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NO. 60509-7-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MARC STEPHEN RENNER

Appellant,

vs.

CITY OF MARYSVILLE

Respondent.

BRIEF OF RESPONDENT

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2008 FEB -6 PM 3:10

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I. INTRODUCTION AND IDENTITY OF RESPONDENT

Respondent City of Marysville (hereinafter “the City”) files this answer and opposes the appeal of Petitioner Marc Renner (hereinafter, “Renner”) from the trial court’s summary judgment dismissal of Renner’s claims for failure to comply with the claim filing requirements of RCW 4.96.020(3).

The standard of review for an appeal from a dismissal on summary judgment is a de novo review. The court must determine if there were genuine issues of material fact, and if the respondent was entitled to judgment as a matter of law.

II. COUNTER STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the long established law of this state requiring substantial compliance with all of the requirements of RCW 4.96.020 is “nit-picking” as characterized by Renner?
2. When Renner failed to provide any statement of his address for the 6 months prior to accrual of his claim as required by RCW 4.96.020(3), was his lawsuit properly dismissed?
3. When Renner failed to provide any amount of damages as required by RCW 4.96.020(3), was his lawsuit properly dismissed?

4. When the City denied that Renner had filed a proper claim in its answer; asserted the affirmative defense of improper claim filing under RCW 4.96 in its answer; and explained the specific defects of the claim in discovery responses to Renner a full year before the statute of limitations expired in this case; did the City properly raise the affirmative defense of insufficient claim filing?

5. When the law states reliance on a defective claim form or instructions is not an excuse when a party is represented by legal counsel, should the court disregard Renner's argument that a defective claim form excused his omissions?

6. When the law states it is irrelevant whether the City suffered any prejudice from Renner's defective claim, should Renner's argument alleging lack of prejudice be denied?

7. When Renner failed to make a bona fide attempt to file a proper claim for damages and resolve his complaint against the City prior to litigation as intended by the legislature, and failed to make any attempt to correct the deficiencies of his claim after being placed on clear notice of those deficiencies by the City, should his appeal be denied?

III. STATEMENT OF THE CASE: COUNTER STATEMENT OF THE FACTS

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 computer 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.

On May 25, 2005, with the assistance of his legal counsel, Renner filed a claim for damages with the City. CP 74-75. The claim directed that all contact from the City regarding the claim should be directed through Renner's legal representative. CP 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.” CP 74. Second, he failed to provide his residential addresses for the six months prior to accrual of his claim. CP 74-75.

The claim form was also 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. This defect was noted in Defendant’s discovery responses to Plaintiff, but was not included as a basis for dismissal in the City’s summary judgment motion.

Neither Renner nor his legal counsel took any steps to correct the claim deficiencies. Renner never provided the City with an amount of damages he was seeking in order to satisfy his claim for damages. He merely listed some of the factors he would consider, such as lost wages and “emotional damages” when asking for an amount for damages at some undefined time in the future. CP 75. The City had no way to determine the actual amount of damages Renner was demanding, thus could not respond to his 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.

The same day Renner filed his complaint, he served 79 interrogatories and requests for production on the City. As stated in Renner's appellate brief, both parties requested and granted extensions to respond to written discovery in this case.¹ Nevertheless, the City filed objections to Renner's discovery requests within the time limit specified by the court rules for lodging objections in order to preserve these objections. CP 33-38. The objections totaled only 5 pages. *Id.* Contrary to Renner's assertions, they were not boilerplate objections, but rather, addressed specific language in the requests and detailed the legitimate basis for the objections. *Id.* Renner lodged no complaint to the objections.

Then, on February 3, 2006, the City provided Renner with its responses to his discovery requests, which totaled 21 pages. CP 39-60. Although Renner is correct that they were mistakenly labeled "objections" to discovery instead of "objections and responses," it was apparent to any person reviewing the document that it contained responses as well as

¹ Renner implies in his appellate brief that he was somehow disadvantaged by this, but admits he freely agreed to the extensions to respond to his requests, and that he was given extensions to respond to the City's requests in kind.

objections, and it was more than three times the length of the initial objections. *Id.* Renner does not deny that this document was received and reviewed by his legal counsel. In fact, no further request for written discovery, or supplementation of responses, was made by Renner or his counsel after receipt of the February 2006 responses; and no motion to compel discovery responses was ever filed. In truth, Plaintiff made no further requests for any form of discovery or depositions after receiving these responses from the City. It is clear he was fully aware that the February 3, 2006 pleading contained the responses to his discovery requests.

