

FILED

MAY 30 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 30054-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Marge Ganser-Heibel, individually,

Appellant,

v.

Chavallo Complex LLC, a Washington Limited Liability Corporation,

Respondents.

RESPONDENTS' BRIEF

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WSBA No. 19061

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I. STATEMENT OF THE CASE

This is a personal injury action. Ms. Ganser-Heibel claims she sustained injuries when she fell while attending an open house at a facility owned and operated by Kennewick Public Hospital District (hereafter “KPH”) on February 27, 2008. (CP 1 - 5). At the time of the fall, the property was owned by Jose and Tammy Chavallo. The ownership of the property was transferred to Chavallo Complex, LC, which is owned by Jose and Tammy Chavallo, sometime in 2010. (CP 42).

Ganser-Heibel purportedly¹ sent KPH a notice of claim on February 3, 2011. Mr. and Mrs. Chavallo were not provided with any prior notice that Plaintiff intended to file a lawsuit against them or their company. Their first notice of the lawsuit was when Mrs. Chavallo was served.

On April 5, 2011, three years and nearly six weeks after the alleged incident, Ms. Ganser-Heibel filed suit against Chavallo Complex, LLC and KPH. (CP 1) The suit was served on both Defendants on April 5, 2011 after it was filed. (CP 8 & 9).

¹ There is nothing in the factual record of this appeal nor in the underlying summary judgment motion at issue in this appeal to show that this was actually done. While Appellant makes reference to a notice of claim being sent to KPH in her Appellate Brief (Appellant’s Brief, p. 2), the citation of “CP 46” is simply a citation to Ganser-Heibel’s briefing in the underlying summary judgment motion, which is not evidence. A review of the Declaration of Christopher Childers (CP 60 – 61) also shows that Appellant never provided factual support for her claim that a notice of claim was sent to KPH in her opposition to the Chavallos’ summary judgment motion.

On May 4, 2011, Chavallo moved for summary judgment as it was undisputed that the case had neither been filed nor served prior to the applicable three year statute of limitations under RCW 4.16.080. (CP 16; 42 - 43). Following oral argument on June 10, 2011, Chavallo's motion was granted. (CP 85). Ganser-Heibel subsequently appealed. (CP 86 – 88).

II. ARGUMENT

Issue 1.: The Trial Court correctly granted Chavallo's Motion for Summary Judgment because Ganser-Heibel failed to timely commence her lawsuit against Chavallo and because RCW 4.96 et. seq. does not apply to Chavallo.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as matter of law. *Marquis v. City of Spokane*, 130 Wash.2d 97, 105, 922 P.2d 43 (1996). The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party makes this showing, the burden then shifts to the non-moving party, who "must set forth specific facts showing that there is a genuine issue for trial." *Young*, at 225-26 (citing CR 56(e)).

A. Ganser-Heibel failed to timely commence her lawsuit against Chavallo.

A personal injury action must be commenced within three years of the

injury. RCW 4.16.080(2). An action is deemed commenced when either a complaint is filed or a summons is served, whichever occurs first. CR 3; RCW 4.16.170. Once a lawsuit is commenced by service or filing within the statute of limitations, a Plaintiff has 90 days from the date of service or filing to complete the second step. RCW 4.16.170

It is undisputed that Appellant failed to timely commence the lawsuit with respect to Chavallo. Either filing or service needed to take place before February 27, 2011, the three year anniversary of Appellant's fall. The suit was not filed nor served until April 5, 2011, three years and nearly six weeks after the alleged incident.

The fact that Appellant was precluded by RCW 4.96.020(4) from commencing her lawsuit against KPH until sixty days had passed following her tort claim notice to KPH did not change her obligation under RCW 4.16.080(2) to timely commence the suit against Chavallo prior to the expiration of the three year statute of limitations. Appellant could have easily met her obligations under both RCW 4.16.080(2) and RCW 4.96.020(4) a number of ways. She could have simply given the requisite 60 day notice to Kennewick Hospital well more than sixty days prior to the three year statute of limitations, thus allowing her to commence the suit against all defendants prior to the three year statute of limitations. She could have sued Chavallo and then amended her Complaint to add KPH later after the 60 days claims notice period ran. She could have served Chavallo with a

lawsuit naming Chavallo and KPH and used the 90 day tolling provided by RCW 4.16.170 to allow for the 60 days claims notice to KPH before filing the suit and serving KPH.

Yet Ganser-Heibel failed to avail herself of any of these options and did nothing to commence her lawsuit against Chavallo until almost six weeks after the three year statute of limitations for personal injury claims expired. The Trial Court therefore properly granted summary judgment to Chavallo.

