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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

CASE NO. 345726

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION III

WILLIAM RUMBURG and CAROL RUMBURG,

Appellants,

v.

FERRY COUNTY PUBLIC UTILITY DISTRICT NO. 1,

Appellee.

BRIEF OF DEFENDANT/APPELLEE
FERRY COUNTY PUBLIC UTILITY DISTRICT NO. 1

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No. 1

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I. INTRODUCTION

Plaintiffs-Appellants, the Rumburgs, sued Defendant-Appellee, Ferry County Public Utility District, No. 1 (“the PUD”), a quasi-governmental entity, for allegedly injuring Mr. Rumburg. Prior to bringing suit, the Rumburgs were required to present a Notice of Tort Claim to the PUD’s designated agent. The Rumburgs presented a Notice of Tort Claim within six months of the alleged injury. For over two years, the Rumburgs did not file suit against the PUD. A couple months short of three years after the alleged injury, the Rumburgs presented a second Notice of Tort Claim. This second notice had no effect on the statute of limitations. Three years and 62 days after the alleged injury, the Rumburgs filed suit against the PUD. Because the Rumburgs’ action was barred by the extended statute of limitations (3 years plus 60 days¹), the trial court concluded that the Rumburgs’ Complaint failed to state a claim upon which relief could be granted. This Court should affirm.

II. STATEMENT OF ISSUE

Whether, under RCW 4.16.080(2) and RCW 4.96.020, an action against a quasi-governmental entity is commenced after the running of the statute of limitations (and, thus, fails to state a claim upon which relief can

¹ Statute of limitations is tolled 60 days on account of the presentment of the Notice of Tort Claim. RCW 4.96.020(4).

be granted) when (1) the plaintiff presents two Notice of Tort Claims, the first presented at a time when there is over two years until the running of the statute of limitations, and (2) the plaintiff does not file suit against the quasi-governmental entity until three years and 62 days after the date of alleged injury?

III. STATEMENT OF THE CASE

The Rumburgs allege that, on July 16, 2012, the PUD participated in a community event in which the PUD set up a tent that collapsed and injured Mr. Rumburg. Clerk's Papers (CP) at 5.

The PUD is a quasi-governmental entity. In order to bring suit against the PUD, the Rumburgs were required to present a Notice of Tort Claim to the PUD's agent, which they did on November 30, 2012. CP at 37-40. For over two years, the Rumburgs took no further legal action.

On July 14, 2015, the Rumburgs, apparently represented by a new attorney, presented a second Notice of Tort Claim to the PUD's agent.

On Tuesday, September 15, 2015, three years and 62 days after Mr. Rumburg was allegedly injured, the Rumburgs filed suit against the PUD in Ferry County Superior Court. CP at 1-6.

The PUD brought a Motion to Dismiss on the grounds that the Rumburgs' suit was barred by the statute of limitations, and therefore, failed to state a claim upon which relief could be granted. CP at 12-19.

After a preliminary hearing on the motion, the trial court ordered supplemental briefing. *See* CP 41-70. The trial court held a second hearing on the motion at which time the trial court granted the PUD's Motion to Dismiss and dismissed the Rumburgs' suit with prejudice. *See* CP 71-74 (Order of Dismissal with Prejudice).

IV. STANDARD OF REVIEW

An appellate court reviews de novo an order granting a motion to dismiss under CR 12(b)(6). *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014). A suit that is time barred by the statute of limitations fails to state a claim upon which relief can be granted and should be dismissed. *Summerrise v. Stephens*, 75 Wn.2d 808, 811, 454 P.2d 224 (1969); *Hipple v. McFadden*, 161 Wn. App. 550, 557, 255 P.3d 730 (2011).

V. ARGUMENT

Generally, a plaintiff must bring a tort action within three years of the date of injury. RCW 4.16.080(2).

