

FILED

APR 03 2017

NO. 345726

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

WILLIAM RUMBURG and CAROL RUMBURG, husband and wife and
the marital community comprised thereof,
Appellant,

v.

FERRY COUNTY PUBLIC UTILITY DISTRICT NO. 1, a public utility
company; and JOHN DOE(S),
Respondents.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

1. The trial court erred in granting the Defendants' Motion to Dismiss under CR12(b)(6).

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Did the Superior Court err in granting the Defendant's Motion to Dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6)?

STATEMENT OF THE CASE

Plaintiff's injury occurred on July 16, 2012. (Response in Opposition to Defendant's Motion to Dismiss). Unbeknownst to the undersigned, Plaintiff filed a Notice of Tort Claim on November 30, 2012. *Id.* On June 28, 2015, Plaintiff had his first consultation with the undersigned as Plaintiff was getting closer to the statute of limitations. *Id.* The undersigned filed a second Notice of Tort Claim on July 14, 2015, to ensure compliance with the statute while gathering the file from Plaintiff's prior attorney. *Id.* After the sixty day tolling period, Plaintiff filed his lawsuit on September 15, 2015, which was the second court day after the weekend of September 12/13, 2015. *Id.*

Defendant's filed a Motion to Dismiss Plaintiff's Complaint with Prejudice on April 15, 2016. (Defendant's Motion to Dismiss). The Defendant's argued that the Plaintiffs' Complaint and Request for Relief were untimely and time-barred. *Id.* Plaintiff's responded in opposition to the Defendant's Motion to Dismiss on April 20, 2016 arguing that under RCW 4.96.020(4) the Complaint was filed timely. Response in Opposition to Defendant's Motion to Dismiss). The parties argued the Motion on May 6, 2016 in front of the Honorable Pat Monasmith. VRP p. 3-8. Judge Monasmith continued the hearing to May 27, 2016 and asked the parties to provide supplement briefing regarding the language of RCW 4.96.020(4). VRP p. 9.

After further argument of the parties Judge Monasmith granted the Defendant's Motion to Dismiss. VRP p. 25-28. However, the Judge noted that without guidance of case law he based his decision on the language of the statute and applying logic. VRP p. 28. Further noting, this is likely an issue the Court of Appeals needs to weigh in on. *Id.*

ARGUMENT

Standard of Review

A trial court's ruling on a motion to dismiss for failure to state a claim on which relief can be granted is a question of law that is reviewed de novo. CR 12(b)(6); *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Courts should dismiss a claim under CR 12(b)(6) only if it appears beyond a reasonable doubt that no facts exist that would justify recovery. *Cutler*, 124 Wn.2d at 755. CR 12(b)(6) motions should be granted sparingly and only where the face of the complaint reveals that there is an insuperable bar to relief. *Cutler*, 124 Wn.2d at 755; see also *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986) (action may be dismissed under CR 12(b)(6) only if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, that would entitle him to relief).

I. Pursuant to RCW 4.96.020(4) and CR 12(b)(6), the trial court erred in dismissing this case for failure to state a claim upon which relief could be granted.

The Superior Court erred when it granted the Defendant's Motion to Dismiss under CR12(b)(6) because its interpretation of RCW 4.96.020(4) ignores the plain language of the statute and the legislative history.

RCW 4.96.020(4) provides:

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.

In the case at hand, Mr. Rumburg commenced his action within five court days after the sixty day period expired, which deems his lawsuit filed on the first day after the sixty calendar day period has elapsed. Plaintiff's injury occurred on July 16, 2012. A Notice of Tort Claim was filed by Plaintiff's previous counsel on November 30, 2012 and by current counsel on July 14, 2015. After the sixty day tolling period, Plaintiff filed his lawsuit on September 15, 2015, which was the second court day after the weekend of September 12-13, 2015.

RCW 4.96.020(5) provides: "With respect to the content of claims under this section and all procedural requirements in this section, this section must be liberally construed so that substantial compliance will be deemed

satisfactory.” (Emphasis added). Mr. Rumburg substantially complied with the statute when he filed his Notice of Tort Claim and then presented his lawsuit for filing within five court days after the sixty calendar day period had elapsed. The amendments to RCW 4.96.020 providing for substantial compliance with the content of the claim and the filing procedures came into effect on July 26, 2009. *Myles v. Clark County*, 170 Wash. App. 521, 289 P.3d 650 (2012), review denied, 176 Wash. 2d 1015 (2013). Included in the amendments was the addition of a five court day buffer after the expiration of the sixty day tolling provision.

