

COURT OF APPEALS
DIVISION II
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COURT OF APPEALS, DIVISION II CAUSE NO. 3177586

COWLITZ COUNTY CAUSE NO. 07-2-01885-0

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

LISA GATES

Respondent

vs.

PORT OF KALAMA, a Washington Municipal Corporation, *et al*

Appellant

BRIEF OF APPELLANT

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I. INTRODUCTION

The Port of Kalama (“the Port”), a municipal corporation, asks this Court to reverse the trial court’s “Order Denying Defendant Port of Kalama’s Motion for Summary Judgment and Denying Plaintiff’s Motion to Declare Service Null,” dated April 21, 2008; and “Order Denying Defendant Port of Kalama’s Motion for Reconsideration of the March 3, 2008 Ruling Denying Defendant’s Motion for Summary Judgment,” dated May 20, 2008. The Port presented unrefuted facts that the Respondent Lisa Gates (“Gates”) failed to provide the statutorily required 60 days’ notice to the Port prior to filing her civil action, thereby failing to comply with RCW 4.96.020. Even though the trial court made findings of undisputed facts acknowledging that Gates had failed to comply with the notice statute, the trial court nonetheless denied the Port’s dispositive motion. The trial court’s ruling is erroneous and unsupported by the admissible evidence presented by the parties.

Most significant is the fact that RCW 4.96.020 is jurisdictional. The Port is a governmental entity that enjoys the privilege of sovereign immunity. Unless a claimant strictly complies with the notice provisions of RCW 4.96.020, sovereign immunity is not waived and there can be no jurisdiction over the governmental entity. The trial court’s ruling, therefore, violates the long-standing principles of sovereign immunity and jurisdiction.

II. ASSIGNMENTS OF ERROR

A. Assignment of Error

The trial court erred by denying the Port's Motion for Summary Judgment despite the presentation of unrefuted facts demonstrating Gates' failure to comply with the notice provisions and despite the fact that the trial court noted as a finding of undisputed fact that Gates failed to comply with RCW 4.96.020.

In addition, the trial court erred in denying the Port's Motion for Reconsideration pertaining to the trial court's denial of the Motion for Summary Judgment.

B. Issues Pertaining to Assignment of Error

1. Where a governmental entity provides unrefuted material facts to establish that a claimant has failed to provide the statutorily required 60 days' notice prior to filing a civil action against that governmental entity, and where the trial court recognizes that the claimant failed to comply with the statutory requirements, is it an abuse of discretion by the trial court when the trial court denies a dispositive motion seeking dismissal on the basis of failure to comply with those statutory requirements?

2. Is there any competent evidence in the record to rebut the Port's admissible evidence that Gates failed to comply with the statutory requirements set out in RCW 4.96.020?

3. Did the Port establish by direct and uncontroverted evidence that Gates never complied with the requirements of RCW 4.96.020?

4. Where an unrelated governmental agency (the Cowlitz County Auditor) provides misinformation to a claimant regarding actions of another governmental agency (the Port), and where that claimant was not injured by the misinformation provided nor her claims compromised, can the actions of the unrelated governmental agency (the Cowlitz County Auditor) serve as a waiver for the other governmental agency (the Port) such that the other governmental agency may be precluded from asserting an affirmative defense?

III. STATEMENT OF THE CASE

A. Introduction

Appellant Port of Kalama seeks reversal of the trial court's order denying the Port's motion for summary judgment entered on April 21, 2008 and the trial court's order denying the Port's motion for reconsideration, entered on May 20, 2008. As shown below, the Port provided unrefuted facts to demonstrate that Gates failed to comply with RCW 4.96.020. The trial court's ruling was unsubstantiated and contradicted by evidence the trial court itself recognized.

B. Factual History

The Port is a municipal corporation pursuant to RCW 39.50.010¹, and owns real property leased as a residential rental, which property was shown to Gates on or about October 22, 2004.² Gates alleged she was injured by a slip and fall while visiting the property.³ On January 28, 2005, Gates forwarded a letter to the Port, signed by Gates but not verified.⁴ The letter from Gates gave a general description of the accident and alleged vaguely that Gates had “incurred medical bills for treatment and at this point I am still treating for my injuries.”⁵ On August 10, 2007, Gates’ attorney forwarded a letter to the Port outlining Gates’ claim.⁶ The August 10, 2007 letter was not verified by Gates but, instead, was signed by her attorney.⁷

¹ See Appendix 1, RCW 39.50.010 (2008).