The February 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. In addition, Renner's legal counsel had to be prompted by the City to review the documents made available by the City in response to Renner's discovery requests, and this review was not completed until July 2006, over five months after they were made available. CP 61.

IV. ARGUMENT

As a condition precedent to maintaining an action against a governmental entity, an injured party is required to comply with statutory claim filing procedures. *Sievers v. City of Mountlake Terrace*, 97 Wn. App. 181, 983 P.2d 1127 (1999) (citing *Williams v. State*, 76 Wn. App. 237, 248, 885 P.2d 845 (1994)). RCW 4.96.020 provides, in relevant part:

All claims for damages arising out of tortious conduct ... 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.

Strict compliance with procedural filing requirements is mandatory, even if the requirements seem harsh and technical. *Burnett v. Tacoma City Light*, 124 Wn. App. 550, 104 P.3d 677 (2004), citing *Shannon v. Dep't of Corr.*, 110 Wn. App. 366, 369, 40 P.3d 1200 (2002). Failure to strictly comply with the statutory requirements results in dismissal. *Medina v. Pub. Util. Dist. No.1*, 147 Wn.2d 303, 53 P.3d 993 (2002).

Although strict compliance with procedural requirements is mandatory, the courts have found the rule of substantial compliance may be applied to the content of the claim. *Duschaine v. City of Everett*, 5 Wn.2d 181, 105 P.2d 18 (1940); *Caron v. Grays Harbor County*, 18 Wn.2d 397, 139 P.2d 626 (1943). Substantial compliance is an essential prerequisite to maintaining an action for damages against a municipality. *Caron*, 18 Wn.2d at 409.

Both the language of the statute itself, as well as prior Washington Supreme Court rulings, support the fact that a claimant must substantially comply with each of the listed requirements in RCW 4.96.020(3). The rules of statutory construction dictate that the terms “shall” and “must” are generally mandatory and compliance is required. *State Ex Rel. Heavey v. Murphy*, 138 Wn.2d 800, 805, 982 P.2d 611 (1999). Courts should interpret statutes to avoid absurd or strained results so as not to render any

language superfluous. *Fray v. Spokane County*, 134 Wn.2d 637, 648, 952 P.2d 601 (1998).

The conjunctive “or” is not contained anywhere in the statute, nor is there any language in the statute indicating that the legislature intended that a claimant need only comply with *some* of the listed requirements. To suggest otherwise is wholly unsupported by any legal authority and would allow claimants to pick and choose what information they wanted to provide in their claims.

The following sections analyze the multiple cases where the courts have affirmed dismissal based on a claimants’ failure to comply with one or more requirements of the claim filing statutes.

A. NEITHER THE CITY NOR THE COURT HAS THE AUTHORITY TO WAIVE THE LEGISLATIVELY MANDATED CLAIM FILING REQUIREMENTS.

The right to sue the state, a county, or other state-created governmental agency must be derived from statutory enactment; and it must be conceded that the state can establish the conditions which must be met before that right can be exercised. *Nelson v. Dunkin*, 69 Wn.2d 726, 729, 419 P.2d 984 (1966). The statutes requiring claims to be presented declare a rule of policy and the courts are not at liberty to ignore it, even though they might be persuaded in a particular case that it was a useless ceremony. *Caron v. Grays Harbor County*, 18 Wn.2d at 405, 139 (citing

Shaw Supply Co. v. King County, 169 Wash. 175, 13 P.2d 472 (1932)). “The Supreme Court has no power or authority to repeal the [claim filing] statute, amend it, or waive compliance with its provisions.” *Green v. Dunkin*, 69 Wn.2d 734, 736, 419 P.2d 978 (1966). “The legislature has required certain information. If this 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 at 732.

