

**FILED**

JUN 27 2012

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

NO 30054-4-III

Superior Court No. 11-2-00805-1

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

MARGE GANSER-HEIBEL, individually,

Appellant

v.

CHAVALLO COMPLEX, LLC., a Washington  
Limited Liability Corporation,

Respondent

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REPLY BRIEF OF APPELLANT

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## II. TABLE OF AUTHORITIES

### Cases

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### **III. BRIEF STATEMENT**

Ms. Ganser-Heibel maintains there exists a genuine issue of material fact regarding whether Chavallo was properly served. If this court agrees then the summary judgment dismissal was granted in error.

### **IV. ARGUMENT**

Both sides have presented their cases for this court's review. The procedural facts of this lawsuit are not disputed. What *is* disputed is whether Chavallo was properly served with the summons and complaint such that it remains a viable defendant in this negligence action.

As is readily apparent, there are no cases in Washington that speak directly to the issue before this court. Even the trial court agreed. At the summary judgment hearing Ms. Ganser-Heibel's counsel explained that the case law on this issue "is not very

clear.”<sup>1</sup> The court agreed stating “I don’t think there is any case exactly on point.”<sup>2</sup>

Both Chavallo and Ms. Ganser-Heibel have cited cases that offer guidance on how this conflict may be decided. However, the summary judgment hearing was not the place to render a final decision on the merits of her case. The lower court’s only job was to decide whether or not there was a genuine issue of material fact such that Chavallo was entitled to judgment as a matter of law. Ms. Ganser-Heibel suggests there is not.

This court’s de novo review requires all the information supplied to the trial court. For this reason Ms. Ganser-Heibel finds it necessary to point out and clarify several misstatements made by Chavallo in its Responsive brief.

First, Chavallo erroneously argues that the briefs from the summary judgment hearing are not in evidence before this court. Resp. Br. at 1.<sup>3</sup> This is incorrect. The order on summary judgment states that the court considered “Plaintiff[’]s Responsive Memorandum in Opposition” as well as “the declaration of

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<sup>1</sup> RP 10

<sup>2</sup> RP 13

<sup>3</sup> The Chavallo’s summary judgment brief is found at CP 19-31; Ms. Ganser-Heibel’s brief is found at CP 45-59; Chavallo’s Reply brief is found at CP 73-84.

Christopher Childers . . .” in making its decision.<sup>4</sup> Because the summary judgment proceedings are being reviewed de novo, every document examined by the trial court is in evidence here on appeal. Mr. Childers’ citation to CP 46 in his opening brief is therefore proper.

Next, Chavallo contends that Ms. Ganser-Heibel only “purportedly” sent a notice of claim form to Kennewick Public Hospital District (KPH) on February 3, 2011. This is a red-herring and a waste of the court’s time.<sup>5</sup> While it is true Ms. Ganser-Heibel did not file with the superior court the Certified Mail Receipt notice, the need did not arise since KPH’s receipt of the notice of claim was never a disputed issue.<sup>6</sup>

Third, Chavallo asserts: “It is *undisputed* that Appellant failed to timely commence the lawsuit with respect to Chavallo.” Resp. Br. at 3. This is patently false. Ms. Ganser-Heibel strongly disputes the fact that Chavallo was not properly served. It is the crux of this appeal.

Chavallo argues at length concerning how the tolling provision found in the tort claim filing statute does not apply to it.

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<sup>4</sup> CP 85

<sup>5</sup> Resp. br. at 1, footnote 1

<sup>6</sup> RP 4-5

On page 4 of its brief, it states: “Appellant contends the sixty day [sic] tolling provision contained in RCW 4.96.020(4) applies to Chavallo . . .” It then devotes much of its responsive brief to an examination of the legislative history of the tort claim filing statute, which, as will be seen below is not necessary.

Under the specific facts of this case, Ms. Ganser-Heibel agrees that the relevant statute does not apply to Chavallo directly – but it does apply *indirectly*. She concurs the tolling statute applies *directly* only to KPH. However, once KPH was properly served, Ms. Ganser-Heibel had a reasonable period of time in which to serve Chavallo, as a co-defendant (thus the indirect application). *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 329-30, 815 P.2d 781 (1991).

Ms. Ganser-Heibel contends that proper service was accomplished as to all parties when both defendants were served the same day. In support of her position she cites the *Sidis*<sup>7</sup> and *Wakeman*<sup>8</sup> cases, while Chavallo dissects the legislative history of RCW 4.96.020 and cites a Division I case.<sup>9</sup> Although neither *Sidis* nor *Wakeman* are directly on point, both courts determined that

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<sup>7</sup> *Sidis, supra*.

<sup>8</sup> *Wakeman v. Lommers*, 67 Wn.2d 819, 840 P.2d 232 (1992).

<sup>9</sup> *Southwick v. Seattle Police Officer John Doe No. 1-5*, 145 Wn. App. 292, 1186 P.3d 1089 (2008).

timely service on one defendant in a multi-defendant action tolls the statute of limitations as to the remaining unserved defendants if joined by a common factual issue. Here there is no dispute that KPH was properly served.