² CP 1-7.

³ *Id.*

⁴ CP 92-106 (attached as Exhibit A to the Declaration of Stuart Shelby in Support of Defendant Port of Kalama’s Motion for Summary Judgment.)

⁵ *Id.*

⁶ *Id.* (attached as Exhibit B to the Declaration of Stuart Shelby in Support of Defendant Port of Kalama’s Motion for Summary Judgment.)

⁷ *Id.*

On October 17, 2007, Gates filed a Complaint with the Cowlitz County Superior Court.⁸ The Complaint was served on the Port on October 17, 2007. The Complaint was filed 68 days after the August 10, 2007 letter from Gates' attorney was provided to the Port.

On January 9, 2008, 83 days after the filing of the Complaint, Gates served on the Port an "Amended Notice of Claim".⁹ The letter was the first communication from Gates to the Port that included a personally verified claim.¹⁰

C. Procedural History

On January 22, 2008, the Port filed a motion for summary judgment seeking dismissal of Gates' claims based on her failure to comply with the requirements of RCW 4.96.020(3) concerning the filing a claim with a governmental agency.¹¹ The Port argued that, since Gates had failed to comply with the jurisdictional requirements of RCW

⁸ CP 1-7.

⁹ CP 92-106 (*Attached as Exhibit C to the Declaration of Stuart Shelby in Support of Defendant Port of Kalama's Motion for Summary Judgment*).

¹⁰ *Id.*

¹¹ CP 77-91. *See also* Appendix 2, RCW 4.96.020(3).

4.96.020(3) and since the statute of limitations expired on October 22, 2007, Gates' claims against the Port were barred.¹²

Gates' opposition to the motion did not provide any material facts to dispute her failure to comply with RCW 4.96.020(3).¹³ Instead, Gates raised the fact that she received misinformation from the Cowlitz County Auditor's office as to whether the Port had identified a registered agent for receiving claims, pursuant to the requirements of RCW 4.96.020(2).¹⁴ RCW 4.96.020(2) requires a governmental entity to record with the auditor the identity of its agent for the purposes of filing claims.¹⁵ If it fails to do so, that entity is precluded from raising an affirmative defense as to statutory notice provisions.¹⁶ According to Gates, the Auditor initially informed Gates' attorney that the Port had not complied with RCW 4.96.020(2).¹⁷ After receiving the Port's motion, Gates intended to attack the Port's affirmative defense on the basis of the Port's failure to

¹² *Id.*

¹³ CP 107-125.

¹⁴ *Id.*

¹⁵ See Appendix 3, RCW 4.96.020(2) (2008).

¹⁶ *Id.*

¹⁷ CP 107-125.

comply with RCW 4.96.020(2).¹⁸ However, when Gates attempted to obtain a Declaration from the Auditor to that effect, the Auditor disclosed that the Port had, in fact, recorded the identity of an agent as far back as 2001.¹⁹ Therefore, Gates' intention to preclude the Port from raising its affirmative defense was derailed by the fact that the Port had, in fact, complied with RCW 4.96.020(2).

It is undisputed that the Port did, in fact, comply with RCW 4.96.020(2) and that the Cowlitz County Auditor had that information at all times relevant to this litigation.²⁰ Nonetheless, Gates argues that the misstatement by the Cowlitz County Auditor serves as a waiver, preventing the Port from asserting its affirmative defense. As discussed below, there is no precedent to support this argument and, should the Court adopt this reasoning, the harm will be significant.

Gates further argued that substantial compliance with RCW 4.96.020(3) was sufficient and that strict compliance was not required; however, Washington law is well settled that strict compliance with notice

¹⁸ *Id.*

¹⁹ CP 71-72.