Prior to filing suit against a government or quasi-government entity, and within the applicable statute of limitations, a plaintiff must present a Notice of Tort Claim to the entity's designated agent. RCW 4.96.020(2), (4). The notice of claim requirement stems from the state's power to prescribe the limitations upon the state's waiver of sovereign

immunity. *Medina v. PUD No. 1 of Benton Cty.*, 147 Wn.2d 303, 320, 53 P.3d 993 (2002) (Ireland, J., dissenting); *see also* Wash. Const., art. 2, § 26 (legislature reserves the power to regulate the manner in which suits against the government may proceed). The purpose of the notice of claim requirement “is to ensure that sufficient notice is provided to government entities in order to allow prompt and thorough investigation of claims and to provide an opportunity for careful evaluation of the potential costs and benefits of litigation.” *Medina*, 147 Wn.2d at 320 (Ireland, J., dissenting).

Presentment of the Notice of Tort Claim has the effect of tolling the statute of limitations for 60 calendar days. RCW 4.96.020(4). During this 60-day waiting period, the governmental entity can investigate the claim and evaluate its options prior to the plaintiff filing suit. *Medina*, 147 Wn.2d at 320 (Ireland, J., dissenting). Although Washington courts have stated that RCW 4.96.020(4) “essentially adds 60 days to the applicable statute of limitation,” *e.g.*, *Castro v. Stanwood Sch. Dist. No. 401*, 151 Wn.2d 221, 226, 86 P.3d 1166 (2004), this is the end result of the tolling provision. The 60-day waiting period is not simply added to the **end** of the statutory time period; rather, it is “a period of 60 **intervening** days.” *Troxell v. Rainer Public School District No. 307*, 154 Wn.2d 345, 354-55, 111 P.3d 1173 (2005) (emphasis added) (subsequent citations omitted). The waiting period commences the day the plaintiff presents the Notice of

Tort Claim and ends 60 days later. *See* RCW 4.96.020(4) (“No action [against a governmental entity] . . . shall be commenced . . . until sixty calendar days have elapsed after the claim has **first** been presented to the agent.”) (Emphasis added).

Finally, RCW 4.96.020(4) provides: “[A]n 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.” The legislature added this sentence to RCW 4.96.020(4) in July 2009 (among other amendments to RCW 4.96.020). Laws of 2009, ch. 433, § 1.

The Rumburgs argue that the five-day grace period contained in RCW 4.96.020(4) applies in this case and makes their suit timely. *See* App. Br. at 6 (“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.”). The Rumburgs further argue that filing suit three years and 62 days after the date of injury substantially complies with the notice of claim statute requirements. *Id.* at 7.

The Rumburgs’ first argument fails because the 60-day waiting period took place between November 30, 2012 (the date the Rumburgs filed their first Notice of Tort Claim) and January 29, 2013 (60 days later).

The 60-day waiting period is an intervening period that gives government entities the chance to investigate and evaluate the claim against it prior to the plaintiff filing suit. Contrary to the Rumburgs' position, the 60-day waiting period and the five-day grace period are not merely tacked onto the end of the statutory time period. Where the 60-day waiting period ends with over two years before the running of the statute of limitations, and when the plaintiff does not file suit in the five days following the 60-day waiting period, the five-day grace period does not apply. The Rumburgs' second argument fails because filing suit after the running of the statute of limitations is not substantial compliance.

A. **The Rumburgs' Argument that RCW 4.96.020(4)'s Five-Day Grace Period Makes Their Suit Timely is Contrary to the Plain Language of RCW 4.96.020(4), Legislative Intent, and Common Sense.**

The Rumburgs argue that the five-day grace period is tacked on the end of the extended statutory time period (three years and 60 days), and, because they filed suit within five days of the expiration of the extended statutory time period, their suit is timely. This interpretation of RCW 4.96.020(4) is contrary to the plain meaning of the statute and legislative intent and leads to absurd results.

