

NO. 351793

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

DANNY STEVEN KRAUSE and LORI A. KRAUSE, husband and wife,

Plaintiffs-Appellants,

v.

CITY OF CLARKSTON, and DOES I-V,

Defendants-Respondents.

BRIEF OF RESPONDENT CITY OF CLARKSTON

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I. INTRODUCTION

This is a tort action against the City of Clarkston (the “City”) brought by Plaintiffs Danny and Lori Krause. On September 11, 2013, Danny Krause crashed his motorcycle at the intersection of Fifth and Fair Street in Clarkston, Washington. Plaintiffs allege the design of the intersection contributed to this incident.

On December 14, 2017, the City moved for summary judgment dismissing Plaintiffs’ claims for failure to comply with RCW 4.96.020(4), which required waiting 60 days after filing a claim before commencing an action in Superior Court. Finding Plaintiffs waited only nine days, the Asotin County Superior Court granted the City’s motion for summary judgment and dismissed Plaintiffs’ claims.

Plaintiffs now appeal that ruling and request the Court reverse the grant of summary judgment order and order the matter remanded.

II. ASSIGNMENTS OF ERROR

The City does not assign error to the trial court’s ruling.

III. ISSUE ON APPEAL

Did the trial court properly grant summary judgment to the City based upon the application of RCW 4.96.020(4), where there are no disputes of material fact that Plaintiffs failed to wait 60 days between filing their claim with the City and commencing this lawsuit?

IV. STATEMENT OF THE CASE

A. Plaintiffs' Allegations Against the City

This is a road liability case brought by Danny and Lori Krause against the City of Clarkston. Plaintiffs allege that on September 11, 2013, in the evening, Danny Krause was operating a motorcycle at the intersection of Fifth Street and Fair Street in Clarkston, Washington. CP 3. Plaintiffs allege that the City was somehow responsible for the accident. *Id.*

B. Statement of Procedure

On August 30, 2016, Plaintiffs submitted a claim for damages to the City's clerk's office. CP 24, 25, 30 – 34. Nine days later, Plaintiffs commenced their action by filing a Complaint for Damages. CP 1. The Plaintiffs served the City with the Complaint on October 31, 2016. CP 25.

The City answered Plaintiffs' Complaint on December 2, 2016. CP 9 – 11. The City's Answer included the following affirmative defenses:

6. That [Plaintiffs'] claims are barred by the statute of limitations.
7. That [Plaintiffs'] claims are barred for failure to adhere to the tort claim filing requirements of RCW 4.96.020(4).

CP at 11.

C. The City's Motion for Summary Judgment

On December 16, 2016, the City moved for summary judgment, seeking to dismiss Plaintiffs' claims for failure to comply with RCW 4.96.020(4). CP 16 – 23. Under RCW 4.96.020(4), CR 3 (pertaining to commencement of actions), and *Lee v. Metro Parks Tacoma*, 183 Wn. App. 961, 335 P.3d 1014 (2014), the City argued Plaintiffs did not substantially comply with the 60 day waiting requirement in RCW 4.96.010(4) before commencing their lawsuit in Superior Court. CP 18 – 21.

Plaintiffs responded they had substantially complied with RCW 4.96.020(4) by waiting 64 days between filing the claim and serving the Complaint on the City. CP 36 – 38. There was no genuine issue of material fact that Plaintiffs waited only nine days between filing the claim and filing the lawsuit in Superior Court. *Id.*

The trial court heard this matter on February 13, 2017. After hearing from counsel, the Court, in its oral ruling, stated:

I actually went back and reviewed all the case law from the various, different divisions that have come down. And there still appears to [be] some head scratching going on as to whether or not the 60-day waiting period is procedural or substantive, but I don't think it really matters under the facts of this case. I do believe that summary judgment is appropriate and that there was not substantial compliance, that substantial compliance was discussed.