²⁰ *Id.*

provisions is required.²¹ Gates also argued that the statute of limitations was tolled pursuant to RCW 4.16.170, because Gates had served the second defendant, a defendant that was not a governmental entity subject to RCW 4.96 *et seq.*²² The Port responded that, since compliance with RCW 4.96 *et seq.* is jurisdictional, RCW 4.16.170 does not toll the statute of limitations with regard to the claims against the Port.²³

Gates presented no evidence to contradict the fact that she failed to provide a personally verified claim at least 60 days prior to filing her action against the Port. Nonetheless, the court denied the motion.²⁴ In the Order, the trial court made findings of undisputed facts, pursuant to Civil Rules of Procedure Rule 56(d).²⁵ The trial court found that: (1) the Port complied with RCW 4.96.020(2); (2) the Port raised as an affirmative defense the failure of Gates to comply with RCW 4.96.020(3); and (3)

²¹ CP 107-25.

²² *Id.*

²³ CP 133-142.

²⁴ CP 178-183.

²⁵ *Id.*

Gates filed suit without complying with RCW 4.96.020(3).²⁶ Despite the findings of undisputed facts above, the trial court denied the motion.²⁷

The Port filed a motion for reconsideration with the trial court, which motion was denied on May 20, 2008.²⁸

IV. ARGUMENT

A. Standard of Review

Whether Gates strictly complied with the notice requirements of RCW 4.96.020(3) and whether the applicable statute of limitations expired on her claims as a result are questions of law and are reviewed *de novo*. Review of a summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court.²⁹ A motion for summary judgment should properly be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.³⁰

²⁶ *Id.*

²⁷ *Id.*

²⁸ CP 186-187.

²⁹ *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003).

³⁰ *Id.* at 485, CR 56(c).

- B. The trial court erred in denying the Port's motion for summary judgment where it was undisputed that Gates had failed to comply with the requirements of RCW 4.96.020(2).

The trial court committed either obvious or probable error when it denied the Port's motion while, at the same time, finding that Gates had failed to comply with RCW 4.96.020(3).³¹ The trial court further committed either obvious or probable error when it rejected the argument that RCW 4.96 is a jurisdictional bar to suit.

Pursuant to RCW 39.50.010, the Port is a municipal corporation:

“Municipal corporation” means any city, town, county, water-sewer district, school district, port district, public utility district, metropolitan municipal corporation, public transportation, benefit area, park and recreation district, irrigation district, fire protection district or any other municipal corporation, public transportation benefit area, park and recreation district, irrigation district, fire protection district or any other municipal or quasi municipal corporation described as such by statute, or regional transit authority, except joint operating agencies under chapter 43.52 RCW.³²

Since the Port is a municipal corporation, claimants who intend to file civil actions against the Port must comply with the statutory requirements for filing claims against local governmental entities, as set out in RCW 4.96 *et seq.* RCW 4.96.010 states that “[f]iling a claim for

³¹ CP 178-183.

³² See Appendix 1, CW 39.50.010(2008).

damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages.”³³

RCW 4.96.020 states, in pertinent part:

(3) 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.

(4) No action shall be commenced against any local governmental entity, or against any local governmental entity’s officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct until sixty days have elapsed after the claim has first been presented to and filed with the governing body thereof. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty-day period.³⁴

³³ See Appendix 4, RCW 4.96.010 (2008).

³⁴ See Appendix 5, RCW 4.96.020 (2008) (emphasis added).

Compliance with RCW 4.96.020 requires that no civil action be filed until at least 60 days after a personally verified claim is filed with the governmental entity.³⁵ Each and every one of these requirements must be strictly construed or the civil action must be dismissed.

Under RCW 4.96.020(3), a claimant must personally verify the claim unless the claimant is a minor, a nonresident or incapacitated. An unverified claim does not comport with the requirements of RCW 4.96.020. In the case at hand, the only claim that comports with the content requirement of the statute was not verified by Gates but was, instead, signed by her attorney.³⁶ The January 28, 2005 letter signed by Gates did not strictly comport with RCW 4.96.020, and fails to serve as a claim. This issue was squarely addressed by the Court of Appeals in *Schoonover v. State of Washington*, 116 Wn.App. 171, 64 P.3d 677 (2003). In *Schoonover*, the plaintiff did not personally verify the

³⁵ *Medina v. Public Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303, 53 P.3d 993 (2002); *Lewis v. City of Mercer Island*, 63 Wn.App. 29, 817 P.2d 408 (1991) (filing requirements of RCW 4.96.010 are conditions precedent to commencing suit and must be strictly complied with); *Andrews v. State*, 65 Wn.App. 734, 738-39, 829 P.2d 250 (1992) (statutory requirements are a mandatory condition precedent and will be strictly construed).