In addition, the Courts ruling is contrary to the legislative history of the statute. The legislative history is clear that the legislature intended to provide potential plaintiffs with overwhelming opportunities to not miss the filing deadline, including by giving a 60-day tolling period tacked onto a limitation of action, and then doubling down by adding an additional five court days to the tolling period. The legislative history shows an intent by the legislature to provide potential plaintiffs with ample opportunity to file their lawsuit after giving appropriate notice to the government. In furtherance of this, they added two safeguards: first, the 60 day tolling period and second, the additional five court day buffer period. See, Legislative History, attached hereto as Exhibit A.

CONCLUSION

Based on the above, the Plaintiff respectfully requests that this Court reverse the decision of the Superior Court below, and remand for trial.

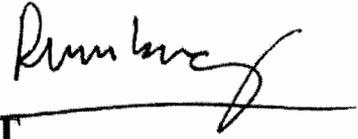
DATED this 3rd day of April, 2017.

A handwritten signature in black ink, appearing to be 'D. Phelps', written over a horizontal line.

Douglas D. Phelps
Phelps & Associates, P.S.
Attorney for Petitioner
WSBA #22620

Exhibit A

Legislative History



HOUSE BILL REPORT

HB 1553

As Reported by House Committee On:
Judiciary

Title: An act relating to claims for damages against the state and local governmental entities.

Brief Description: Addressing claims for damages against the state and local governmental entities.

Sponsors: Representatives Takko, Goodman, Williams, Hurst, Pedersen and Campbell.

Brief History:

Committee Activity:

Judiciary: 2/2/09, 2/12/09 [DPS].

Brief Summary of Substitute Bill

- Amends procedures applicable to claims filed against local governments and the state, including requiring the claim to be presented on a standard tort claim form.
- Provides that substantial compliance with the procedural requirements of the claim filing statutes is satisfactory.
- Allows an action to be commenced in court within five days after the expiration of the 60-day period in the claim filing statute.
- Provides that claims involving health care are governed by the medical malpractice statutes.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Flannigan, Kelley, Kirby, Ormsby and Roberts.

Minority Report: Do not pass. Signed by 2 members: Representatives Ross and Warnick.

Staff: Trudes Tango (786-7384)

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background:

A tort claim against either the state or a local government may not be filed in court until the claimant complies with certain notice requirements established in statute, called the "claim filing statute." One of the purposes of the claim filing statute is to allow local governments time to investigate, evaluate, and settle claims prior to the instigation of a civil proceeding.

A tort claim against the state must be presented to and filed with the Risk Management Division of the Office of Financial Management (OFM). A tort claim against a local governmental entity must be presented to an agent designated by the local governmental entity to receive the claims.

The claim must accurately describe the injury or damages, the conduct or circumstances that brought about the injury or damage, the names of all persons involved, and the amount of damages claimed. A claimant may not commence a civil tort action against the state, or against a local governmental entity, until 60 days after the claim is filed. The statute of limitations for the claim is tolled during this 60-day period.

The claimant is required to verify, present, and file the claim. However, if the claimant is incapacitated, a minor, or is a nonresident of the state who is absent when the claim is required to be filed, the claim may be verified, presented, and filed by any relative, attorney, or agent representing the claimant.

Substantial compliance with respect to the contents of the claim is sufficient. In fact, the claim filing statute for the state specifically provides that with respect to the content, the statute should be liberally construed so that substantial compliance is sufficient. However, the courts have generally required strict compliance with the procedural requirements of the claim filing statute and failure to strictly comply leads to dismissal of the action.

Procedures for filing claims for injuries resulting from health care are governed under a separate chapter of the Revised Code of Washington.

Summary of Substitute Bill:

Claims against local governments and the state must be presented on a standard tort claim form. The form must be maintained by the OFM and put on its website. Local governments and the state must make the standard form available with instructions on how the form is to be presented along with the name, address, and business hours of the agent authorized to receive the claim. The claim form must not list the claimant's social security number and may not require information that is not specified in the statute. The amount of damages stated on the claim form is not admissible at trial.