Preliminarily, it is unclear whether the Rumburgs are arguing that the 60-day waiting period took place after the presentment of their first or

second Notice of Tort Claim. App. Br. at 6. But there can be no question that the 60-day waiting period started when the Rumburgs presented their first Notice of Tort Claim on November 30, 2012 and ended 60 days later on January 29, 2013. *See* RCW 4.96.020(4) (“No action [against a governmental entity] . . . shall be commenced . . . until sixty calendar days have elapsed after the claim has **first** been presented to the agent.”) (Emphasis added). In this case, the Rumburgs’ presentment of their first Notice of Tort Claim triggered the tolling provision and five-day grace period of RCW 4.96.020(4); the Rumburgs’ presentment of a second Notice of Tort Claim had no effect.

1. *The plain language of RCW 4.96.020(4) does not support the Rumburgs’ position.*

The starting point for an issue involving the meaning and application of a statute is the statute’s plain language. *State Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The plain language of the third sentence of RCW 4.96.020(4) indicates that the legislature intended the five-day grace period to immediately follow the 60-day waiting period. “For the purposes of the applicable period of limitations, an action commenced **within five court days after the sixty day calendar day period** has elapsed is deemed to have been

presented on the first day after the sixty day period elapsed.”
RCW 4.96.020(4) (emphasis added).

In this case, the 60-day waiting period occurred between November 30, 2012 and January 29, 2013. The Rumburgs did not commence an action within five court days after January 29, 2013. Instead, they waited over two more years, and after the extended statutory time period, to file suit. Because of the way the Rumburgs proceeded in this litigation, the five-day grace period has no application. The plain language of RCW 4.96.020(4) does not support the Rumburgs’ argument that the five-day grace period tacks onto the end of the extended statutory time period to make their suit timely.

2. *Case law and legislative history do not support the position advocated by the Rumburgs.*

Because the plain language of RCW 4.96.020(4) is clear, it is perhaps not surprising that no Washington appellate court has addressed the circumstances in which the five-day grace period operates. If the Court is inclined to look beyond the plain language of the statute, case law and legislative history is informative about why the legislature added the five-day grace period to RCW 4.96.020(4). The concerns that prompted the legislature to amend the statute to include the five-day grace period, however, are not present in the Rumburgs’ case.

Prior to 2009, RCW 4.96.020(4) read:

No action 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 days have elapsed after the claim has first been presented to and filed with the governing body thereof. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty-day period.

Former RCW 4.96.020(4) (2006). The mechanical application of this statute resulted in harsh outcomes.

In *Medina v. PUD No. 1 of Benton County*, 147 Wn.2d 303, 53 P.3d 993 (2002), the Court affirmed the dismissal of a case where the plaintiff, Medina, filed a notice of claim but failed to wait the 60 days prior to filing suit against a public utility. Medina was injured on January 9, 1995 when a vehicle owned by Benton County rear-ended Medina's car. *Id.* at 307. On January 7, 1998, two days before the statute of limitations was to expire, Medina presented a notice of claim with the County for personal injury damages. *Id.* The County denied the claim on January 13, 1998 and made no subsequent attempts to investigate the claim or contact Medina. *Id.* at 308. On March 5, 1998, four days before the 60-day waiting period expired, Medina filed a complaint in Benton County Superior Court. The trial court dismissed the case on summary judgment for Medina's failure to comply with the 60-day waiting period.

The Washington Supreme Court affirmed. On appeal, Medina argued that the trial court should not have dismissed his claim because he substantially complied with the statute, noting that he waited 56 days and the County did not intend to further investigate his claim. *Id.* at 316. The Court rejected this argument.