Not only are the courts prevented from waiving claim filing requirements, but under Washington law, municipal officials do not have the authority to waive the content requirements of RCW 4.96.020(3) either. In *Caron*, the plaintiff was injured in the county clerk’s office when she fell from a ladder while attempting to access a file. The county auditor filed a claim on the plaintiff’s behalf. When presenting the claim to the county commissioners, the auditor 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. *Caron*, 18 Wn.2d at 402. The commissioners declared that the claim was all right, and that no further detail was necessary, and directed the auditor to advise the plaintiff “not to worry, that everything is all right; the claim is sufficient.” *Id.*

Despite the assurances given by the county commissioners, the

Caron 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. The court further stated the adoption of such a rule not only affords the municipality a full opportunity to make a complete investigation of the facts, but also provides 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.

Renner's argument that he should not be required to comply with the statutory requirements because he was a prior employee of the City and known to City employees is exactly the type of favoritism referred to by the court in *Caron*. He argues he should be accorded leeway where another claimant would not receive the same benefit.

Renner also argues that requiring him to provide a statement of his residences for the six months prior to accrual of his claim, and to provide the amount of damages he was claiming in his claim for damages, is simply "nit-picking" and should be overturned because the City could have discovered this information from other sources. However, the case law is clear that these are not requirements that can be waived by either the City, or the court.

Just as the county commissioners were not authorized to waive the claim requirements despite having direct knowledge of the incident that occurred in their own offices in *Caron*, the City is not authorized to waive the claim requirements even if it were able to fill in the blanks on Renner's form with information it might obtain elsewhere. Because the law does not allow the City to waive any portion of the statutory claim filing requirements, Renner's argument that his claim was not deficient because the City could have obtained the information from his old personnel file is without legal authority or merit.

B. RENNER PROVIDED NO INFORMATION REGARDING HIS RESIDENTIAL ADDRESSES FOR THE SIX MONTHS PRIOR TO ACCRUAL OF HIS CLAIM, THUS HE DID NOT SUBSTANTIALLY COMPLY WITH THE STATUTE.

It is well established in Washington law that where claimants have failed to supply required residential information, they have failed to comply with the statutory claim filing provisions. In *Nelson*, the claimant merely stated he had been a resident of the State of Alaska for a period of six months immediately preceding the accident. The court noted that claims which fail to state any past residence have been deemed fatally defective. *Nelson*, 69 Wn.2d at 732. Thus, the court affirmed the dismissal of the Plaintiff's lawsuit.

Likewise, in *Green*, the court again held that information that the claimant had been a resident of Oregon was not substantial compliance with the requirement that the claim contain a statement of the actual residence for a period of six months immediately prior to the time the claim accrued. *Green*, 69 Wn.2d at 736.

In *Brigham v. Seattle*, 34 Wn.2d 786, 210 P.2d 144 (1949), the plaintiff provided the address where she had resided during the six month period of time prior to accrual of the claim, but did not *state* this was her actual residence during that time. She argued that she substantially complied with the claim filing statute by providing the actual address, even though she did not certify that it was in fact her address for the six months prior to accrual of the claim.

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*, 34 Wn.2d at 789. “Where there is no attempt to comply with the law, there is nothing to construe.” *Brigham*, 34 Wn.2d at 790. Thus, the court held her failure to state that the address she provided had also been her residence for the six months prior to accrual of the claim was insufficient to meet the requirements of the claim filing statute.

In *Sopchak v. Tacoma*, 189 Wash. 518, 520, 66 P.2d 302 (1937), the claimant provided his current address, and stated he had resided “in Tacoma” for thirty-one years. The court held the claim did not give the address of the claimant for the six months immediately prior to the date the claim accrued, thus it did not meet statutory requirements. Although the plaintiff argued the court should have corrected the deficiency by resorting to liberal construction, the court reasoned there was no language in the claim even remotely purporting to state the residence by street and number (as required by the existing statute) during the six month period. “Data not already included therein in some form cannot be supplied by any method of construction, however liberal.” *Sopchak*, 189 Wash. at 520.