[An] unpublished opinion – that was Tony versus Lewis County [2017 Wash. App. LEXIS 217 (Docket No. 76030-1-I) (January 30, 2017)] – this was about two weeks ago it came out. And there the Court discussed substantial compliance was required, and that the plaintiff make a bonafide attempt to comply with the law and must actually accomplish its purpose. *And the purpose of this particular statute has been reviewed at some length, as allowing the governmental entity time to investigate, evaluate, and settle claims. No showing that that had occurred within those nine days.* And in order to show substantial compliance, you can't simply say, well, the County had enough time to reach a decision before we filed suit. It's actually a burden shifting, and that *would require the plaintiff in this case to come in and prove that the County, at the time that the lawsuit was filed, had already investigated, evaluated, and decided whether or not it would settle some or all of the claims before it at the time the action was commenced. That hasn't been forthcoming from plaintiff in support of this – or in defense of this motion, so I'm finding that summary judgment is appropriate under the facts and circumstances of this case.*

RP 6 - 7 (emphases added). The Court granted the City's motion for summary judgment, and entered an order dismissing Plaintiffs' claims on March 9, 2017. CP 54 – 55. This appeal followed.

V. ARGUMENT

A. Standard on Appeal

Plaintiffs seek review of the trial court's ruling on the City's motion for summary judgment. Appellate courts review a trial court's ruling on a motion for summary judgment *de novo*. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976);

Mahoney v. Shinpoch, 107 Wn.2d 679, 683, 732 P.2d 510 (1987).

Summary judgment is proper if the records on file with the trial court show “there is no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” CR 56(c).

B. The Trial Court Properly Granted the City’s Motion for Summary Judgment and Dismissed Plaintiffs’ Claims For Failure to Wait 60 Days Between Filing Their Tort Claim With the City And Commencing Their Lawsuit.

The Washington State Constitution reserves to the Legislature the right to “direct by law, in what manner, and in what courts, suits may be brought against the state.” Const. art. II, § 26. The right to sue state and local governments is “created by statute and is not a fundamental right.” *Medina v. Pub. Util. Dist. No. 1 of Benton County*, 147 Wn.2d 303, 312, 53 P.3d 993 (2002). In 1967, the legislature required that “filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages” for claims against local governments. RCW 4.96.010, *et seq.* RCW 4.96.020 governs the filing of such claims and states in pertinent part:

- (1) The provisions of this section apply to claims for damages against all local governmental entities.
- (2) All claims for damages against any such entity... shall be presented to and filed with the governing body thereof within

the applicable period of limitations within which such an action must be commenced.

...

(4) No action shall be commenced against any local governmental entity 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.

(emphasis added). The claim filing condition precedent serves the important function of fostering inexpensive settlements of tort claims. *Renner v. City of Marysville*, 168 Wn.2d 540, 545, 230 P.3d 569 (2010) (the purpose of this claim form requirement is “to allow government entities time to investigate, evaluate, and settle claims before they are sued”).

Claim filing statutes with reasonable procedural burdens that do not constitute substantial impediments for governmental tort victims have been upheld as constitutional. *See Pirtle v. Spokane Pub. Sch. Dist. No. 81*, 83 Wn. App. 304, 308, 921 P.2d 1084 (1996)(finding the requirement of RCW 4.96.020(4) did not create substantial impediments and observing that the statute of limitations is tolled during the 60-day waiting period from the time of the notice of claim to the commencement of the action).

After setting forth the claim filing requirements, RCW 4.96.010(1) provides that “[t]he laws specifying the content of such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.” While historically, Washington courts construed the content of

such claims liberally, the courts used to require strict compliance with procedural requirements. However, in 2009, the legislature enacted a new subsection to RCW 4.96.020, which states:

(5) 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.

Thus, it is the current practice that in order for a plaintiff to bring a valid claim, the plaintiff must substantially comply with content and procedural filing requirements.

Even under the substantial compliance standard for filing requirements, certain major flaws cannot be absolved by the Courts. For instance, in *Brigham v. City of Seattle*, 34 Wn.2d 786, 789, 210 P.2d 144 (1949), the Court determined it would not read missing information into a claim form: missing information “cannot be supplied by any method of construction, however liberal”). Another court noted, “if a [statutory] requirement is no longer meaningful, it is for the legislature and not for this court to take it out of the statute.” *Nelson v. Dunkin*, 69 Wn.2d 726, 732, 419 P.2d 984 (1996). The requirement that a plaintiff wait 60 days between filing their claim and commencing their lawsuit remains law. RCW 4.96.020(4).

