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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

CASE NO.: 60509-7-I

CITY OF MARYSVILLE,

Petitioner,

vs.

MARC RENNER,

Respondent.

FILED

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CITY OF MARYSVILLE'S PETITION FOR REVIEW TO
THE SUPREME COURT OF THE STATE OF
WASHINGTON

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ORIGINAL

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I. ISSUES PRESENTED FOR REVIEW

- A. Did the Court of Appeals err in holding that a general list of categories of damages to be sought in future litigation could constitute substantial compliance with the requirement that a claim “shall contain the amount of damages claimed?”
- B. Does the Court of Appeals ruling excuse former government employees from complying with the statutory claim filing requirements of RCW 4.96.020(3) and conflict with prior law?

II. STATEMENT OF THE CASE

A. FACTS

Marc Renner alleges he was wrongfully discharged from employment by the City of Marysville because he expressed an interest in having his job as the City’s Network Administrator be converted to a union position instead of an exempt administrative position. The City contends that Renner, an at-will administrative employee, only approached the union in an eleventh hour attempt to insulate himself from termination for his well documented history of misconduct and insubordination. Co-workers, vendors and members of the public had complained about Renner’s use of profanity and offensive and demeaning language and behavior; complained about Renner’s use of equipment that did not belong to him without authorization; and complained about Renner accessing computer systems without proper authorization. CP 44, ln.10-17; and CP 45, ln.12-20.

computer systems without proper authorization. CP 44, ln.10-17; and CP 45, ln.12-20.

On May 25, 2005, with the assistance of his legal counsel, Renner filed a claim for damages with the City. CP 74-75. However, Renner failed to provide some of the statutorily required information in his claim. First, he failed to provide a statement of the amount of damages he was seeking and instead wrote “undetermined pending further investigation and discovery” in the space provided for this amount. CP 74. On a second page of the claim, Renner listed the categories of damages he would seek in future litigation after discovery was conducted. These categories included “wages and benefits as well known to the city since termination plus front pay, emotional damages, costs, fees and such other damage as determined.” CP 75. The City had no way to determine the actual amount of damages Renner was demanding to settle the claim.

Second, he failed to provide his residential addresses for the six months prior to accrual of his claim. CP 74-75. The address he provided was only his address for two months prior to accrual. CP 26, 74.

Third, the claim form was not properly verified as the notary public wrote her name instead of Renner’s in the verification section on both pages of the claim. CP 74-75. Renner did not actually verify the contents of the claim.

On October 21, 2005, Renner filed a complaint for wrongful termination with the Snohomish County Superior Court. CP 77-79. On December 12, 2005, the City filed its answer to Renner's complaint. CP 81-84. In its answer, the City asserted the affirmative defense of failure to comply with the claim filing requirements of RCW 4.96. CP 83, ln.3. The City further denied Renner's factual assertion in paragraph I. of his complaint where he claimed he had filed a proper claim for damages. CP 81, ln.18-20.

Renner served 79 initial discovery requests on the City. After securing an extension of the deadline to produce responses to Renner, the City filed 5 pages of initial objections to preserve these. CP 33-38. Then on February 3, 2006, the City provided Renner with its substantive responses to his discovery requests, which totaled 21 pages. CP 39-60. Although they were still mistakenly labeled "objections" to discovery instead of "objections and responses," it was apparent to any person reviewing the document that it contained substantive responses as well as objections, and it was more than three times the length of the initial objections. *Id.* No further request for written discovery, or supplementation of responses, was made by Renner after receipt of the February 3, 2006 responses; and no motion to compel discovery responses

was ever filed. It is clear he was fully aware that the February 3, 2006 pleading contained the responses to his discovery requests.

The February 3, 2006 discovery responses from the City provided specific information regarding the affirmative defense of defective claim filing. CP 55, ln.3-15. They specifically stated Renner's claim was deficient as (1) he failed to provide his residences for the six months prior to accrual of his claim, (2) he failed to provide the amount of damages he sought, and (3) his claim form was not properly verified. *Id.*

Renner alleged his injury occurred on December 2, 2003. CP 74. With the addition of the 60 day tolling period of RCW 4.96.020, the statute of limitations in this case did not expire until February 2, 2007. Renner had a full year between the time the City provided him with specific information about the deficiency of his claim on February 3, 2006, and the expiration of the statute of limitations on February 2, 2007, to take the simple steps to correct his claim. It is undisputed that he made no effort to do so, despite being placed on notice by Defendant that it intended to raise this as an affirmative defense to his lawsuit.

No other discovery was conducted by Renner in this case. No depositions were taken. CP 20, ln.20. This case was nearly dismissed for want of prosecution in March 2007. CP 22.

B. PROCEDURAL HISTORY

This lawsuit was dismissed by The Honorable Richard J. Thorpe upon Defendant's motion for summary judgment on August 21, 2007. Renner filed an appeal of this ruling and oral argument was heard on June 10, 2008. Division I of the Court of Appeals reversed this decision in an opinion published on June 30, 2008. *Renner v. Marysville*, Docket No. 60509-7-I (June 30, 2008).