Justice Chambers dissented on constitutional grounds. Justice Chambers explained his disagreement with the majority as follows:

Medina wished to file his lawsuit within three years of injury, but was effectively barred from doing so by the complex and complicating application of RCW 4.96.020. He would not have been prohibited from filing suit against a private party. The [County] denied his claim, before the 60-day waiting period had ended, but after the three year statute of limitations had lapsed. **According to the majority, Medina was required by unyielding law to file his complaint on a single magic date; precisely 60 days after the notice was filed.** A complex rule for computing the 60 days must be followed. CR 6(a). No margin of error, according to the majority, is permitted, even an error in favor of timely compliance.

Id. at 327-28 (Chambers, J., dissenting) (footnote omitted) (emphasis added).

Troxell v. Rainer Public School District No. 307, 154 Wn.2d 345, 111 P.3d 1173 (2005) presented an even closer question regarding whether a plaintiff complied with the notice of claim waiting period. In that case, the plaintiff, Troxell, was injured in a high school parking lot on December 17, 1998. *Id.* at 348. Troxell filed a tort claim notice with the

school district on December 10, 2001. *Id.* On the 60th day following December 10, 2001—February 8, 2002—Troxell filed a complaint in Thurston County Superior Court. *Id.* The trial court granted summary judgment in favor of the school district because Troxell commenced her action prior to the expiration of the 60-day waiting period. *Id.* at 349. Because the last day of Troxell’s extended statute of limitations period was February 15, 2002, *see id.* at 349 n.2, the trial court dismissed the case with prejudice. The Court of Appeals reversed, concluding that the mandatory 60-day waiting period was satisfied by the passage of 59 calendar days. *Id.* at 349.

The Washington Supreme Court reversed the Court of Appeals and affirmed the trial court’s dismissal of the action. The majority of the Court held that “the plain language of RCW 4.96.020(4) requires a waiting period of 60 full calendar days between the filing of the claim notice and the commencement of the action.” *Id.* at 352, 360-61. In reaching this conclusion, the Court relied on dictionary definitions, time computation rules derived from other jurisdictions, and the treatment of the waiting period in other Washington cases, including *Medina*. *Id.* at 360.

Justice Chambers again dissented. He disagreed with how the majority interpreted when the 60th day of the waiting period “elapsed.” *Id.* at 362-64. Justice Chambers found the majority’s opinion led to “an

absurd result” in that it “effectively precludes claims from litigants who wait until the last day of the original statute of limitation period to serve claim notice.” *Id.* at 364.

A Court of Appeals case, *Sievers v. City of Mountlake Terrace*, 97 Wn. App. 181, 983 P.2d 1127 (1999), presented facts nearly identical to *Troxell* and is further illustrative of the problem the legislature intended to cure with the 2009 amendments that added the five-day grace period. In that case, plaintiff, Sievers, filed her notice of claim on the last day before the expiration of the statute of limitation on her personal injury claim. 59 days later, Sievers filed a complaint against the City. Sievers claimed

it was necessary to file her action with the court on the Friday preceding the expiration of the applicable statute of limitations because the 60th day of the notice claim statute fell on Saturday, a day when the courts were not open. She asserts that if she waited until the following Monday the applicable statute of limitation would have run.

Id. at 184. The Court of Appeals disagreed and affirmed the dismissal of Sievers’ complaint, reasoning

given the fact that Sievers waited until the last possible day to file her notice of claim with the City before the running of the limitation period, it was necessary to properly count the days under the statutes and court rules to discover that the only (last) possible day to commence the action here would have been on Monday, October 20, 1997, a date in compliance with the 60-day waiting rule mandated by RCW 4.96.020(4) and within the applicable statute of limitation.

Although seemingly harsh, this case is an excellent illustration of the dangers fraught with waiting to file claim notices or complaints on the last day of the applicable limitation period.

Id. at 184-85.

In 2009, the legislature amended RCW 4.96.020(4) to include the five-day grace period. Laws of 2009, ch. 433, § 1. The available legislative records document that those supporting the amendments claimed the amendments were necessary because:

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.