For claims against local governments, presentation of a claim is accomplished by delivery to the agent or other person authorized to accept delivery at the agent's office, by registered mail, or by certified mail with return receipt requested. For claims against the state, presentation of the claim is accomplished by service upon the agent or by registered mail.

For claims against local governments, if the local government has actual knowledge of the claim and no claim form is provided, or if the claim form fails to seek the information specified in the statute or incorrectly lists the agent to whom the claim is to be filed, the local government is deemed to have waived any defense related to the failure to provide that specific information or to file with the proper agent. The claimant does not have to provide his or her actual residence six months prior to the time the claim arose, but must state his or her actual residence at the time the claim arose. The claim must be signed either by the claimant (who must also verify the claim), by the claimant's attorney-in-fact under a power of attorney, or by an attorney licensed to practice in Washington.

An action commenced within five business days after the 60-calendar-day period has elapsed will be considered timely.

The claim filing statutes do not apply to claims based on injuries from health care. The procedures established under the medical malpractice statutes apply to those claims. However, when a claim involving health care is filed against the state, a copy of the claim must still be filed with the OFM.

The claim filing statutes are to be liberally construed with respect to the procedural requirements of the statute and substantial compliance will be deemed satisfactory.

Substitute Bill Compared to Original Bill:

The original bill contained the following provisions: (1) the statute of limitations for an action is tolled for one year if the claimant requests mediation; (2) a claim may not be dismissed for failing to comply with the procedural requirements of the claim filing statute absent bad faith by the claimant and actual prejudice to the local government or state; and (3) the claim form could not ask for the claimant's date of birth. These provisions are removed in the substitute bill.

The substitute bill also removes language under existing law that allows an attorney, relative, or other agent to present the claim if the claimant is incapacitated, a minor, or a nonresident.

The substitute bill provides that if the local government has actual knowledge of the claim and no form was provided, then the local government waives any defense related to failure to provide information on the form or failure to file with the proper agent. The substitute requires that when a claim is filed against the state under the medical malpractice statutes, a copy of the claim must also be filed with the OFM.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Injured plaintiff's claims are being denied because of the strict claim filing statutes. The original intent of the statutes was to provide notice so that the government can get the facts of the claim and investigate. They were not meant to be "gotcha" statutes. Some of the procedural requirements are tricky. Cases are being dismissed based on technical interpretations of the statute. The bill is aimed at restoring the original intent. It corrects historical unfairness and makes the statute functional. It requires notice to the government, but eliminates the barnacles of judicial bureaucracy. The current statutes reward deception hidden in the claim forms. If the purpose is to provide notice, the form should be simple. This bill will make filing claims against local government consistent with state filings. Local governments all have different claim forms.

(Opposed) The statutes work well and people can comply with it. The language regarding dismissal of claims only if there is bad faith and the tolling of the statute of limitations based on a mediation request should be removed. Not allowing the claimant's date of birth on the claim form and not allowing the government to request more information would make it difficult for the government to verify who the claimant is and would make it more difficult for the government to resolve claims. The changes made in this bill will only increase the cost of litigation. Adding five extra days to file a claim will not address the issue of courts not knowing how to calculate when 60 days expire. The case law regarding where claims are filed and how days are counted is clearly established. The state receives numerous medical malpractice claims and it is important that the state continue to receive notice of those claims.

Persons Testifying: (In support) Representative Takko, prime sponsor; Larry Shannon, Charles Kimbrough, and Jim Sellers, Washington State Association for Justice; and Kurt Anagnostou.

(Opposed) John Milton, Washington State Department of Transportation; Tammy Fellin, Association of Washington Cities; Glen Anderson, Office of the Attorney General; and Tom McBride, Washington Association of Prosecuting Attorneys.

Persons Signed In To Testify But Not Testifying: None.

Judiciary Committee

HB 1553

Title: An act relating to claims for damages against the state and local governmental entities.

Brief Description: Addressing claims for damages against the state and local governmental entities.

Sponsors: Representatives Takko, Goodman, Williams, Hurst, Pedersen and Campbell.