III. LEGAL ARGUMENT

A. STANDARD OF REVIEW

Appellate review of a trial court's decision on summary judgment is de novo. *Troxell v. Rainier Public School Dist. No. 307*, 154 Wn.2d 345, 111 P.3d 1173 (2005), citing *Castro v. Stanwood Sch. Dist. No. 401*, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004). As with all questions of law, the interpretation of a statute is also reviewed de novo. *Castro*, 151 Wn.2d at 224. When asked to resolve a question of statutory interpretation, this court's duty is "to discern and implement the intent of the legislature." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The court must take as its "starting point . . . 'the statute's plain language and ordinary meaning.'" *Id.* (quoting *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). An interpretation that produces "absurd consequences" must be rejected, since such results

would belie legislative intent. *State v. Vela*, 100 Wn.2d 636, 641, 673 P.2d 185 (1983).

The relevant statute at issue in this case is RCW 4.96.020(3). This statute states:

All claims for damages arising out of tortious conduct must locate and describe the conduct and circumstances which brought about the injury or damage, describe the injury or damage, state the time and place the injury or damage occurred, state the names of all persons involved, if known, and **shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six months immediately prior to the time the claim arose.** If the claimant is incapacitated from verifying, presenting, and filing the claim in the time prescribed or if the claimant is a minor, or is a nonresident of the state absent therefrom during the time within which the claim is required to be filed, the claim may be verified, presented, and filed on behalf of the claimant by any relative, attorney, or agent representing the claimant.

(emphasis added).

B. PROVIDING A GENERAL LIST OF CATEGORIES OF FUTURE DAMAGES DOES NOT SUBSTANTIALLY COMPLY WITH THE REQUIREMENT THAT A CLAIM “SHALL PROVIDE THE AMOUNT OF DAMAGES CLAIMED.”

1. A claimant must provide the amount of money he will accept to settle a claim.

It is well established that one of the purposes of the claim filing statute is to enable the government to investigate and settle claims where possible without incurring litigation expenses. *Troxell v. Rainier Public*

School Dist. No. 307, 154 Wn.2d 345, 351, 111 P.3d 1173 (2005); *Medina v. Public Utility Dist. No.1*, 147 Wn.2d 303, 310, 53 P.3d 993 (2002); and *Johnston v. City of Seattle*, 95 Wn. App. 770, 775, 976 P.2d 1269 (1999). In order to effectuate its purpose in encouraging early settlement of claims, the legislature has required claimants to file a claim, and provide an amount of damages they will accept to settle the claim.

In *Caron v. Grays Harbor Co.*, 18 Wn.2d 397, 402-405, 139 P.2d 626 (1943), the Washington Supreme Court recognized that providing the amount of damages claimed was an essential requirement of the claim filing statute. In that case, the appellant fell off a ladder leaning on a file case in the county clerk's office. She visited the clerk's office almost daily on business and spent much of her time there. After the accident, she asked the county auditor to prepare and present a claim for damages on her behalf against the county. The county auditor did so. When the auditor presented the claim to the county commissioners, she called their attention to the fact that the claim did not state the amount of damages sought and did not accurately describe the defects which caused the accident. The commissioners allegedly told her the claim was sufficient, and no further detail was necessary. Ultimately the commissioners obtained a judgment notwithstanding a jury verdict due to insufficiency of the claim.

Upon appeal, the Court stated one of the deficiencies of the claim was the failure to provide the amount of damages claimed. *Caron*, 18 Wn.2d at 404. The court further noted that even the appellant conceded the claim was defective in that it did not state the amount of damages claimed and did not set forth in detail the defects that caused the accident. The appellant argued the commissioners had waived the claim filing defense, but the court rejected this argument for reasons discussed in Section C. Instead, the court held the claimant needed to comply with the requirements of the claim filing statute, including providing the amount of damages claimed, and had failed to do so.

In *Olson v. King County*, 71 Wn.2d 279, 287-291, 428 P.2d 562 (1967), the court again recognized the requirement for claimants to state the amount of damages sought in their claim. The court then went on to hold that if a claim is not settled, a claimant still has the right to recover a larger amount of damages at trial if these can be proven, and is not penalized by initially being required to provide an amount of damages in his claim.

There is a plethora of authority recognizing the right to recover damages in excess of the dollar amount stated in the claim both as to personal injuries and property damage. This is placed not only on the basis of knowledge obtained subsequent to the filing of the claim, but on the basis that where the claim has served all the purposes intended and

the governmental subdivision involved has rejected it, it has thus made litigation the only recourse.

That a claimant might have been willing to settle for less than his provable damages, if the amount was paid promptly and without litigation, should not, the claim being rejected, prevent the recovery of the damages actually sustained - *i.e.*, those damages naturally and proximately flowing from the injuries described in the claim but not liquidated at the time the claim was filed.

Olson, 71 Wn.2d at 287-291.

It is clear from this opinion that the statute requires claimants to provide an amount of damages they would accept to settle the claim early before litigation is filed. If the claim is not settled by the government, then the claimant is not later penalized or limited to recovering the amount that had originally been requested in the claim.

Despite the precedent set by the *Caron* and *Olson* cases, the Court of Appeals issued a decision in this case which held the claimant was not required to provide a monetary amount of damages that would settle the claim. Rather, the court held that merely providing a general list of the categories of damages that would be sought in future litigation could constitute substantial compliance with the statutory requirement to provide an amount of damages because, in the opinion of the Court of Appeals, the City could have made an educated guess at an amount Renner might accept to settle his claim.