Renner cites to *Duschaine v. City of Everett*, 5 Wn.2d 181, 105 P. 2d 18 (1940) for his proposition that the “real world context” in which a claim form dispute arises should be taken into account in considering what the legislature intends when it prescribes liberal construction. Brief of Appellant, p.20. However, *Duschaine* does not support this proposition as the facts of that case are different from those at issue here. In *Duschaine*, the pertinent portion of the claim read:

That she is now a resident of the City of Everett, Washington, and residing at 1510 Chestnut St. **and prior**

**thereto resided at route number 1, Marysville,
Washington.**

(Emphasis added). Thus, the claimant had provided the required residential information, she simply did not use the words “for the six months prior to accrual of her claim.” The Court stated:

Had the claim recited claimant’s residence at the time of presentment only, then, under the holdings of the *Barton* case and similar cases, the claim would clearly have been insufficient, even though that same address might, as a matter of fact, also have been her residence for six months prior to the accrual of the right of action.

Duschaine, 5 Wn.2d at 186-87. Thus, the court affirmed that in situations where no attempt is made to provide the residences for the six months prior to accrual of the claim, even if the residence turned out to be the same as the current residence, the claim would be insufficient. This is the exact situation in this case. Renner made no attempt to provide this information. Thus, this case does not support Renner’s argument that the court should look outside of the claim to the “real world context” to find residential information to insert into his claim to meet the statutory claim filing requirements. Nor does it support Renner’s theory that requiring claimants to fulfill all of the statutory claim filing requirements is “nit-picking,” even if it turns out that the same address given as the current address was also the residence for the six months prior to accrual of the claim.

C. REFERRING TO A LIST OF FACTORS THAT MAY BE CONSIDERED BY RENNER AT AN UNDETERMINED TIME IN THE FUTURE TO SUBMIT AN AMOUNT OF DAMAGES IS NOT SUBSTANTIAL COMPLIANCE WITH RCW 4.96.020(3).

Renner argues that he substantially complied with the statute by listing the factors he would likely consider to calculate the amount of damages he was going to request from the City. The problem with this argument is that Renner was required to give an amount of damages as part of his claim, not at some undetermined date in the future. The legislature intended claims to be used as a possible means for resolving disputes against governmental entities without having to resort to litigation. A city cannot evaluate a claim or consider possible settlement options if no amount of damages is given.

Renner argues he was unable to provide the amount of his damages as he did not yet know the exact amount. However, his situation is not unique and it is not the job of the parties or this court to question this legislative requirement. Most tort claimants are unsure of their exact damages at the time of filing a claim, or even at the time of trial. They nevertheless present a demand for an amount of damages they believe is appropriate for a determination of possible settlement. Thus, his statement of the damages he was seeking from the City was not a “worthless piece of incredible fiction unworthy of plaintiff’s oath” as he contends. Brief of

Appellant, p. 3. Rather, the purpose of requiring a statement of damages in a claim is to provide the City with information it needs to determine if a settlement of the claim might be appropriate. A complete failure to do so denies the City this opportunity and fails to comply with the statutory requirement.

Renner stated in his claim that he wanted lost wages and benefits, emotional damages, costs, fees and such other damages as to be determined at some undetermined future date. Was Renner claiming \$10,000 in damages or \$10,000,000? How did Renner wish the City to value his emotional damages, for example, if he himself was unwilling to do so?

In *Caron*, the Washington Supreme Court noted that the claim filed by the plaintiff in that case did not comply with the essential requirements of the statute, in part, because it did not state the amount of damages claimed. *Caron*, 18 Wn.2d at 405.

Although we have frequently said that statutory provisions respecting the presentation of claims for torts against a municipality are to be liberally construed, we have always proceeded upon the principle that there must be a *substantial* compliance with such requirements. (citations omitted) (emphasis in original)...“Data not already included therein in some form cannot be supplied by any method of construction, however liberal.”

Caron, 18 Wn.2d at 406.