Brief Summary of Bill

- Amends procedures applicable to claims filed against local governments and the state, including requiring the claim to be presented on a standard tort claim form;
- Provides that a claim may not be dismissed for noncompliance with the procedural requirements absent bad faith by the claimant and actual prejudice to the local governmental entity or the state.
- Provides that a written, good faith request to mediate a claim before filing the cause of action tolls the statute of limitations for one year.

Hearing Date: 2/2/09

Staff: Trudes Tango (786-7384)

Background:

A tort claim against either the state or a local government may not be filed in court until the claimant complies with certain notice requirements established in statute, called the "claim filing statute." One of the purposes of the claim filing statute is to allow local governments time to investigate, evaluate, and settle claims prior to the instigation of a civil proceeding.

A tort claim against the state must be presented to and filed with the Risk Management Division of the Office of Financial Management. A tort claim against a local governmental entity must be presented to an agent designated by the local governmental entity to receive the claims.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

The claim must accurately describe the injury or damages, the conduct or circumstances that brought about the injury or damage, the names of all persons involved, and the amount of damages claimed. A claimant may not commence a civil tort action against the state, or against a local governmental entity, until 60 days after the claim is filed. The statute of limitations for the claim is tolled during this 60-day period.

The claimant is required to verify, present, and file the claim. However, if the claimant is incapacitated, a minor, or is a nonresident of the state who is absent when the claim is required to be filed, the claim may be verified, presented, and filed by any relative, attorney, or agent representing the claimant.

Substantial compliance with respect to the contents of the claim is sufficient. In fact, the claim filing statute for the state specifically provides that with respect to the content, the statute should be liberally construed so that substantial compliance is sufficient. However, the courts have generally required strict compliance with the procedural requirements of the claim filing statute and failure to strictly comply leads to dismissal of the action.

Procedures for filing claims for injuries resulting from health care are governed under a separate chapter of the Revised Code of Washington. A provision in that chapter tolls the statute of limitations for the action for one year if the claimant has made a written, good faith request for mediation prior to filing the action in court.

Summary of Bill:

Changes are made to the claim filing statutes applicable to local governmental entities and the state.

Presentation of the Claim

For claims against local governments, presentation of a claim is accomplished by delivery to the agent or other person authorized to accept delivery at the agent's office, or by registered mail, or by certified mail return with receipt requested. For claims against the state, presentation of the claim is accomplished by service upon the agent or by registered mail.

Claims against local governments and the state must be presented on a standard tort claim form. The form must be maintained by the Office of Financial Management and put on its website. Local governments and the state must make the standard form available with instructions on how the form is to be presented and the name, address, and business hours of the agent authorized to receive the claim.

The claim form must not list the claimant's social security number or birth date and must not require information that is not specified in the statute. For claims against local governments if the claim form fails to seek the information specified in the statute or incorrectly lists the agent to whom the claim is to be filed, the local government is deemed to have waived any defense related to the failure to provide that specific information or to file with the proper agent. The claimant does not have to provide his or her actual residence six months prior to the time the claim arose, but must state his or her actual residence at the time the claim arose.

Persons Who can Sign, Verify, and Present the Claim

The claim must be signed and verified either by the claimant, by the claimant's attorney-in-fact under a power of attorney, or by an attorney licensed to practice in Washington.

Compliance with the Statutes

The statutes are to be liberally construed with respect to the contents of the claim and the procedural requirements of the statute. A claim must not be dismissed for noncompliance absent bad faith by the claimant and actual prejudice to the local governmental entity or the state.

Statute of Limitations

For claims against a local government or the state, an action commenced within five business days after the 60 calendar day period has elapsed will be considered timely. In addition, making a written, good faith request for mediation before filing the cause of action will toll the applicable statute of limitations for that action for one year.

Other

For claims against a local government or the state, the amount of damages stated on the claim form is not admissible at trial.

Language is added to clarify that these claim filing statutes do not apply to claims based on injuries from health care. The procedures established under the medical malpractice statutes apply to those claims.

Appropriation: None.

Fiscal Note: Requested on January 28, 2009.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of April, 2017, I caused to be served a true and correct copy of the foregoing to the following counsel of record, with costs of service prepaid:

Court of Appeals Division III
500 N. Cedar
Spokane, WA 99201

Legal Messenger

Scott C. Cifrese
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717 West Sprague Avenue, Suite 1200
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U.S. Mail


_____ #UGM6

PHELPS & ASSOCIATES, P.S.