Specifically, the Court of Appeals concluded that Renner's statement that he would request lost wages and benefits since termination, supplied enough information from which the City "could calculate an approximate base amount of the claim to which it was exposed." *Renner v. Marysville*, Docket No. 60509-7-I, p.16. However, without providing the City with *any* information in the claim as to whether he had obtained other employment, or the wages or benefits he had earned from other employment to offset his lost wages, there was absolutely no way for the City to begin to calculate an approximate amount of wages and benefits he had actually lost.¹ It is illogical to conclude that the City had sufficient information to calculate an approximate base amount of the claim merely because it had access to records which showed Renner's former wage rate.

In addition, Renner listed "emotional damages" as another element of damages he would seek in litigation, yet there was no possible way for the City to know how Renner valued these damages. They could range from \$100 to \$1,000,000. Renner also listed "other damage as determined" as an element of damages he would seek in the future. Somehow, from this general listing of the types of damages he would seek, the City was expected to take a guess at the amount of money Renner would accept to settle the claim before a lawsuit was filed.

¹ In fact, Renner did obtain employment subsequent to his termination, thus his lost wage and benefit claim would have been offset by this undisclosed amount.

If the Court of Appeals decision is allowed to stand, it will defeat the purpose of the claim filing statute, and the intent of the legislature. Claimants could simply list categories of damages such as “emotional damages,” “property damages,” “special damages,” “general damages,” and “lost wages” in their claims instead of providing the amount of damages claimed. This decision is not only contrary to the intent of the legislature to encourage early settlement, but is contrary to the rules of statutory interpretation and the plain meaning of the language of RCW 4.96.020(3).

The *Caron* court recognized the importance of the statutory requirement to provide the amount of damages claimed. **“Its provisions cannot be waived, for they are intended for the benefit of the public whose money must be appropriated to the payment of any damages recovered.”** *Caron*, 18 Wn.2d at 409, citing *Berry v. Helena*, 56 Mont. 122, 182 Pac. 117 (emphasis added). The legislature certainly never intended for cities to have to guess at the amount of damages sought by a claimant, with the very real possibility that overestimating that amount could result in an excessive and unnecessary payment of public funds. Cities rightfully must answer to their taxpayers and the state auditor on how public funds are spent. Further, without a specific amount provided, cities have no idea how much money to reserve out of the annual budget

for payment of claims, or whether approval will be needed from governmental branches such as a city council, town mayor or city manager for payment of funds.

2. **Renner did not make a bona fide attempt to substantially comply with the statute.**

The rule regarding substantial compliance was stated in *Wagner v. Seattle*, 84 Wash. 275, 146 Pac. 621 and quoted approvingly in *Duschaine v. Everett*, 5 Wn.2d 181, 186, 105 P.2d 18. The court stated the rule regarding substantial compliance has two necessary conditions. The claimant must make a sufficient bona fide attempt to comply with the law, and the attempt must actually accomplish that purpose. *Brigham v. Seattle*, 34 Wn.2d 786, 789, 210 P.2d 144 (1949).

To make a bona fide attempt to comply with the requirements and purpose of the claim filing statute, claimants must provide an amount of damages that would be acceptable to settle the claim before having to resort to litigation. This is the intent of the legislature and one of the purposes of the statute. If a claimant states “undetermined pending further investigation and discovery” like Renner, he has failed to make any good faith attempt to settle the claim before litigation. Filing a claim is not simply a stepping stone to litigation, it is an opportunity to avoid expensive litigation. Unfortunately, Renner viewed it only as a procedural

formality and made no attempt to clearly identify the damages he believed he actually suffered. Because Renner did not make any bona fide attempt to comply with the claim filing statute, or give the City a reasonable chance to settle prior to litigation, his claim was invalid.

In sum, the Court of Appeals ruling in this case that Renner's statement of "undetermined" damages could substantially comply with the requirement of RCW 4.96.020(3) is contrary to the language and intent of the statute and is contrary to existing case law. Therefore, this decision should be reversed.

C. BEING A FORMER GOVERNMENTAL EMPLOYEE DOES NOT EXCUSE COMPLIANCE WITH THE STATUTORY CLAIM FILING REQUIREMENTS OF RCW 4.96.020(3).

In its opinion, the Court of Appeals acknowledged that Renner did not provide his residential address for the six months prior to accrual of his claim as required by RCW 4.96.020(3). *Renner*, p.13. The address he provided was only his address for two of those six months. Despite this failure to comply with the undisputed statutory requirement, the Court held that because Renner was a former City employee, the City presumably had personnel files from which it could investigate and discover his prior addresses.² However, as discussed in *Caron*, the claim

² As stated above, the Court also held the City could use the information it had in its personnel files regarding Renner's former wage rate to try and "calculate an approximate base amount of the claim to which it was exposed." *Renner*, p.16.

filing requirements must be enforced against all claimants equally to avoid favoritism, negligence or inefficiency of government employees processing the claims.

In *Caron*, the court held municipal officers do not have the power or authority to disregard the plain, mandatory provisions of claim statutes and may not waive substantial compliance therewith. *Caron*, 18 Wn.2d at 407. As explained previously, this was a case where the accident occurred right in the county clerk's office, the county commissioners were familiar with the accident, and the claim was actually filed by the county auditor. Despite these facts, the court held the statutory requirements could not be waived or ignored by the officials accepting the claim.