³⁶ CP 92-106 (*Attached as Exhibit B to the Declaration of Stuart Shelby in Support of Defendant Port of Kalama's Motion for Summary Judgment*).

information in the claim form.³⁷ The plaintiff contended that the statute does not require that the claimant personally verify his claim.³⁸ The Court of Appeals referenced *Shannon v. State*, 110 Wn.App. 366, 40 P.3d 1200 (2000), in which the plaintiff's attorney, rather than the plaintiff, signed and verified the tort claim against the Department of Corrections.³⁹ The Court noted that "[w]e rejected the plaintiffs' argument that RCW 4.92.100 was ambiguous. We held that under this statute, the claimant must personally verify the claim unless the claimant is a minor, a nonresident, or incapacitated."⁴⁰

³⁷ *Schoonover v. State of Washington*, 116 Wn.App. 171, 176, 64 P.3d 677 (2003).

³⁸ *Id.* at 177, 64 P.3d 677.

³⁹ *Id.* at 178, 64 P.3d 677.

⁴⁰ *Id.* In her opposition to the Port's Motion, Gates argued that RCW 4.96 does not require personal verification because RCW 4.96 does not include the same language contained in RCW 4.92.100 ("All such claims shall be verified"). In *Schoonover*, the Plaintiff attempted to use this minor discrepancy to challenge the constitutionality of the statute. The Court disagreed and, in fact, concluded that the only reasonable interpretation of RCW 4.96 requires personal verification ("Reviewing the statutory scheme as a whole to the end of maintaining the integrity of the respective statutes, we conclude that RCW 4.96.020 has the same verification requirements as RCW 4.92.100."). *Schoonover*, 116 Wn.App. 171, 183-84, 64 P.3d 677.

Furthermore, the Court of Appeals stated that the compliance with the verification requirement could not be liberally construed but must be strictly construed:

Furthermore, in contrast to the contents of the claim, which we liberally construe for substantial compliance, we strictly construe the statutory filing requirements. Accordingly, whether Phelps verified and signed Schoonover's claim in his capacity as his attorney or his agent is ultimately immaterial, as neither status carries more authority than the other. Thus, unless Schoonover can demonstrate that he falls into one or more of the three statutory exceptions, Phelps' verification is deficient.⁴¹

Sixty-eight days after the August 10, 2007 letter to the Port, Gates initiated this civil action by filing a Complaint and Summons.⁴² It is undisputed that, at the time Gates initiated her civil action against the Port, she had not provided the Port with a verified claim meeting the requirements of RCW 4.96.020.

On January 9, 2008 – 83 days after filing her lawsuit against the Port and after realizing her error – Gates provided the Port with an Amended Claim, verified by Gates.⁴³ Gates hoped to correct her error with regard to RCW 4.96.020(3) by filing an Amended Claim after she has

⁴¹ *Id.* at 178-79, 64 P.3d 677 (emphasis added).

⁴² CP 1-7.

⁴³ CP 92-106 (*Attached as Exhibit C to the Declaration of Stuart Shelby in Support of Defendant Port of Kalama's Motion for Summary Judgment*).

already initiated suit against the Port. However, it is well settled law that a claimant cannot cure the defect of an unverified claim by supplying the missing oath after the filing period has expired.⁴⁴ In *Medina v. Public Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303, 53 P.3d 993 (2002), the Court held that, by failing to strictly comply with the time requirements, the plaintiff had failed to comply with the provisions of RCW 4.96.020(4), and dismissal of the claims was appropriate.⁴⁵ Just as in *Medina*, Gates failed to strictly comport with the requirements of RCW 4.96.020. Gates offered no material facts to dispute the Port's contention that she had failed to comply with the notice provisions. Nonetheless, the trial court denied the summary judgment motion.

The trial court is obliged to give full effect to the plain language of a statute, even when the results appear unduly harsh.⁴⁶ In *Sievers v. Mountlake Terrace*, 97 Wn.App. 181, 983 P.2d 1127 (1999), the plaintiff failed to comply with the statute by only one day, commencing her action

⁴⁴ *Dillabough v. Brady*, 115 Wash. 76, 79-80 (1921).