B. RCW 4.96 Does Not Apply to Defendant Chavallo Complex, LLC.

Appellant contends that RCW 4.96. et. seq. operated to toll the statute of limitations applicable to her claim against Chavallo. More specifically, despite acknowledging Chavallo is not a governmental entity as defined by RCW 4.96.010, Appellant contends the sixty day tolling provision contained in RCW 4.96.020(4) applies to Chavallo for no other reason than Chavallo is a co-defendant with governmental entity KPH, to whom the statute does apply. This ignores the historical basis for the legislature's enactment of RCW 4.96, the purpose behind the tolling language, the relationship between the notice requirement and the tolling provision, and case law limiting its application to governmental entities.

1. **There is nothing in the history, language or purpose of RCW 4.96, et. seq. that suggests a legislative intent to have the tolling provision of this statute apply to non-governmental entities.**

In 1963, the Washington State Legislature abolished the State's sovereign immunity for tort liability. *Wilson v. City of Seattle*, 122 Wa.2d 814, 819 (1993). In 1967, the Legislature extended this abrogation of sovereign immunity to all its political subdivisions, through the enactment of RCW 4.96 et. seq. *Id.* at 819. The Historical and Statutory Notes to RCW 4.96.010 state:

Purpose—1967 c 164: “It is the purpose of this act to extend the doctrine established in chapter 136, Laws of 1961, as amended, to all political subdivisions, municipal corporations and quasi municipal corporations of the state.

RCW 4.96.010, Historical and Statutory Notes. Quite simply, RCW 4.96 was enacted as part of the evolution of the law regarding governmental tort liability. There is nothing in the Historical and Statutory Notes to suggest a legislative intent to apply RCW 4.96 to non-governmental entities such as Chavallo.

Similarly, there is nothing in the express language of the statute or its stated purpose to suggest any legislative intent to have the tolling provision of this statute apply to non-governmental entities. RCW 4.96. is expressly entitled **ACTIONS AGAINST POLITICAL**

SUBDIVISIONS, MUNICIPAL AND QUASI-MUNICIPAL

CORPORATIONS. RCW 4.96.010 provides in pertinent part:

All **local governmental entities**, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages.

RCW 4.96.010(1). Similarly, RCW 4.96.020 expressly states that:

(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...

The purpose of the claim-notice provision is “to allow **government entities** time to investigate, evaluate, and settle claims” before they are sued. *Renner v. City of Marysville*, 145 Wash. App. 443, 187 P.3d 283 (2008)(citing *Medina v. Public Util. Dist. No. 1*, 147 Wash.2d 303, 310, 53 P.3d 993 (2002). (emphasis added). Since Chavallo is not a “local governmental entity” as defined by RCW 4.96.010, Ganser-Heibel was not required to give Chavallo notice of the threatened suit and in fact, no notice was given to Chavallo. The Chavallos did not even know a lawsuit was being considered or threatened until they were served. Applying the tolling provision to a non-governmental entity, when no notice is required to be given to that non-governmental entity, does not further the purpose of allowing a governmental entity time to investigate, evaluate, and settle

claims.

Conversely, applying the tolling provision to a non-governmental entity, when no notice is required to be given to that non-governmental entity, runs counter to the purpose behind having a three year statute of limitations for personal injury claims. The purpose of the statute of limitations is to prevent stale claims. *Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wash.App. 655, 662, 37 P.3d 309 (2001). The legislature in RCW 4.16.080(2) deemed three years to be the deadline for initiating litigation for personal injury damages. Beyond that, the claim is by definition stale. There is no legal authority for the proposition that Chavallo's right to have suit commenced within the three year statute of limitations is abrogated by a statute whose history, name, purpose and verbiage all limit its applicability to governmental entities.

2. The 60 day tolling provision in RCW 4.96.020 does not apply to Appellant's personal injury claim against Chavallo.

The language at issue is contained in RCW 4.96.020(4), which states:

(4) No action subject to the claim filing requirements of this section shall be commenced against any local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct until sixty calendar days have elapsed after the claim has first been presented to the agent of the governing body thereof. The applicable period of limitations

within which an action must be commenced shall be tolled during the sixty calendar day period. For the purposes of the applicable period of limitations, an action commenced within five court days after the sixty calendar day period has elapsed is deemed to have been presented on the first day after the sixty calendar day period elapsed.

RCW 4.96.020(4). (emphasis added).

Despite the restrictive language contained throughout the statute limiting its applicability to governmental entities, Appellant wishes to extend the tolling period to Chavallo. In order to achieve this illogical result, Appellant extracts a single sentence from the body of section (4), **“The applicable period of limitations which an action must be commenced shall be tolled during the sixty day period”** and reads it out of context with the rest of RCW 4.96, et. seq. in order to argue that “an action” in the tolling sentence encompasses all defendants in any tort action in which a governmental entity is a co-defendant.