But the plaintiff argues that the case elsewhere shows that the municipal officers knew otherwise all that a perfect notice would have shown them, and that by their conduct they had waived the imperfections in the notice. Neither point is well taken. The knowledge of the municipal officers is immaterial. The written statutory notice is an indispensable prerequisite to the right to maintain a suit...The municipal officers cannot waive. *Caron*, 18 Wn.2d 408, citing *Rich v. Eastport*, 110 Me. 537, 87 Atl. 374.

It is not an answer to say that the city officials obtained correct information from other sources and were not misled. The only right which plaintiff can assert against the city is the right granted by statute. Compliance with the law on her part is a necessary prerequisite to her right to institute this action... *Caron*, 18 Wn.2d at 408, citing *Berry v. Helena*, 56 Mont. 122, 182 Pac. 117.

The court explained, “The adoption of such a rule not only affords the municipality a full opportunity to make a complete investigation of the facts, **but will also provide a safeguard against favoritism, negligence, or inattention on the part of officials to whom the affairs of the municipality are committed.**” *Caron*, 18 Wn.2d at 410 (emphasis added). These are principles and protection of the public are just as important today as they were when the *Caron* case was decided.

The Court of Appeals ruling that Renner was not required to comply with the statutory requirements because he was a prior employee with a three year old personnel file stored at the City is exactly the type of impermissible favoritism referred to by the Court. This decision would allow former and current government employees to submit incomplete claims where a regular citizen would have the same claim invalidated for failure to provide the information required by RCW 4.96.020(3).

In its opinion, the Court of Appeals cited dicta in the case of *Nelson v. Dunkin*, 69 Wn.2d 726, 731-32, 419 P.2d 984 (1966) where that court said the information in a claim would be sufficient as to present and past residence if it would enable the municipality by reasonable diligence to determine where the claimant lived in the six months time period. However, in *Nelson*, this statement was made specifically in reference to situations where addresses provided in the claim may be slightly

inaccurate but an inquiry at the address would have disclosed the correct address, or where a rural route number was given where there were no street addresses available. *Nelson*, 69 Wn.2d at 732. In other words, clerical type errors that could easily be corrected by a visit to the address.

In the present case, no such partial address or slightly incorrect address was contained in Renner's claim. Rather, the Court of Appeals overlooked the fact that there was no information regarding Renner's residence for 4 months of the required time frame, and instead held that because the City *might* have information about Renner's other address in its old personnel files, he was not required to include his past residential information in his claim.³ There is no legal authority supporting this ruling.

Further, if this opinion is upheld, other claimants could easily argue that governmental entities have access to police records, court files, property records and other databases from which they could fill in missing information on claims. This was not the intention of the legislature in setting conditions which must be met by claimants before they can institute litigation against governmental entities in Washington. In fact it would have the opposite effect by allowing claimants to provide only

³ There is no evidence in the record that this information was ever contained in the personnel file as it was not. The only change of address form submitted by Renner was for a post office box, not a residential address. Renner merely stated in his declaration that he believed some of the City's employees knew his address.

general information regarding incidents, and requiring the government to do extensive investigation just to assemble the basic facts of the claims.

The courts do not have legal authority to waive substantial compliance with the statutory claim filing requirements. In *Green v. Dunkin*, 69 Wn.2d 734, 736, 419 P.2d 978 (1966), the Court held the courts have no power or authority to repeal the claim filing statute, amend it, or waive compliance with its provisions. The court stated it is not for the courts to decide whether a requirement is meaningful. See also, *Nelson v. Dunkin*, 69 Wn.2d at 732 (if a requirement is no longer meaningful, it is for the legislature and not for this court to take it out of the statute).

The Court of Appeals decision in this case to excuse governmental employees from complying with the essential requirements of RCW 4.96.020(3) because of their pre-existing relationship with their government employers is contrary to the letter and intent of the claim filing statute and well-established case law. This is the very favoritism the court warned against in the *Caron* case. Because this decision is so contrary to the law, it should be reversed.

D. INVESTIGATION OF THE CLAIM REVEALED THE ADDRESS PROVIDED BY RENNER WAS FALSE, THUS PURSUANT TO PRIOR CASE LAW, THE CLAIM WAS STILL INVALID.

The Court of Appeals commented in its opinion that a reasonably diligent investigation by the City would have revealed the true addresses of Renner for the six months prior to accrual of the claim. Ultimately, however, it turned out that the address information given in the claim was false in that Renner only lived at the given address for two months prior to accrual of the claim, and lived at a different, undisclosed address for the other four months.

In *Duschaine*, “Any bona fide effort on the part of the city to avail itself of the notice by making an investigation will disclose whether or not appellant actually resided at the given addresses for the six month period, and will enable the city either to reap every benefit of a valid notice or to take advantage of any discovered fact that would render the notice invalid because of its noncompliance with the statute.” *Duschaine*, 5 Wn.2d at 188. Here, because an investigation revealed Renner’s residential information was false for four of the six months, he still failed to meet the requirements of the claim filing statute and his claim was invalid.

Renner’s status as a former employee does not provide him with a free pass for providing false information in his claim simply because the truthful information *might* be available to the City in other records (although in this case it was not). After all, what is the purpose of the verification requirement of RCW 4.96.020? This requirement compels the

claimant to verify that all of the information provided in the claim is truthful. Strict compliance with this requirement is necessary. *Schoonover v. State*, 116 Wn. App. 171, 64 P.3d 677 (2003). Renner's only defense to this would be that he never properly verified the claim as the notary public who witnessed his signature actually wrote her name in the verification section on both pages of the claim instead of Renner's. However, this does not assist Renner as his claim would then be invalidated for his failure to properly verify the claim.