⁴⁵ *Medina v. Public Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303, 319, 53 P.3d 993 (2002).

⁴⁶ *Sievers v. Mountlake Terrace*, 97 Wn.App. 181, 183, 983 P.2d 1127 (1999); *Pirtle v. Spokane Pub. School Dist.*, 83 Wn.App. 304, 309, 921 P.2d 1084 (1996).

59 days after filing her claim; nonetheless, the Court of Appeals determined that dismissal was appropriate.⁴⁷

Gates failed to provide any evidence to refute that presented by the Port concerning RCW 4.96.020. The trial court judge recognized that Gates had failed to comply with the notice provisions, and stated, in his findings of undisputed facts that “the Plaintiff filed suit in the Cowlitz County Superior Court without first complying with the requirements of RCW 4.96.020(3)”.⁴⁸ Nonetheless, the trial court denied the motion for summary judgment.

C. Gates failed to provide material facts to establish the application of equitable estoppel and failed to meet the clear, cogent and convincing standard of proof.

As noted in the Ruling Granting Review, “the equitable doctrine is the only means by which this case can continue.”⁴⁹ Gates’ claim now depends upon the application of the equitable estoppel doctrine to excuse her failure to comply with RCW 4.96.020. However, Gates failed to

⁴⁷ *Id.* at 184-85, 983 P.2d 1127 (1999). See also *Andrews v. State of Washington*, 65 Wn.App. 734, 738, 829 P.2d 250 (1992) (dismissal of claim for failure to strictly comply “seems harsh and technical but the statute and the long line of cases interpreting it require the result”).

⁴⁸ CP 178-183.

⁴⁹ See Appendix 6, Ruling Granting Review, filed July 25, 2008.

provide material facts to establish the application of equitable doctrine or meet the clear, cogent and convincing standard.

For equitable estoppel to apply, Gates must prove: (1) an admission, statement or act inconsistent with a claim later asserted; (2) reasonable reliance on that admission, statement, or act by the other party; and (3) injury to the relying party.⁵⁰ Equitable estoppel against the government is disfavored and also requires a showing that it is necessary to prevent a manifest injustice and that its application will not impair the exercise of government functions.⁵¹ Gates failed to make any such showing.

Gates' argument for equitable estoppel is solely based upon the fact that the Cowlitz County Auditor provided her with misinformation concerning the Port's compliance with RCW 4.96.020(2). However, Gates' failure to comply with the notice provisions of RCW 4.96.020 was not the result of her reliance on the misinformation from the Auditor. Instead, Gates made a conscious and deliberate choice to gamble with the notice requirements of RCW 4.96.020. She deliberately chose to take her

⁵⁰ *Department of Ecology v. Theodaratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998).

⁵¹ *Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 20, 43 P.3d 4 (2002).

chances with compliance, and she opted to challenge any affirmative defenses raised by the Port later. Her gamble should not be rewarded in a situation where the Port has, in fact, complied with all requirements of RCW 4.96.020 and where Gates has not complied with the statutory requirements. Gates does not have clean hands as required before equitable relief may be granted. Gates deliberately decided to disregard the notice requirements, and thereby put herself at the mercy of whether the Port had complied with RCW 4.96.020(2).

Fitzgerald v. City of Bangor, 726 A.2d 1253 (1999) is analogous to the case at bar. In *Fitzgerald*, the plaintiff owned two properties on which he owed several years' worth of property taxes to the city.⁵² The plaintiff was required to pay certain amounts on each building by a certain date to prevent the automatic foreclosure of the liens on the two properties.⁵³ Unbeknown to the plaintiff, the mortgage holder for one of the buildings paid the taxes due on the same day the plaintiff arrived at city hall to pay off the taxes.⁵⁴ He asked the accounts clerk to tell him the amount due on

⁵² See Appendix 7, *Fitzgerald v. City of Bangor*, 726 A.2d 1253 (1999).

⁵³ *Id.* at 1254.