It is undisputed Plaintiffs filed their claim on August 30, 2016, and that they filed their Complaint in Superior Court on September 8, 2016 –

nine days later. Pursuant to CR 3, pertaining to Commencement of Actions, “except as provided in rule 4.1 [relating to domestic relations actions], a civil action is commenced by service of a copy of a summons together with a copy of a complaint, as provided in rule 4 or by filing a complaint.”¹ (emphasis added).² Accordingly, under the plain language of CR 3, an action is “commenced” by either filing the complaint or by serving the complaint. *See also Schmitz v. State*, 68 Wn. App. 486, 843 P.2d 1109, *rev. denied*, 121 Wn.2d 1031, 856 P.2d 383 (1993) (holding the filing of a complaint or service of a summons, or both, within the 60-day waiting period violates RCW 4.96.020(4) justifying dismissal); *Hintz v. Kitsap County*, 92 Wn. App. 10, 960 P.2d 946 (1998) (finding plaintiff’s complaint served 57 days after service of the claim form on the County violated RCW 4.96.020(4), meriting dismissal). Where a court rule is plain on its face, the court must give effect to its plain meaning and assume the rule means exactly what was intended. *City of Bellevue v. Hellenthal*, 144 Wn.2d 425, 431, 28 P.3d 744 (2001); *State v. Chholm*, 162 Wn.2d 451, 458, 173 P.3d 234 (2007) (applying the same to court rules).

¹ Asotin County does not have a local court rule pertaining to commencement of actions.

² Similarly, and while there is no statute clarifying when an action is commenced, RCW 4.16.170 (pertaining to the tolling of a statute of limitations) states, “[f]or the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served **whichever occurs first.**” (emphasis added).

Plaintiffs commenced this action on September 8, 2016, when they filed this matter in Asotin County – only *nine* days after submitting their claim form to the City. This violates RCW 4.92.020, which requires claimants to wait *60* days after claim filing to commence an action. Plaintiffs’ failure is not excused by their later decision to wait to serve the City with the Complaint until after 60 days had elapsed. Court Rule 3 and relevant case law provide that an action is commenced when service “or” filing is complete – not service “and” filing. Accordingly, plaintiffs untimely commenced this action only nine days after filing their claim form with the County and violated RCW 4.96.020(4).

C. Plaintiffs Did Not Substantially Comply with RCW 4.96.020(4).

In this appeal, Plaintiffs argue that in the post-2009 era (under the new subsection (5) to RCW 4.96.020), they have “substantially complied” with the procedural requirements. *Lee v. Metro Parks Tacoma*, 183 Wn. App. 961, 335 P.3d 1014 (2014) rejects this contention.

In *Lee*, Division Two addressed whether a plaintiff’s failure to wait 60 days to commence an action constituted substantial compliance under the new RCW 4.96.020(5). The plaintiff had been injured at a City of Tacoma Metro Park on June 28, 2009. On June 8, 2012, she filed a claim for damages against Metro Park. On June 20, 2012, twelve days after Metro Parks received the tort claim, plaintiff filed her complaint for damages. She

later filed an amended complaint on June 22, 2012.³ Metro Parks sought dismissal of plaintiff's lawsuit for failure to wait 60 days prior to commencing her action. The trial court agreed and dismissed plaintiff's claims against Metro Parks.

On appeal, the Court undertook a lengthy discussion of substantial compliance and what impact, if any, the 2009 addition of RCW 4.96.020(5) had on procedural filing requirements. After determining that adherence to the 60 day waiting period was procedural in nature, requiring substantial compliance under RCW 4.96.020(5), the Court determined plaintiff had not substantially complied with the 60 day waiting period and dismissed the plaintiff's claims. Here, the trial court below relied on *Lee* in rendering its decision to grant the City's motion for summary judgment. CP 55.

The trial court also found *Toney v. Lewis County*, 2017 Wn. App. LEXIS 217 persuasive.⁴ There, the plaintiff waited 31 days between serving the claim form and serving the defendant County with a copy of the Complaint. The County moved for summary judgment, claiming the plaintiff's service violated the 60 day waiting provision. The plaintiff argued he had substantially complied with the statute, relying on RCW 4.96.020(5).

³ The opinion does not state when Metro Parks was served with a copy of the Complaint.

⁴ The Court's Order granting the City's Motion for Summary Judgment notes the Court relied on this unpublished authority "to the extent persuasive." CP 55.