There is no decision known to the City where the court has ever waived the requirement to verify that the information provided in the claim is truthful just because the government had access to the truthful information in some other file or database. The Court of Appeals decision directly conflicts with the statutory requirement for verification of the truth and accuracy of the contents of the claim, and is without legal authority or supporting precedent. As such, this decision should be overturned.

IV. CONCLUSION

The Court of Appeals decision is contrary to the clear intent and language of RCW 4.96.020(3), and is contrary to well-established case law. Renner failed to provide the amount of damages claimed, and failed to provide his residences for the six months prior to accrual of the claim,

even though this information is required by the statute. The Court of Appeals ruling that the claim may nevertheless have substantially complied with the statute because the missing information could have either been guessed by the City, or found in old employment files held by the City is contrary to the law and should be reversed.

RESPECTFULLY SUBMITTED this 29th day of July, 2008.

KEATING, BUCKLIN & McCORMACK,
INC., P.S.



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Attorneys for City of Marysville

CERTIFICATE OF SERVICE

I certify that I served a copy of *City of Marysville's Petition for Review to the Supreme Court of the State of Washington* via Legal Messenger upon:

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DATED this 29th day of July 2008.



Katie Johnson

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

MARC STEPHEN RENNER,)	NO. 60509-7-I
)	
Appellant,)	
)	
v.)	PUBLISHED OPINION
)	
CITY OF MARYSVILLE ,)	
)	
Respondent.)	FILED: June 30, 2008

BECKER, J — At issue in this appeal is the interpretation and application of the claim filing statute, RCW 4.96.020, to appellant Marc Renner's claim against the City of Marysville for wrongful termination of employment. The current statute requires a statement of the claimant's actual residence at the time of presenting the claim and for a period of six months before the claim arose. We hold that a bona fide attempt to meet this requirement substantially complies with the statute so long as the information provided enables the government entity, by reasonable diligence, to determine where the claimant

resided at the relevant times. The statute also requires a statement of the amount of damages claimed. Renner listed the elements of his damage claim while stating that the amount was "undetermined." Under the circumstances of this case we cannot say this was insufficient as a matter of law. The order granting the city's motion for summary judgment is reversed.

Marc Renner worked for the City of Marysville as the computer network administrator. The city discharged him on December 2, 2003. Renner claims that he was wrongfully discharged because he expressed interest in having his job converted to a union position. The city's view is that Renner only approached the union in an eleventh hour attempt to insulate himself from termination for a well-documented history of misconduct and insubordination.

A statute provides that an action shall not be commenced against any local governmental entity for damages arising out of tortious conduct unless a claim is first presented to the governing body of the entity and 60 days have elapsed. RCW 4.96.020. The general purpose of the claim-filing statute is "to allow government entities time to investigate, evaluate, and settle claims" before they are sued. Medina v. Public Util. Dist. No. 1, 147 Wn.2d 303, 310, 53 P.3d 993 (2002). The claim must name the persons involved, describe the injury or damage, and provide the time, location, and circumstances in which the injury or damage occurred. Pertinent to this case, the claim "shall contain the amount of damages claimed, together with a statement of the actual residence of the

claimant at the time of presenting and filing the claim and for a period of six months immediately prior to the time the claim arose." RCW 4.96.020(3).

Using a form provided by the City of Marysville, Renner filed a claim for damages on May 26, 2005. He filled in the spaces asking for the claimant's name, residence, and home and work telephone numbers. In the space supplied for his place of residence, Renner filled in "6811 54th Pl. N.E. Marysville, WA 98270." Where the form left a blank for the damages claimed "in the sum of \$_____", Renner wrote, "undetermined pending further investigation and discovery."¹ The form directed the claimant to describe the occurrence. Renner attached a response that stated, "Wrongful termination of more than five years of employment as City of Marysville and Marysville Fire District Network Administrator." The form also directed the claimant to "Attach copies of all documentation relating to expenses, injuries, losses, and/or estimates for repair." Renner attached a response that stated, "Wages and benefits as well known to the city since termination plus front pay, emotional damages, costs, fees and such other damage as determined."²

Renner sued the city for wrongful termination on October 21, 2005. Among other things, his complaint alleged that he had filed a proper claim in a timely manner. At the same time he served the city with a set of discovery

¹ Clerk's Papers at 74 (Claim for damages).

² Clerk's Papers at 75 (Claim for damages).

requests. On December 6, the city served Renner with a set of objections to his discovery requests. On December 12, the city answered the complaint. The answer admitted that Renner had filed a claim but denied that the claim was either proper or timely. The answer also asserted Renner's failure to comply with the requirements of RCW 4.96 as an affirmative defense.

On February 3, 2006, the city sent Renner a document responding to his discovery requests. Renner's attorney admits that he did not read this document at the time because it was captioned "Objections" and he assumed that, like the first set of objections, it contained no meaningful information. This document did maintain the city's position that Renner's requests were "vague," "burdensome," and "overly broad." But it also included substantive responses, including the facts on which the city was basing its affirmative defense under RCW 4.96: "Plaintiff failed to comply with RCW 4.96 as he did not state an amount of damages or his residences for six months prior to accrual of his claim."³

On July 19, 2007, the city successfully moved for summary judgment dismissal of Renner's wrongful termination claim on the basis that Renner's claim did not comply with RCW 4.96. Renner appeals.

