Id.* It requested Mitchell's medical records in May 2008. CP 55. It requested the medical records again in July of that year. CP 56. After the complaint was filed in August 2008, the County Prosecutor's office filed a Notice of Appearance. CP 105. On September 29, 2008, plaintiff's counsel discussed the case with the County's attorney. CP 72. And the County filed a Notice of Association of Counsel on December 10, 2009. CP 57.

At no time during these events did the County or its counsel ever raise the issue of the claim being defective. The affirmative defense of failure to comply with the claims statute was raised for the first time in the County's Motion for Summary Judgment, filed February 8, 2010 (over 17 months after the statute of limitations had run out). CP 81. In the language of *Lybbert*, Yakima County "held itself out as going forward" with the case for 22 months after receipt of the claim, thereby waiving the affirmative defense. *Lybbert*, 93 Wn. App. at 633.

d. The County's actions were inconsistent with its later assertion of the claim filing defense.

Just as the *Renner* and *Lindquist* courts contemplated, Mitchell put Yakima County on notice of the claim and gave it time to investigate, negotiate and perhaps settle it. *Renner*, 168 Wn.2d at 546; *Lindquist*, 67 Wn. at 232. The statute requires a minimum of 60 days to elapse between

filing a claim for injuries and filing suit based on the injuries. RCW 4.96.020(4). Presumably the Legislature viewed 60 days as sufficient for a governmental entity to investigate and evaluate a claim. Here, the claim was filed on April 4, 2008 (CP 38), while suit was filed August 12, 2008 (CP 47), 130 days later. Yakima County had more than twice the time mandated by the statute to pursue its investigation before the suit was filed. During that time, it never raised any question as to the sufficiency of the claim or gave any indication that it had not been placed on notice.

Instead, the County proceeded to do exactly what would be expected if it had effectively been given notice: it involved its counsel (the Prosecutor's Office) and began to investigate the claims. CP 54. Its conduct was wholly inconsistent with its subsequent argument that the claim was ineffective; rather, it demonstrates that the statute's purpose was fulfilled, and that the claim provided notice of the allegations and what was to be investigated. Further, the County never raised the issue of any defect in the claim form until its motion for summary judgment was filed in February 2010, after independent counsel had been associated. CP 81. A February 5, 2010 letter from Mr. Watson to Mitchell's attorney, Mistee Verhulp, requests a statement that the County would not be seen as having waived its defense by issuing discovery. CP 59. Ms. Verhulp's reply states that moving forward with discovery would not be seen as a

waiver of defenses. CP 61. The County did not, however, inquire as to whether the events that had **already** occurred might be seen as waiver, nor did Ms. Verhulp provide any assurances regarding any past conduct.

The County's attorney, Larry Peterson, admitted in his Declaration that as late as September 29, 2008, after the statute of limitations had run, it had "not occurred" to him that the claim form might be defective. CP 26. Assuming, *arguendo*, that there was an issue with the claim form, it appears that the County discovered it only after their outside counsel came on board. If so, the fact that the County's original attorney did not discover the defect does not excuse the fact that it was not raised for nearly two years.

Taken in the light most favorable to Mitchell, the record shows that respondent Yakima County acknowledged receipt of a claim (CP 54), investigated it with knowledge of the type of claim (CP 44), the persons involved (CP 41-3), the date, time and location (CP 44), and the alleged instrumentality of the damages (CP 45), and then waited until long after the statute of limitations had run to raise any issue of a defective claim form. Only when moving for summary judgment, 22 months after the claim was filed and 17 months after the statute of limitations had lapsed, did the County express any concern over the possibility of waiver. CP 59.

Because reasonable minds could surely conclude that the County's

actions here constituted waiver of the affirmative defense, as described by the *King*, *Lybbert*, *Dyson*, and *Raymond* courts, the trial court erred when it concluded that there had not been waiver. *King*, 146 Wn.2d at 427; *Lybbert*, 93 Wn. App. at 633; *Dyson*, 62 Wn. App. at 245; *Raymond*, 24 Wn. App. at 115. The court should have denied the County's motion for summary judgment.

F. CONCLUSION

The trial court's grant of summary judgment should be reversed. Mitchell substantially complied with the statute, putting the county on notice of a personal injury claim so that it could "investigate and perhaps settle" before suit was filed. The record amply shows that the County was able to do exactly that, demonstrating that it was placed on notice and that the purpose of the statute was fulfilled. Further, the County waived any defense of insufficient claim filing when it gave all appearances of going forward with the case until long after the statute of limitations had run.

Mitchell clearly complied with the law. The County seeks, on technical grounds, to avoid having this claim addressed on its merits. Affirming the trial court's grant of summary judgment would reward form over substance, and violate the principle that resolution on the merits is favored. *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007). To uphold the dismissal in this case would be inconsistent with the

Legislature's intent to make government accountable through the passage of RCW 4.96.010 (providing for tort claims against governmental entities), inconsistent with the case law cited above, and inconsistent with the principle that "the conduct of government should always be scrupulously just in dealing with its citizens." *State of Washington ex rel Shannon v. Sponburgh*, 66 Wn.2d 135, 401 P.2d 635 (1965). Mitchell respectfully requests that this court reverse the trial court's grant of summary judgment.

Respectfully submitted this 28 day of October, 2010.

LEE SMART, P.S., INC.

By: 

Sam Franklin, WSBA No. 1903
Dan J. Von Seggern, WSBA No. 39239
Of Attorneys for Appellants

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on October 28, 2010, I caused service of the foregoing on each and every attorney of record herein:

VIA FED EX OVERNIGHT

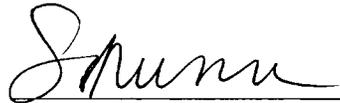
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Susan M. Munn, Legal Assistant