We are of the opinion that the majority rule is in accord with the positive declaration and the manifest intendment of our own statute, and that at least a substantial compliance with its requirements is an essential prerequisite to the maintenance, of an action for damages against a municipality, including a county. The adoption of such a rule not only affords the municipality a full opportunity to make a complete and intelligent investigation of the facts concerning the claim, 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. Since, as we have heretofore indicated, the claim in question did not substantially comply with the essential requirements of the statute, the present action cannot be maintained.

Caron, 18 Wn.2d at 409-10.

Here, Renner made no bona fide attempt to comply with the requirement to state an amount of damages in order to afford the City a legitimate opportunity to consider and potentially resolve this claim prior to litigation. Therefore, he failed to substantially comply with the statutory requirement of providing an amount of damages sought from the City and his lawsuit was properly dismissed due to this claim deficiency.

D. THE CITY CLEARLY AND PROPERLY ASSERTED THE AFFIRMATIVE DEFENSE OF DEFECTIVE CLAIM FILING.

The City took the following unambiguous steps to make clear to Renner it was asserting the affirmative defense of his failure to comply with the claim filing requirements of RCW 4.96.020(3). (1) The City denied in its answer that Renner had filed a proper claim; (2) the City

asserted in its answer the affirmative defense that Renner failed to comply with the claim filing requirements of RCW 4.96; and (3) the City responded on February 3, 2006 to Renner's written discovery request asking for the basis of its affirmative defenses by stating unequivocally, "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, and the claim form is not properly verified." CP 55, ln.3-14. At no time did the City inform Renner that it would agree to waive this affirmative defense, or that it was not going to pursue the affirmative defense.

The City expected Renner to respond as most claimants do when faced with this affirmative defense by taking the simple steps to correct the deficiencies and properly file his lawsuit. Renner negligently failed to do so, despite having a full year before the statute of limitations expired on his claim. Renner states that he believed it would have been worthless to the City for him to provide the missing information, except for the delay and expense it would have imposed on him to wait another 90 [sic] days and re-file his suit.² Brief of Appellant, p. 10. Apparently this was the reason why he decided not to correct the deficiencies in his claim. He offers no other explanation for his failure to act.

² The statutory waiting period is 60 days, not 90. RCW 4.96.020(4).

Renner now claims the City was “hiding” its affirmative defense because the City mistakenly failed to change the title and footer on the document containing the City’s discovery responses. This contention is without merit. Not only were these responses over three times the length of the City’s initial objections, but they contained substantial and detailed factual responses to Renner’s interrogatory requests, and they were reviewed and analyzed by Renner’s attorney. Renner made no further requests for discovery or supplementation after receiving those responses, nor did he move to compel discovery responses. Thus, he was aware that the City had provided substantive responses to his discovery requests and had only to read those responses to learn the specific deficiencies of his claim. **In fact, he has never disputed that his attorney received and reviewed these responses.**

Renner also alleges that the assertion of the affirmative defense in the City’s answer violated the specificity and particularity pleading rule of CR 9(c), and thus constituted misleading affirmative action. However, the Washington Supreme Court has already ruled that the statutory requirement to file a claim before instituting a lawsuit is a procedural condition precedent which is not subject to the specificity requirements of CR 9(c). *Goodner v. Chicago, M., St. P. & Pac. R.R.*, 61 Wn.2d 12, 27, 377 P.2d 231 (1962). The defendant is merely required to raise the

objection that no claim was filed – or as in this case – that the claim filed was deficient. *Id.*

Further, this case is entirely distinguishable from *Dyson v. King County*, 61 Wn. App. 243 (1991), *rev. den.*, 117 Wn.2d 1020 (1991), which was cited by Renner. *Dyson* was a case where the defendant did not assert defective claim filing as an affirmative defense until *after* the limitations period had run. The court found that this was “affirmative misleading action” and barred the defendant from intentionally waiting and raising the defense after it was too late for the plaintiff to do anything about it. This case does not apply here where the City raised the defense from the beginning, and provided specific information detailing the claim deficiencies a year prior to the expiration of the statute of limitations.