On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. When ruling on

³ Clerk's Papers at 55 (City's response to plaintiff's discovery, dated February 3, 2006).

a summary judgment motion, the court is to view all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

The city argues Renner's claim failed to comply with the statute in two ways. First, he did not specifically state where he had resided for the six months prior to the time his claim arose. Second, he did not state an "amount" of damages claimed.

Renner initially contends the city may not assert failure to comply with RCW 4.96.020 as a defense because the city's own conduct affirmatively misled him to believe his claim was adequate. He points out that the claim form supplied by the city asked only for his current residential address; it did not mention that he was to provide any previous address. He contends the city violated CR 9(c) when answering his complaint by asserting the affirmative defense of failure to comply with RCW 4.96 without alerting him to the specifics of how he failed to comply. And he argues that the city concealed its intention to rely on RCW 4.96.020(3) by "burying" the facts underlying that defense in the second set of objections to his discovery request.

Renner invokes the doctrines of estoppel and waiver, relying primarily on

Dyson v. King County, 61 Wn. App. 243, 809 P.2d 769 (1991). In Dyson, the county answered the claimant's complaint without raising a claim-filing defense. This was a violation of CR 9(c)'s requirement to plead a denial of performance "specifically and with particularity." Dyson, 61 Wn. App. at 245. The county then proceeded to defend the case for almost two years while awaiting the running of the statute of limitations. Under these circumstances we held that the county had engaged in affirmatively misleading action and was thereby "estopped" from raising the claim-filing defense after the statute of limitations ran. Dyson, 61 Wn. App. at 246.

It is now clear under Lybbert that the doctrine to be applied when a governmental entity engages in such conduct is waiver, not estoppel. In Lybbert, the plaintiffs mistakenly served a summons and complaint upon the administrative assistant to the county commissioners when, by statute, they should have served the county auditor. The county appeared and for the next nine months acted as if it were preparing to litigate the merits of the case, without making any mention of a problem with sufficiency of service of process. The Lybberts served interrogatories asking the county if it intended to rely on the affirmative defense of insufficient service of process. The county did not answer the interrogatories. After the statute of limitations had run, the county answered the Lybberts' complaint and asserted, for the first time, the affirmative defense of insufficient service of process. The county then obtained summary judgment

dismissal.

The Supreme Court reversed, but not on grounds of estoppel. Equitable estoppel is based on the notion that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon. Where both parties can determine the law and have knowledge of the underlying facts, estoppel cannot lie. Lybbert, 141 Wn.2d at 35. Given the clear statutory mandate to serve the county auditor, the court reasoned that it was not at all reasonable, much less justifiable, for the Lybberts to rely on the county's failure to assert the affirmative defense. Lybbert, 141 Wn.2d at 36.

The common law doctrine of waiver, on the other hand, can preclude a defendant from asserting a defense such as insufficient service of process if it is inconsistent with the defendant's previous behavior, or if the defendant's counsel has been dilatory in asserting the defense. Lybbert, 141 Wn.2d at 38. In Lybbert, the county waived the defense by failing to raise it in its answer or responsive pleading, by engaging in discovery over the course of several months, and by asserting the defense for the first time after the statute of limitations expired. Lybbert, 141 Wn.2d at 42. The court found it particularly significant that the Lybberts served the county with interrogatories designed to ascertain whether the county was going to rely on the defense of insufficient service of process. Had the county responded to these interrogatories in a

timely fashion, the Lybberts would have had several days to cure the defective service. Lybbert, 141 Wn.2d at 42.

The facts of the present case, viewed in light of the Lybbert analysis, do not establish a foundation for either estoppel or waiver. While the form supplied by Marysville was arguably misleading, Renner was under no obligation to use it. He was equally as able as the city to read the statute and understand what information he had to provide. In contrast to Dyson, here the city did raise the claim-filing defense when it formally answered Renner's complaint. Consistent with that position, the city elaborated on the defense in the February 3, 2006 document answering Renner's interrogatories. This document was somewhat misleadingly captioned as "Objections" to his discovery requests when it also contained answers to them. But at 21 pages it was not so long as to excuse counsel from reading it. Reading the document would have provided Renner with ample opportunity to correct the alleged defects before the statute of limitations ran in December 2006. We conclude that the city is not precluded from asserting a claim-filing defense.

On the merits, the city's position is not strong. Although courts require strict compliance with the filing deadlines provided by RCW 4.96.020, the content of the claim for damages need only substantially comply. RCW 4.96.010(1). The substantial compliance rule has two necessary conditions: First, there must be a sufficient bona fide attempt to comply with the law,

notwithstanding the attempt is defective in some particular. Second, the attempt at compliance must actually accomplish the statutory purpose, which is to give the governmental entity such notice as will enable it to investigate the cause and character of the injury. Brigham v. City of Seattle, 34 Wn.2d 786, 789, 210 P.2d 144 (1949). Required information that is totally absent from the claim "cannot be supplied by any method of construction, however liberal." Brigham, 34 Wn.2d at 789.

Statement of Residence

The purpose of the statutory requirement for stating the claimant's residences is to give the municipality "an opportunity to investigate the claimant as well as his claimed injuries." Nelson v. Dunkin, 69 Wn.2d 726, 728, 419 P.2d 984 (1966).