There are several problems with this self-serving interpretation. First, it ignores the rest of the language of the paragraph. The prime objective in statutory construction is to effectuate legislative intent. *Bosteder v. City of Renton*, 155 Wa.2d. 18, 42 (2005). A Court always begins by looking at the plain meaning of a statute, but in discerning this meaning the Court takes into account all of the text in the statute and in related statutes that help discern legislative intent. *Id.*

In reviewing the entirety of section (4) of RCW 4.96.020, it is clear

that the words “an action” referenced in the sentence that addresses tolling is not any action against any defendant. The first sentence of the same paragraph clearly restricts the “action” to those actions “subject to the claim filing requirements of this section”. The only actions subject to the claim filing requirements are those actions against governmental entities, not actions against individual defendants who are not governmental entities. The narrow scope of the statute is made even more clear by the fact that the only action which can not be commenced until the requisite 60 day notice has been provided are actions **”against any local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity”**. If the legislature had intended to extend the reach of the tolling in RCW 4.96.020 (4) to non-governmental entities when a non-governmental entity was a co-defendant in a case with a governmental entity, it could have easily achieved this by having the statute expressly preclude the commencement of any action in which a governmental entity was a party and correspondingly provided a mechanism for all parties in the action to be provided with a 60 day notice of the claim. There is simply nothing in the statute to evidence any legislative intent to apply the tolling language to a non-governmental entity.

It is important to note the inter-relationship between the 60 day notice requirement and the 60 day tolling provision of RCW 4.96.020(4). This was addressed by the Court in *Southwick v. Seattle Police Officer John*

Doe, et. al., 145 Wa. App. 292 (2008). In *Southwick*, the Plaintiff brought an action against unnamed police officers, the City of Seattle and King County. *Id.* Suit was filed more than three years after the alleged incident, but within 60 days after the three year deadline. *Id.* at 295. Following dismissal of his suit, Southwick appealed, claiming that the three year statute of limitations pertaining to his § 1983 claim was tolled under the Washington statute governing claims against local government entities.

While the claim in question in *Southwick* is a Federal §1983 claim, the *Southwick* Court did, in fact, examine and interpret the scope of RCW 4.96.020(4) to determine whether the tolling provision therein applies to what is clearly a cause of action outside of the statute.

Southwick is instructive in that it limits the tolling language of RCW 4.96.020 to only those instances where a notice of claim is required, which is applicable whether it is a §1983 claim not covered by the statute or a non-governmental entity like Chavallo not covered by the statute.

“The tolling provision of RCW 4.96.020(4) is not a general tolling provision applicable to all personal injury actions. It is contained in the same statute requiring a delay of 60 days following the mandatory filing of a state claim with a local government agency before the commencement of suit and is inextricably intertwined with this claim-filing requirement. It has no application generally to personal injury actions where no claim is required...”

Since Southwick was not required to file a claim with the city before commencing his federal § 1983 action, he was not delayed in commencing his action by the 60 days prescribed in RCW 4.96.020(4). **The tolling period contained in subsection (4) of this statute is analogous to an equitable tolling of a statute of limitations** when a party must exhaust administrative remedies before filing suit. However, no equitable tolling occurs when a party is not required to exhaust the available administrative remedies before filing suit. **Since Southwick was not burdened with any obligation to file a pre-suit claim, no valid purpose would be served by enlarging the limitation period.**

Southwick at 300 - 301. (Emphasis added).

In the case before this Court, Appellant was not required to give Chavallo notice of her intent to sue and in fact, did not do so. In short, she had no burden under the statute to put Chavallo on notice of her claim, yet Appellant seeks the benefit of the associated tolling provision contained within the statute. Unlike Kennewick Hospital, Chavallo received no benefit of advance notice from this statute. It had no opportunity to avail itself of the statute's purpose to allow time to investigate, evaluate, and settle the claim before it was sued.

The Supreme Court avoids "literal reading of a statute which would result in unlikely, absurd, or strained consequences. The spirit or purpose of an enactment should prevail over...express but inept wording". *Bosteder* at 44 – 45. The historical origin, stated purpose and express language of RCW 4.96, et. seq. all run counter to Ganser-Heibel's self-serving application of the tolling provision. Every aspect

of RCW 4.96 et. seq. is designed to deal narrowly with tort liability of governmental entities. It has no applicability to a claim being brought against a private, non-governmental party like Chavallo.

3. Appellant's reliance on *Sidis* and *Wakeman* is misplaced because neither filing nor service took place prior to the expiration of the statute of limitations pertaining to Chavallo.