H.B. Rep. on Engrossed Substitute H.B. 1533, at 3, 61st Leg., Reg. Sess. (Wash. 2009), *available at* <http://lawfilesextra.leg.wa.gov/biennium/2009-10/Pdf/Bill%20Reports/House/1553%20HBR%20JUDI%2009.pdf> (last visited April 10, 2017).

Medina, Troxell, and Sievers illustrate the harsh outcomes that resulted when plaintiffs filed their notice of claims mere days before the end of the statutory limitation period. In those scenarios, where the

statutory limitation period expired during the 60-day waiting period, plaintiffs were required to file their complaints on a “magic date.” *Medina*, 147 Wn.2d at 327 (Chambers, J., dissenting). That is, a day “in compliance with the 60-day waiting rule mandated by RCW 4.96.020(4) and within the applicable limitation period.” *Sievers*, 97 Wn. App. at 184. In *Medina*, *Troxell*, and *Sievers*, the plaintiffs, who were understandably nervous about missing the “magic” day, filed their complaints a day (or several days) early, only to have their claims dismissed for not complying with RCW 4.96.020(4). By amending RCW 4.96.020(4) to include a five-day grace period, the legislature was clearly attempting to provide plaintiffs in these circumstances a limited “margin of error,” *Medina*, 147 Wn.2d at 328 (Chambers, J., dissenting), when it came to computing the time to file their complaints. If the 2009 amendment had been in effect prior to 1999, *Medina*, *Troxell*, and *Sievers* would not have been in the position where they had to file their complaints on one “magic” day.²

² The legislature is presumed to have been aware of the Court’s interpretations of the claim filing statutes. *Harberd v. City of Kettle Falls*, 120 Wn. App. 498, 512, 84 P.3d 1241 (2004). If the legislature did not add the five-day grace period to address this precise situation, then it is extremely coincidental because the amendment specifically addresses the harsh results reached in these cases. It is also worth noting that representatives of the Washington State Trial Lawyers Association (renamed the Washington State Association for Justice in 2008) appeared as amicus curiae in *Medina* and also testified in support of House Bill 1553.

In this case, the Rumburgs did not have a single “magic date” in which to file suit. They filed their first Notice of Tort Claim about five and a half months after Mr. Rumburg was allegedly injured and had over two years to file suit. This was not a “gotcha” scenario that the legislature had tried to cure with the five-day grace period. The legislature’s enactment of the five-day grace period was not to grant relief to plaintiffs in the Rumburgs’ situation. It was enacted for the benefit of plaintiffs who presented their (first) Notice of Tort Claim on the day of, or the day before, the expiration of the statute of limitations. The Rumburgs’ argument that the five-day grace period applies to make their suit timely is contrary to the legislative intent behind the five-day grace period.

3. *The Rumburgs’ interpretation of RCW 4.96.020(4) is illogical and acceptance of their interpretation would cause absurd results.*

Before the trial court, the Rumburgs argued that the 60-day waiting period can shift to the last 60 days of the extended statutory waiting period and that the five-day grace period follows. The Rumburgs appear to make a similar argument on appeal, although the Rumburgs’ briefing is not clear on this issue. Regardless, moving the 60-day waiting period to the end of the statutory period is illogical for at least two reasons.

First, moving the 60-day waiting period to the end of the statutory time period would make it so the waiting period is not an “intervening”

period as recognized by the Washington Supreme Court. *E.g., Troxell*, 154 Wn.2d at 354-55.

Second, RCW 4.96.020(4) requires government entities to act immediately when they receive a tort notice. Upon receiving a notice claim, a government entity could not simply ignore the claim notice until the running of the statutory period and then claim to have 60 additional days in which to investigate the claim. Government entities do not control when plaintiffs file notice of tort claims. The legislature did not intend to create a one-sided rule that allow plaintiffs to shift the 60-day period to a time that is convenient for them.