Chavallo asserts that *Sidis* is distinguishable for three reasons: (1) filing; (2) service; and (3) tolling of the statute of limitations.<sup>10</sup> Each will be discussed briefly below. However, it is these differing opinions that form the basis of this appeal and are the reasons Ms. Ganser-Heibel maintains the summary judgment motion was granted in error.

Initially in attempting to distinguish *Sidis*, Chavallo asserts the *only* reason the reviewing court found the filing was appropriate was because the *Sidis* plaintiffs properly filed their summons and complaints *prior to* the expiration of the statute of limitations. Not only is that statement misleading, it is a bit simplistic considering the number of factors at play in resolving the *Sidis* case.

Chavallo opines Ms. Ganser-Heibel had many options to perfect service on it. While it was certainly possible and appropriate for Ms. Ganser-Heibel to have filed a summons and complaint prior to the 3-year statute of limitations on negligence

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<sup>10</sup> Resp. Br. 12-13.

actions, it was not fatal to her lawsuit that she waited until KPH could be properly served at the same time the filing was accomplished. This is because of the broad holding in *Sidis*: “[U]nder RCW 4.16.170, service of process on one defendant tolls the statute of limitations as to unserved defendants.”<sup>11</sup>

Chavallo insists the tolling provisions of RCW 4.96.020 prevented appropriate service on it under every circumstance imaginable. The *Sidis* court held otherwise when it stated: “The simple existence of statutes of limitation does not mean exceptions thereto are never appropriate[.]”<sup>12</sup> Regarding the fairness of a tolling statute the court held: “It is arguably unfair to require a plaintiff to serve all defendants within a set limitation period, when it may be difficult or impossible to determine the actual location of some defendants before discovery is under way.”<sup>13</sup>

Next, Chavallo attempts to distinguish *Sidis* by declaring that none of the defendants was a governmental entity thus, RCW 4.96.020 did not apply. This is not accurate. The state of Washington was a defendant in the consolidated case that accompanied the *Sidis* case. The other plaintiff, Lesta Clark, sued

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<sup>11</sup> *Sidis*, supra, at 327.

<sup>12</sup> *Id.* at 330.

<sup>13</sup> *Id.*

the state of Washington for injuries her son suffered as the result of a pedestrian/automobile accident.<sup>14</sup> Although not mentioned in the opinion, RCW 4.96.020 did apply to the State.

Finally, Chavallo relies heavily on *Southwick v. Seattle Police Officer John Doe No. 1*, 145 Wn. App. 292, 1186 P.3d 1089 (2008). This reliance is misplaced. Although *Southwick* mentioned the state claim-filing statute, it did so in the context of a federal section 1983 claim, which has no relevance to the case on appeal. *Southwick* is a Division I case. The relevant portion of the case has never been cited by any Washington court. It was cited in one unpublished Federal case,<sup>15</sup> which disagreed with the *Southwick* court's analysis of the tolling statute. *Southwick* is not binding authority.

A careful reading of the paragraph cited by Chavallo reveals there is no distinction from Ms. Ganser-Heibel's position on appeal. Chavallo places in bold lettering : "It [RCW 4.96.020(4)] has no application *generally* to personal injury actions where no claim is required." Resp. Br. at 10 citing *Southwick*, supra at 300-01 (emphasis added). Ms. Ganser-Heibel agrees with this statement. However, in the case before this court a notice of tort claim filing

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<sup>14</sup> *Id.* at 328.

<sup>15</sup> *Wyant v. City of Lynnwood, et al.*, 621 F. Supp.2d 1108 (2008).

was required prior to filing suit against KPH so the statute applied to the cause of action but not to Chavallo directly as explained above.

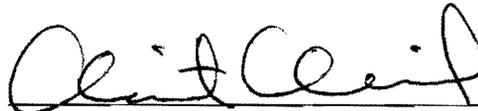
## **V. CONCLUSION**

The issue before this Court is a simple one. Was summary judgment dismissal properly granted? Ms. Ganser-Heibel maintains it was not because there is a genuine issue of material fact regarding whether Chavallo was properly served on the same day that KGH was properly served.

As can be seen after reading the Appellant's and Respondent's briefs, in combination with the superior court's comment at the conclusion of the summary judgment hearing, the law is not well settled in this specific area. No case offers definitive guidance on how to resolve the issue of proper service on co-defendants once a governmental entity has been properly served pursuant to the tort claim filing statute. Under the circumstances, it is difficult to see how Chavallo would be entitled to judgment as a matter of law.

Both parties have set forth their interpretation of the law as it relates to the facts presented, which resulted in a reasonable difference of opinion. Additionally, courts favor resolution of cases on their merits. For these reasons, Ms. Ganser-Heibel respectfully requests this court reverse the lower court decision and remand the case for trial.

Respectfully submitted this 26<sup>th</sup> day of June, 2012



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26<sup>th</sup> day of June, 2012, I sent for delivery a true and correct copy of the foregoing Reply Brief of Appellant by the method indicated below, and addressed to the following:

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