⁵⁴ *Id.*

the two buildings.⁵⁵ Because a different clerk had waited on the mortgage holder and because payments made after noon are not posted until the following day, the clerk gave the plaintiff misinformation concerning the total amount due.⁵⁶ As a result of the misinformation, the plaintiff paid the full tax on the building that had already been paid by the mortgage holder, rather than paying the tax on the other building.⁵⁷ Subsequently, the city's tax lien was foreclosed on the other building, and the plaintiff brought suit.⁵⁸

The *Fitzgerald* plaintiff argued that, as a result of the incorrect information given to him by the clerk, the city was estopped from asserting that it had acquired title to the other building.⁵⁹ The Court disagreed, and stated that the plaintiff simply had not acted with the reasonable diligence necessary to apply estoppel.⁶⁰ The Court noted that the plaintiff:

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 1255.

⁶⁰ *Id.* at 1256.

made a calculated decision to allow the City to foreclose the lien on the Freese's building, and chose instead to wait until the very last minute to pay the taxes on the Dakin's building. Although Fitzgerald correctly asserts that the law allows him to pay the taxes in the last hour of the final day in the period of redemption, if he chooses to delay until that time, he may do so to his detriment. His eleventh hour decision, even if based on misinformation obtained from the city clerk, is not the solid foundation which we would require before considering the application of the doctrine of equitable estoppel in this context.⁶¹

Similarly, Gates made a calculated decision concerning whether to comply with RCW 4.96.020. As with the *Fitzgerald* plaintiff, Gates' eleventh hour decision, even if based on the misinformation from the Auditor, is not the solid foundation required before the doctrine of equitable estoppel may be applied.

Not only did Gates fail to establish the elements of estoppel clearly, cogently and convincingly as is required by the law, but she also cannot claim reliance as the basis for her injury. The basis for her injury is her conscious and deliberate decision not to comply with the requirements of RCW 4.96.020.

⁶¹ *Id.*

D. Gates' argument that the Auditor's misrepresentations waived the Port's right to assert an affirmative defense is not supported under Washington law.

Gates argues that the Cowlitz County Auditor's misrepresentations waived the Port's right to assert the affirmative defense concerning compliance with RCW 4.96.020. Gates' waiver argument is not supported by Washington precedent and does not constitute grounds for denying the Port's motion for summary judgment.

Gates argues that the misinformation provided by the Cowlitz County Auditor serves as a waiver by the Port as to the affirmative defenses asserted in the Port's motion for summary judgment. However, there is no precedent in Washington law to support the contention that one unrelated governmental entity can waive an affirmative defense for another unrelated governmental entity, when that other entity has complied with all statutory requirements that allow it to assert an affirmative defense. This concept is particularly troubling because it infringes upon the governmental entity's privilege of sovereign immunity.

The Cowlitz County Auditor is a separate and distinct governmental entity from the Port. The duties of the Cowlitz County Auditor are mandated by the legislature and set out in several statutes. That do not outline duties that include authority to bind the Port. Gates has failed to provide any authority whatsoever to support the contention

that the Auditor has authority to speak for or act on behalf of the Port with regard to assertion of affirmative defenses. Similarly, the Port has no authority over information that the Auditor provides to the public and cannot control the accuracy of that information. In this instance, the Port complied with all requirements necessary to allow it to assert its affirmative defenses, and it should not be denied that right by the action of an unrelated governmental agency.

Although not directly on point, *Strand v. State*, 16 Wn.2d 107, 132 P.2d 1011 (1943) was noted by the Court in the Ruling Granting Review as being instructive.⁶² However, *Strand* is distinguishable from the case at hand and involves very different principles of real property and property rights.

In *Strand*, the purchasers filed an application with the commissioner of public lands to purchase certain lands, including tidelands.⁶³ Thereafter, the proper statutory steps were taken and a deed was executed by the proper state officials conveying title.⁶⁴ The original

⁶² See Appendix 6, Ruling Granting Review, filed July 25, 2008.

⁶³ *Strand v. State*, 16 Wn.2d 107, 112, 132 P.2d 1011 (1943).