In sum, the Rumburgs' argument that their suit was timely based on the five-day grace period is contrary to the plain language of RCW 4.96.020(4), the legislative intent behind the five-day grace period, and common sense. The trial court correctly found that the Rumburgs' suit was time barred and did not err in dismissing it with prejudice.

B. The Rumburgs Did Not Substantially Comply with RCW 4.96.020 Because Filing Suit after the Running of the Extended Statute of Limitations Period is Not Substantial Compliance.

"All time requirements necessarily involve a judgment by the legislature or a court as to the amount of time necessary to achieve the legislative or judicial purpose." *Medina*, 147 Wn.2d at 318. "It is

impossible to substantially comply with a statutory time limit . . . It is complied with or it is not.” *City of Seattle v. Pub. Employment Relations Comm’n*, 116 Wn.2d 923, 929, 809 P.2d 1377 (1991); *Forseth v. City of Tacoma*, 27 Wn.2d 284, 297, 178 P.2d 357 (1947) (“[T]here can be no ‘substantial compliance’ with the provision concerning the time within which a claim must be filed, except by filing it within that time.”) *overruled on other grounds by Shafer v. State*, 83 Wn.2d 618, 623, 521 P.2d 736 (1974).

In this case, the Rumburgs did not substantially comply with the notice of tort claim requirements because they did not file suit until three years and 62 days after Mr. Rumburg was allegedly injured. Even though they were only a day late in filing their Complaint, this cannot be deemed substantial compliance. One either complies with the statutory time limit or does not.

RCW 4.96.020(5), which provides that RCW 4.96.020 “must be liberally construed so that substantial compliance will be deemed satisfactory,” does not alleviate a plaintiff from his or her burden to file suit within the statutory time limit. RCW 4.96.020(5) applies to the contents of the notice of tort claim and, at least in some cases, its presentment to the government entity’s designated agent. *E.g.*, *Myles v. Clark Cty.*, 170 Wn. App. 521, 525-26, 289 P.3d 650 (2012) (plaintiff

substantially complied with RCW 4.96.020 when she presented her notice of tort claim to the risk management division of government entity, which responded to the plaintiff's notice, but the risk management division was not the entity's designated agent). While substantial compliance with RCW 4.96.020 is the standard applied to most aspects of the statute, it cannot be the standard applied to whether suit was timely filed. *City of Seattle*, 116 Wn.2d at 929; *Forseth*, 27 Wn.2d at 297.

In sum, the Rumburgs did not substantially comply with RCW 4.96.020. They failed to file suit within the extended statutory time limit and, thus, their Complaint fails to state a claim upon which relief can be granted.

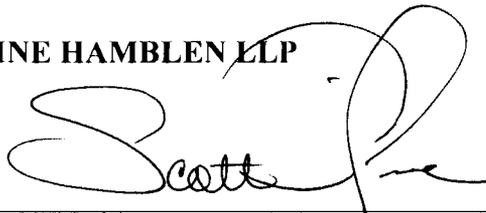
VI. CONCLUSION

For the above-stated reasons, Appellee-Defendant Ferry County PUD respectfully requests that the decision of the trial court be affirmed.

RESPECTFULLY SUBMITTED this 2nd day of May, 2017.

PAINE HAMBLEN LLP

By: _____



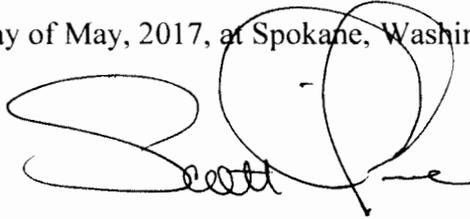
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that a true and accurate copy of the document to which this declaration is affixed was sent via regular mail, postage prepaid, on this day, to:

Douglas D. Phelps
Amber Henry
Katharine Allison
Phelps & Associates, P.S.
2903 N. Stout Rd.
Spokane Valley, WA 99206

Dated this 2nd day of May, 2017, at Spokane, Washington.



Scott C. Cifrese