The city relies on Brigham, where the claim was held to be defective because it only stated the claimant's address at the time she filed the claim. It did not separately state where she had resided for six months immediately prior to the time her claim for damages accrued. The court held that her complaint was properly dismissed even though in fact she had lived at the same address for the previous six months. The statute required a separate "statement" about her residence during the six months period, and because that statement was

totally absent from her claim, it could not be supplied by liberal construction. Brigham, 34 Wn.2d at 789-90. The city contends that Renner's claim was defective under Brigham because he provided only one statement of an actual residence.

Brigham, however, is not on all fours because the applicable statutory language is different now than it was in 1949. In 1993, the legislature repealed the separate claim-filing statutes for cities and counties, and replaced them with a single consolidated claim-filing statute, RCW 4.96.020. Laws of 1993, ch. 449, §§ 1, 13. The former statute applied in Brigham expressly required a claim against a city to contain two separate statements regarding the claimant's actual residence:

[A] statement of the actual residence of such claimant, by street and number, at the date of presenting and filing such claim; and also a statement of the actual residence of such claimant for six months immediately prior to the time such claim for damages accrued.

Rem. Rev. Stat. § 9478 (emphasis added); see also former RCW 35.31.010.

The current statute, on the other hand, requires "a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six months immediately prior to the time the claim arose." RCW 4.96.020(3). In contrast to the former statute for cities that requires "a statement . . . ; and also a statement," the unpunctuated grammatical structure of the current statute indicates that a single statement of actual residence will suffice.

The language in the current statute mirrors the wording of former RCW 36.45.020, the statute formerly applicable to counties. We have found no cases decided under the former county statute requiring two separate statements for present and past residence. The leading case in which statement of residence information was held inadequate in a claim against a county is Nelson v. Dunkin, 69 Wn.2d 726. We presume that the legislature was aware of Nelson when it chose to adopt for the current statute the same language that was before the court in Nelson rather than the more exacting language of the statute considered in Brigham. Bundrick v. Stewart, 128 Wn. App. 11, 17, 114 P.3d 1204 (2005) (the legislature is presumed to know the existing state of case law). We therefore look to Nelson as the primary precedent guiding the analysis of the present case.

At issue in Nelson was a claim for damages against Whatcom County for injuries sustained by the claimant's son in an automobile accident at an intersection where the county had failed to replace a "Yield Right-of-Way" sign. The claim stated that the claimant and his son "had been residents of the State of Alaska for a period of six months immediately preceding this accident." Nelson, 69 Wn.2d at 728. This was held insufficient because there was "absolutely no attempt" to state the actual residence of the claimant at the time the claim was presented and filed, and the only effort to state the claimant's residence during the six months period before accrual of the claim was the

reference to the State of Alaska. Nelson, 69 Wn.2d at 728. "We need not expatiate on the size of Alaska; for all practical purposes the claimant might just as well have said that they were residents of the planet Earth." Nelson, 69 Wn.2d at 729.

But in dicta, the court said that the information in a claim would be sufficient as to present and past residence if it would enable the municipality, "by reasonable diligence," to locate the claimant and determine where the claimant lived in the six months time period:

An examination of a 1959 annotation "Sufficiency of notice of claim against municipality as regards identity, name, and residence of claimant" (63 A.L.R.2d 911-920), reveals a disposition by the courts to class as sufficient any information as to present residence of the claimant which would enable the defendant to locate the claimant by the exercise of reasonable diligence (as where a wrong address was given, but inquiry at that address would have disclosed the correct address; Tannert v. City of Chicago, 308 Ill. App. 327, 31 N.E.2d 342 (1941); and where there were no street addresses, a rural route number was held to be sufficient (Tolbert v. Birmingham, 262 Ala. 674, 81 So.2d 336, 63 A.L.R.2d 901 (1955)); but no case holds that a failure to give any address can be excused; and no case holds that just the name of a state is a sufficient address.

With reference to the requirement of the address for 6 months' prior to accrual of the damage, the cases indicate that the information given would appear to be sufficient where it would enable the municipality, by reasonable diligence, to determine where the claimant had lived during the 6 months period, and claims have been construed liberally to find a proper statement of past residence; but a claim which failed to state any past residence has been deemed fatally defective (three cases in Washington are cited on that point: Brigham v. Seattle, 34 Wn.2d 786, 210 P.2d 144 (1949); Zettler v. Seattle, 153 Wash. 179, 279 Pac. 570 (1929); Barton v. City of Seattle, 114 Wash. 331, 194 Pac. 961 (1921)), and no case has been found in which the court could,

under the most liberal rules laid down, have determined that “State of Alaska” was a substantial compliance with a requirement for the statement of residence “for a period of six months immediately prior to the time the claim accrued.”

Nelson, 69 Wn.2d at 731-32.

The city points out that in the above discussion in Nelson, the court favorably cites Brigham and other cases for the proposition that a failure to state any past residence is fatally defective. We do not disagree with that proposition. We simply note that the current statute does not contain the language “a statement . . . ; and also a statement,” and so it is less exacting than the statute construed in Brigham. There is no literal necessity to make two distinct statements. Cf. Brigham, 34 Wn.2d at 787 (placing emphasis on the “and also a statement” clause in the former statute). On its face, a claim that states only one residence satisfies the current statute because, when liberally construed, such a statement implies that the claimant had the same actual residence both at the time of filing and also during the six months before the claim arose. Renner’s claim as filed is valid on its face.