⁶⁴ *Id.* at 113, 132 P.2d 1011 (1943).

title to the land was conveyed in 1928.⁶⁵ In 1941 – nearly 20 years after title to the property was conveyed – the state game commissioner attempted to classify the property as public hunting grounds, resulting in a quiet title action by the property owners.⁶⁶

In reviewing the matter, the Washington Supreme Court considered the doctrine of equitable estoppel under the theory that the granting of title by one governmental agency precluded the affirmative defenses of another.⁶⁷ The Court noted that “[i]t is admitted that the property is properly included in that designated by the legislature for public hunting if respondents do not have a valid title to it.”⁶⁸

In considering whether the actions of the state commissioner of public lands estopped the state game commissioner from challenging title to the property, the Washington Supreme Court noted that the grantee in the 1928 deed relied on the acts and representations of the state officials that he had taken the proper steps and had done all that was necessary to

⁶⁵ *Id.* at 112, 132 P.2d 1011 (1943).

⁶⁶ *Id.* at 114, 132 P.2d 1011 (1943).

⁶⁷ *Id.* at 114-115, 132 P.2d 1011 (1943).

⁶⁸ *Id.* at 114, 132 P.2d 1011 (1943).

obtain title.⁶⁹ Ultimately, the Court determined that the actions of the commissioner of public lands precluded the challenge by the game commissioner.⁷⁰

Although *Strand* is instructive, it is neither dispositive nor persuasive with regard to the case at bar. There are numerous crucial distinctions between the case at bar and *Strand*. *Strand* involved the issue of property rights and conveyance of title, and the injuries involved the loss of property rights that had been bestowed by the state nearly 20 years earlier. *Strand* does not involve compliance with a notice provision prior to initiating a claim against a governmental entity, nor does it involve the issue of whether a governmental agency's sovereign immunity has been waived.

In addition, *Strand* involves affirmative action taken by the state that potentially infringed upon property rights of individuals who had owned that property for years. As the *Strand* Court noted:

The state should not have the right many years later to come into a court of equity and set aside the acts of its officials to the irreparable injury of the citizens who acted in good faith and relied upon the assumption that the commissioner knew what he was doing.⁷¹

⁶⁹ *Id.* at 115, 132 P.2d 1011 (1943).

⁷⁰ *Id.* at 123, 132 P.2d 1011 (1943).

⁷¹ *Id.* at 119, 132 P.2d 1011 (1943).

The *Strand* Court focused on the significant passage of time, the improvements done to the property and the expense incurred by the plaintiff: “[w]e hold that the deed was acquired in good faith by Einarsen and that, having allowed Einarsen and the other respondents to go upon the land, make expensive improvements, and pay the taxes for a number of years, the state is estopped to deny respondents’ title.”⁷² None of these factors are relevant to the case at bar.

Unlike *Strand*, the case at bar does not involve affirmative actions taken by the state that will cause “irreparable injury to citizens who acted in good faith.” In this instance, the issue is whether Gates should be allowed to use the waiver/estoppel argument to preclude an affirmative defense by a governmental entity where it is undisputed that Gates failed to comply with statutory notice requirements. In *Strand*, the estoppel argument was used as a shield to prevent the governmental agency from causing harm by its affirmative actions. If this Court adopts the estoppel/waiver argument in this case based on the attenuated reasoning in *Strand*, it will be used as a sword to allow Gates to pursue claims that are in jeopardy because of her own actions – her failure to comply with the statutory requirements clearly set out in RCW 4.96.020.

⁷² *Id.* at 123, 132 P.2d 1011 (1943) (emphasis added).

In the case at bar, Gates made a conscious choice not to comply with RCW 4.96.020, relying upon the misinformation by the Cowlitz County Auditor to counter any defense by the Port. She elected to take her chances rather than to comply with the statutory requirements. Unlike the plaintiff in *Strand*, Gates' situation is the result of her own actions in deciding to forego compliance with the statute.

E. The Cowlitz County Auditor does not have the authority to waive the Port's privilege of sovereign immunity.

Unlike the case at bar, *Strand* does not involve whether a governmental entity's sovereign immunity can be waived by an unrelated governmental agency. As a governmental entity, the Port enjoys the privilege of sovereign immunity.

The right to bring suit against a local governmental entity was created by statute in 1967 when the Washington State Legislature waived sovereign immunity by enacting RCW 4.96.⁷³ The statute provided that, as a condition precedent to maintaining an action against a local governmental agency, the injured party is required to comply with statutory claim filing procedures.⁷⁴ Failure to comply with the filing

⁷³ *Medina v. Pub. Util. Dist. No. 1 of Benton County*, 147 Wn.2d 303, 312, 53 P.3d 993 (2002).