The Court here need only compare the factual differences between *Sidis* and the case at issue to conclude that *Sidis* does not apply here:

1. **Filing:** In *Sidis*, the Plaintiff claimed injury arising out of an incident which occurred in 1984. Suit in *Sidis* was filed in 1986, within the three year statute of limitations applicable to all Defendants.

In this case, Appellant claims injury arising out of a fall which occurred on February 27, 2008. Suit was not filed as to any Defendant until April 5, 2011, three years and nearly six weeks later, after the three year statute of limitations had run as to Chavallo.

2. **Service:** In *Sidis*, once suit was timely filed, timely service followed as to one Defendant, thus perfecting the lawsuit as to that Defendant. Because and only because suit was timely perfected as to one Defendant prior to the expiration of the statute of limitations as to the Co-Defendants who had not been served, the Court tolled the statute of limitations as to the Co-Defendant.

In this case, service did not take place as to any Defendant until April 5, 2011, three years and nearly six weeks after the date of loss. By the time suit was perfected against KPH, the three year statute of limitations had already run as to Chavallo. RCW 4.16.170 simply does not apply.

3. RCW 4.96: In *Sidis*, none of the defendants were governmental entities, so RCW 4.96 was not at issue.

In this case, RCW 4.96 applies to KPH. Appellant was required to provide notice of her intent to make a claim and having done so, the statute of limitations as to KPH was tolled for 60 days. RCW 4.96 does not apply to non-governmental entities.

The Supreme Court in *Sidis* tolled the statute of limitations as to all defendants because 1) suit had been timely filed and 2) service had been timely made on one defendant **before** the applicable statute of limitations had passed as to all the defendants. *Sidis* does not apply to this case because neither of the two events necessary for tolling under the plain language of RCW 4.16.090 had taken place.

The facts in *Wakeman v. Lommers*, 67 Wn.App. 819 (1992) cited by Appellant, illustrate the same point. In *Wakeman*, Plaintiff sued two separate tort feasons, Lommers and Taylor, with whom she had been in two separate motor vehicle accidents. Unlike the case before this Court, suit was timely filed as to both defendants. Unlike the case before this Court, the lawsuit was perfected (filing and service) as to one defendant prior to the expiration of the statute of limitations applicable to the co-defendant. It was then and only then, did the *Wakeman* Court hold that the statute of

limitations was tolled as to Lommers. Neither *Sidis* nor *Wakeman* support Appellant's contention that RCW 4.96.020(4) tolled the statute of limitations as to Chavallo.

III. CONCLUSION

It is undisputed that Ganser-Heibel failed to commence her lawsuit prior to the expiration of the applicable three years statute of limitations for personal injury actions. It is also undisputed that RCW 4.96. et. seq. was enacted as part of the evolution of tort liability for governmental entities, that the statute repeatedly limits its application to the interaction between a would be plaintiff and the purported governmental entity tortfeasor for the specific purpose of allowing the governmental entity the time to investigate and avoid litigation altogether. It is also undisputed that the 60 day tolling period provided for in RCW 4.96.020(4) goes hand in hand with the 60 day notice provision required solely for governmental entities, that there is no other reason for its existence. Yet Appellant would ask this Court to expand the reach of RCW 4.96 to a result clearly not contemplated by the legislature, to apply it to non-governmental entities.

The end result is to put a non-governmental entity in the position of having no right to advance notice that suit is coming, no ability to

investigate and avoid litigation like its governmental entity counterpart, yet subject to suit being commenced either prior to or after the 60 day notice period expires as to the co-defendant governmental entity depending on the whim of the plaintiff; in short, no certainty whatsoever as to when suit must be commenced. What purpose would this uncertainty serve and how does any aspect of RCW 4.96, its origin, purpose and language lead to this result?

Ganser-Heibel's solution was simple. All she had to do was give KPH notice of the claim more than 60 days prior to the three year statute of limitations and then timely file and serve the lawsuit as to both Defendants or she could have served Chavallo with the lawsuit prior to the three year statute of limitations running. This would have given her 90 days to file it. During this time she could have easily met her obligations to KPH under RCW 4.96. Alternatively, she could have simply sued Chavallo, given KPH notice and then amended her Complaint to add KPH after the 60 day period ran.

The language of RCW 4.16.080(2) which requires a personal injury action to be commenced by service or filing within three years is clear and straightforward and should prevail. RCW 4.96 is a statute that was never designed to affect the rights or obligations of non-governmental

entities. The Trial Court found this to be the case and granted summary judgment to Chavallo. This was the correct decision.

Respectfully submitted this 29th day of May, 2012.

LAW OFFICES OF RAYMOND W. SCHUTTS

By:


Raymond W. Schutts, WSBA No. 19061
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of May, 2012 I caused to be served a true and correct copy of the foregoing RESPONDENT'S BRIEF by the method indicated below, and addressed to the following:

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