Renner cannot legitimately allege that he was surprised by the City’s assertion of this affirmative defense, nor can he explain or justify his failure to correct the statutory deficiency of his claim and preserve his cause of action. He had more than ample time to file a proper claim, yet he chose not to do so. Whatever the reason might be behind this strategy, the law is clear that the City was entitled to dismissal based on Renner’s failure to substantially comply with the statutory requirements.³

³ This is no different than cases where plaintiffs fail to file their lawsuits within the statute of limitations or fail to effect proper service on defendants. Although dismissal

In addition, it is well established that municipal corporations have no affirmative duty to ensure that claimants comply with claim filing requirements. See, *Pirtle v. District 81*, 83 Wn. App. 304, 310, 921 P.2d 1084 (1996) (the district had no affirmative obligations under RCW 4.96 and was not required to make sure Ms. Pirtle complied with the filing requirements); and *Levy v. State*, 91 Wn. App. 934, 941, 957 P.2d 1272 (1998) (the State's failure to inform the claimant that her claim was insufficient did not establish equitable estoppel, nor did it waive the State's objection to the sufficiency of her claim). Therefore, any suggestion by Renner that the City was obligated to "mark up" a copy of his claim form upon receipt and return it to him with a list of the legal deficiencies, or that the City was required to file an early motion requesting relief on the basis of this defense, is not supported by law. Likewise, there was no legal requirement that the City send periodic reminders to Renner that he still had not complied with the claim filing statute, or that the City continue to re-assert its affirmative defenses in order to preserve them.

In sum, the City unambiguously asserted the affirmative defense of insufficient claim filing under RCW 4.96. The City's actions throughout the litigation were consistent with this defense, and in no way waived the

based on procedural deficiencies may sometimes seem unduly harsh, the legislature has enacted these procedural requirements and they must be met.

defense. Renner's inexplicable decision not to take the simple but necessary steps to correct his claim deficiencies is not a legitimate basis for denying this affirmative defense. Therefore, the trial court properly dismissed Renner's claims on the basis of this defense.

E. SUBSTANTIAL LITIGATION HAS NOT OCCURRED IN THIS CASE.

Although Renner is correct that this case has been pending for a substantial amount of time, this does not mean that substantial litigation has occurred in this matter. In fact, Renner narrowly missed having his lawsuit dismissed by the trial court for want of prosecution in March of 2007. In truth, not a single deposition was taken in this case. Written discovery was requested by Renner when his complaint was filed, but no additional discovery was requested after responses were provided by the City on February 3, 2006. Renner's legal counsel failed to review the documents made available to him in response to his public disclosure and discovery requests until five months after they became available, and only after prompting from the City.

This case is distinguishable from *Miotke v. Spokane*, 101 Wn.2d 307 (1984), cited by Renner. In *Miotke*, the court held substantial litigation had occurred because the first phase of the litigation had been completed, the court had already held several days of hearings, and the

court had already entered its first set of findings and conclusions. The defendant did not raise the claim filing defense until all of this litigation had taken place. In contrast, in the present case, the City raised the affirmative defense in its answer, provided notice of the specific deficiencies in its discovery responses, and very little actual discovery or litigation had taken place before the trial court granted the City's motion for summary judgment dismissal.

Contrary to his representations that "substantial litigation" has occurred, this lawsuit has not been actively pursued by Renner, and very little litigation costs have been incurred. Mere passage of time with little actual work on a case does not equate to "substantial litigation."

F. A DEFECTIVE CLAIM FORM IS NOT AN EXCUSE WHEN A PARTY IS REPRESENTED BY LEGAL COUNSEL.

Renner claims the City should not be permitted to raise the claim filing defense as he used a City created form to submit his claim. However, this court has previously ruled on this exact issue and held that equitable estoppel does not apply in this situation. Using a defective claim form does not excuse a claimant from defects in his claim when he is represented by legal counsel. *Schoonover v. State*, 116 Wn. App. 171, 64 P.3d 677 (2003).