The Court held plaintiff had not substantially complied with the 60 day waiting period under either standard.

Here, we do not decide whether the 60-day waiting period in RCW 4.96.020(4) is procedural or substantive. Even if the 60-day waiting period is a procedural requirement that allows for substantial compliance, summary judgment is still proper because Toney did not “substantially comply” with the statute.

Id. at 11 – 12.

Plaintiffs have also made no showing that they substantially complied with RCW 4.96.020 because they provide no evidence that the City had sufficient time to investigate and pursue settlement of Plaintiffs’ claims. Appellant’s Brief at 8:14 – 8:16. *Toney* and *Lee* also speak to this issue.

In *Lee* the plaintiff argued that during fourteen day period the City had her claim (and before she commenced her lawsuit), the City could have investigated and offered to settle the claim, thereby satisfying the purpose behind the 60 day waiting requirement. *Lee*, 183 Wn. App. At 968. At the City’s motion for summary judgment, the Court determined plaintiff had the burden to show that the purpose of RCW 4.96.020(4) had been satisfied prior to commencing her lawsuit. *Id.* Finding plaintiff failed to make this showing, the Court stated, “Lee submitted no evidence that [the City] completed its investigation and evaluation, decided whether to accept or reject the claim, or engaged in settlement negotiations. In

fact, Lee submitted no evidence that [the City] had taken any action at all on her claim at the time she filed her amended complaint.” *Id.* The Court granted the City’s motion for summary judgment. *Id.*

In *Toney*, the plaintiff made the same claim (albeit during the 31 days between when he filed the claim and commenced his lawsuit). He offered two pieces of evidence in support of his contention that the investigation had been completed: (1) a letter from the District Court responding to his public records request; and (2) a letter from the County Prosecutor’s Office requesting plaintiff file his lawsuit pursuant to CR 3(a) (i.e., file his lawsuit in Superior Court). In determining whether plaintiff’s evidence was sufficient (or created a genuine issue of fact to preclude summary judgment), the Court stated:

Neither letter demonstrates that the County had completed its evaluation of Toney’s claim. The District Court letter was simply a response to Toney’s request for records, and neither the letter nor the request referenced Toney’s pending claim. Similarly, [the Prosecutor’s Office’s] demand letter did not mention the County Risk Manager’s investigation or indicate that a decision had been made... **Toney needed to demonstrate that the County had completed its investigation before he commenced his action.**

Id. at 13 – 14 (emphasis added).

Here, Plaintiffs admit that during the nine days between serving the claim form and filing their Complaint, “plaintiff’s had no contact from defendant or representatives therefore regarding settlement, question of

damages, or liability.” Appellant’s Brief at 5:27 – 6:4. They summarize, “There simply was no contact.” *Id.* at 6:4 (citing CP 42).

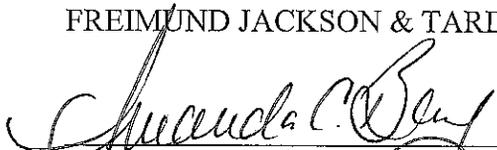
In order to avoid the statutory requirement to wait 60 days between filing a claim form and commencing a lawsuit, Plaintiffs must show the City completed its investigation into their claims. They must show the purpose of the 60 day waiting period has been accomplished, i.e., “demonstrate that the [City] had completed its investigation *before* he commenced his action.” *Lee*, 183 Wn. App. at 968; *Toney*, 2017 LEXIS at 13-14. They did not provide this evidence, but state; “there simply was no contact” between Plaintiffs and the City. CP 42. The trial court properly granted summary judgment to the City.

VI. CONCLUSION

The City respectfully requests the Court to affirm the superior court’s order dismissing Plaintiffs’ claims.

RESPECTFULLY SUBMITTED this 22nd day of August, 2017.

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CERTIFICATE OF SERVICE

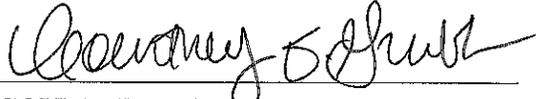
I certify that the foregoing was served by the method indicated below to the following this 22nd day of August, 2017.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 22nd day of August, 2017, at Olympia, WA.



COURTNEY GRUBB

FREIMUND JACKSON & TARDIF P.L.L.C

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