The city contends, however, that even if Renner’s claim is valid on its face, the record on summary judgment requires dismissal of his suit because it shows that Renner did not in fact have the same residence during the entire six months before his claim arose. Renner’s declaration responding to the city’s motion for summary judgment states that he lived at the address on 54th Place

N.E. beginning in October 2003. This was two months, not six months, before his claim arose when he was terminated in December 2003. The city reasonably infers that Renner resided somewhere else before October 2003. If so, the city was entitled to know the previous address in order to be able to investigate his background. Because the claim does not provide that address, the city argues that the record shows the claim to be fatally defective. See Duschaine v. City of Everett, 5 Wn.2d 181, 188, 105 P.2d 18 (1940) (claim valid on its face will be rendered invalid if investigation shows the claimant did not in fact reside at the place given in the notice).

Our response to this argument is grounded in Nelson. Nelson states that a failure to give any address cannot be excused, but otherwise claims will be liberally construed to find a proper statement of past residence. The information given "would appear to be sufficient where it would enable the municipality, by reasonable diligence, to determine where the claimant had lived during the 6 months' period." Nelson, 69 Wn.2d at 731.

This is not a case where the claimant failed entirely to state any past residence. Renner supplied the address where he lived not only at the time of filing the claim but also for the two months immediately prior to the time his claim arose. Renner's claim is that the City of Marysville wrongfully terminated him after five years of employment. Taken in the light most favorable to Renner, these facts support an inference that the city had personnel files pertaining to

Renner and by reasonable diligence could discover within them the address where Renner resided during the four months before October 2003. There is nothing in the record indicating that the city did anything at all to discover this information, let alone that it used reasonable diligence.

The inference that Renner's claim provided adequate information is further supported by the fact that the claim form supplied to Renner by the city did not specifically ask for a separate statement of his residence for the six months immediately prior to the time the claim arose, although it did specifically ask for every other item of information identified in the statute. The city suggests this omission was due to an oversight. Renner suggests it was a deliberate effort to mislead him into filing a claim that could then be attacked as defective. Perhaps the most reasonable inference, though, is that the city itself believed the information obtained from Renner's answers to the other questions on the form would be adequate to allow the city, by reasonable diligence, to fill in the gaps about where he lived during the entire six-month period. In any event, the way the city worded its claim form is a circumstance that can be considered by the finder of fact in determining whether Renner's claim substantially complied with the statutory requirements as to residence. We therefore conclude the city was not entitled to obtain summary judgment on this issue.

Statement of Damages

The second defect alleged by the city is that Renner failed to state "the

amount of damages claimed” when he wrote “undetermined pending further investigation and discovery” and then listed the elements of his claim as including, among other things, wages and benefits “as well known to the city since termination.”⁴

The amount of damages claimed does not serve as a limit to the amount of damages the claimant may eventually recover from a lawsuit. Olson v. King County, 71 Wn.2d 279, 287-91, 428 P.2d 562 (1967). While the residence information must be truthful, the amount of damages stated in a claim need not bear any verifiable relationship to what the case is actually worth. The point of requiring it is to facilitate efforts by the government entity to settle the claim before suit is filed.

The leading case on this issue is Caron v. Grays Harbor County, 18 Wn.2d 397, 139 P.2d 626 (1943). In Caron, the plaintiff slipped and fell from a ladder in the county clerk’s office. While in the hospital, she asked the county auditor to prepare and present a claim for damages against the county on her behalf. The auditor did so, submitting a claim “for damages to the person of said Blanche Caron, caused from a fall while carrying on her general duty as an abstractor.” Caron, 18 Wn.2d at 403. The claim did not state the amount of damages sought. The suit was tried to a jury and the jury brought in a verdict for the plaintiff, rejecting the county’s affirmative defense that she had failed to file a

⁴ Clerk’s Papers at 74 (Claim for damages).

proper claim. But the trial court granted the county's motion for judgment notwithstanding the verdict and dismissed the suit. The Supreme Court affirmed. Again, the standard is substantial compliance; data not already included therein "in some form" cannot be supplied by any method of construction, however liberal. Caron, 18 Wn.2d at 406 (quoting Sopchak v. Tacoma, 189 Wash. 518, 520, 66 P.2d 302 (1937)). Caron's claim did not substantially comply with the essential requirements of the statute because it provided no data about the amount of damages claimed.

Here, data was supplied in some form. The claim informed the city precisely who Renner was and where he lived and that his claim was for lost wages and benefits since the date of termination. As Renner's former employer, the city was familiar with his wages and benefits prior to termination. With this information, the city could calculate an approximate base amount of the claim to which it was exposed. The data supplied by Renner was at least as facilitative of settlement as a gross dollar amount that might or might not be realistic. We conclude Renner supplied sufficient information such that a trier of fact could find he substantially complied with the requirement for stating the amount of damages claimed.

In summary, Renner has raised genuine issues of material fact with respect to the city's affirmative defense based on RCW 4.96.020(3). The trial court erred in ruling that the city established its defense as a matter of law.

No. 60509-7-1/18

Reversed.

Becker, J.

WE CONCUR:

Schiveler, CT

Lesch, J.