Equitable estoppel against the government is disfavored and

requires a showing that it is necessary to prevent a manifest injustice and that its application will not impair the exercise of government functions. *Schoonover*, 116 Wn. App. at 180 (citing *Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3d 4 (2002)). Further, equitable estoppel does not apply where both parties can determine the law and have knowledge of the underlying facts. *Schoonover*, 116 Wn. App. at 180 (citing *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000)).

In *Schoonover*, the plaintiff contended the State was equitably estopped from raising the claim filing defense where the State provided an outdated claim form and instructions that his attorney used to prepare and file his claim. The court held that even assuming the attorney relied on the outdated form and instructions in preparing the claim, the estoppel argument fails as equitable estoppel does not apply where the representation is a legal matter. *Schoonover*, 116 Wn. App. at 181. The court further held that interpretation of a claim filing statute is purely legal, thus equitable estoppel does not apply. *Id.* The plaintiff's attorney was just as able to interpret the requirements of the statute for filing a proper claim as was the State, which provided the form.

In this case, Renner chose to use a form available at the City, even though he was not required to use that form, and in fact not all claimants use this form. Renner was represented by his attorney at the time he

prepared and filed his claim. He specifically indicated on his claim form that all contact by the City should be through his attorney. As interpretation of the claim filing statute was purely legal, and Renner's legal counsel had knowledge of the law and the underlying facts of the case, equitable estoppel does not apply. Thus, the City was not estopped from raising Renner's defective claim as a defense to this lawsuit.

G. WHETHER THE CITY SUFFERED PREJUDICE IS IMMATERIAL.

Renner argues that the City could have discovered his addresses through a review of its own files. Renner ignores two important factors. First, Renner was terminated from employment by the City for a pattern of misconduct, and City investigators might not know whether information he had submitted in the past was true or current during the relevant time period.

Second, the courts have long held that the issue of whether a defendant has suffered any prejudice from a claimant's failure to provide required information in a claim is immaterial. *Nelson v. Dunkin*, 69 Wn.2d 726, 732, 419 P.2d 984 (1966). In *Nelson*, the court noted that a very appealing argument had been made that in the situation presented, the defendant was not prejudiced by not having the information that was missing from the claim. *Nelson*, 69 Wn.2d at 729. However, the court

stated the answer to this argument is that the information required is for the defendant's consideration of the claim. There can be no interrogatories and depositions until the county has rejected the claim and an action has been commenced. *Id.* The court further stated it had always proceeded upon the principle, regardless of the issue of prejudice, that there must be a substantial compliance with the statute. *Nelson*, 69 Wn.2d at 730 (citing *Caron, supra*; *Duschaine, supra*; and *Sopchak, supra*).

As the *Nelson* court analyzed on page 731, in the *Caron* case, there could have been no contention that the defect in the claim was in any respect prejudicial. The claimant had been injured in the courthouse, and the county commissioners were all familiar with the circumstances. The court concluded that knowledge by the county officials of the circumstances of the incident was immaterial as they did not have the power to waive the requirements of the statute.

“It is not for the courts to decide whether a claimant's failure to comply with the statutory requirements relative to his claim is prejudicial ... if [a] requirement is no longer meaningful, it is for the legislature and not for this court to take it out of the statute.” *Nelson*, 69 Wn.2d at 732. Therefore, Renner's argument that his claim was not deficient because the City could have gotten the required information itself and suffered no prejudice is without legal authority.

V. CONCLUSION

The City was entitled to dismissal of Renner's claims as a matter of law based on his failure to comply with the requirements of RCW 4.96.020(3). For the foregoing reasons, the City requests the Court affirm the trial court's summary judgment dismissal of Renner's claims.

DATED this 6th day of February, 2008.

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

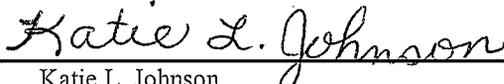

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CERTIFICATE OF SERVICE

Under penalty of perjury under the laws of the State of Washington, I declare that on February 6, 2008 a true copy of this document was served via:

Legal Messenger [] U.S. Mail [] Facsimile
upon the following:

Robert S. Bryan


By: Katie L. Johnson

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