⁷⁴ *Daggs v. City of Seattle*, 110 Wn.2d 49, 52, 750 P.2d 626 (1988).

requirements leads to dismissal of the action, because compliance is a condition precedent to the waiver of sovereign immunity.⁷⁵

The right to sue the state or local governmental agency is not a fundamental right; it is statutory.⁷⁶ Therefore, the state can place limitations upon that right and, in fact, it has.⁷⁷ One such limitation is the strict requirement of the notice provision.

Furthermore, the Washington State Constitution expressly reserves to the legislature the right to regulate lawsuits against governmental entities as well as the waiver of sovereign immunity.⁷⁸ Therefore, unless there was authority from the legislature, there is no basis for one local governmental entity to waive the sovereign immunity of another. Therefore, Gates' application of waiver in this instance, based on the misinformation of the Cowlitz County Auditor, is misplaced.

Compliance with the requirements of a statute waiving sovereign immunity, such as RCW 4.96, is a jurisdictional condition precedent to a

⁷⁵ *Id.*

⁷⁶ *Medina*, 147 Wn.2d at 312, 53 P.3d 993 (2002).

⁷⁷ *Id.*

⁷⁸ CONST. art. II, § 26.

cause of action.⁷⁹ Therefore, the trial court only has jurisdiction with regard to the Port if Gates strictly complied with RCW 4.96.020. Since Gates failed to strictly comply with the requirements of the statute, the trial court had no jurisdiction over the Port and should have dismissed the claims. Since it is undisputed that Gates failed to comply with the statute's requirement to provide the Port with a personally verified claim at least sixty days prior to initiating suit against the Port, sovereign immunity was never waived.

Allowing the misinformation by the Cowlitz County Auditor to serve as a waiver of the sovereign immunity of the Port violates all principles with regard to waiver of sovereign immunity. Accordingly, the Court should reject Gates' argument and decline to extend *Strand* to this degree.

V. CONCLUSION

The trial court's conclusion that Gates is entitled to bring suit against the Port, a governmental entity, without complying with the requirements of RCW 4.96.020(3) is erroneous and an abuse of the court's discretion. Gates argues that she need not comply with RCW 4.96.020(3) because the Port waived its affirmative defense through the actions of an

⁷⁹ *Sowers v. Lewis*, 49 Wn.2d 891, 895, 307 P.2d 1064 (1957); *Sullivan v. Purvis*, 90 Wn.App. 456, 459, 966 P.2d 912 (1998).

unrelated governmental entity. This argument is attenuated and violates numerous well-settled principles of law, including the principle of strict compliance with notice provisions and the principle of sovereign immunity. There is no precedent for Gates' position, and no basis for extending the current state of the law to such a degree.

The trial court erroneously denied the Port's motion for summary judgment that sought the dismissal of Gates' claims due to the fact that she failed to comply with RCW 4.96.020. It is undisputed that she failed to comply with the statute. Furthermore, she has failed to establish clearly, cogently and convincingly that she reasonably relied upon the misinformation provided by the Cowlitz County Auditor – a requirement for the application of the equitable estoppel doctrine. Finally, the Cowlitz County Auditor cannot waive the Port's sovereign immunity, thereby allowing Gates to sue the Port. Only the legislature can determine when the Port's sovereign immunity is waived and when the Port may be sued.

The Port's summary judgment motion was a simple one and, ultimately, asked a simple question: did Gates comply with the requirements of RCW 4.96.020? Even the trial court did not dispute that Gates failed to comply with the statute. The Port was entitled to summary adjudication and the trial court's erroneous order should be reversed. The Port respectfully requests that this Court reverse the trial court's order.

DATED this 23rd day of September, 2008.

Respectfully submitted,

GIERKE, CURWEN, DYNAN & JONES, P.S.

By  _____
Elizabeth C. Thompson, WSBA # 32222
Attorney for Petitioner Port of Kalama

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APPENDIX 1

RCW 39.50.010

Definitions.

As used in this chapter, the following terms have the meanings indicated unless the context clearly requires otherwise.

(1) "Governing body" means the legislative authority of a municipal corporation by whatever name designated;

(2) "Local improvement district" includes local improvement districts, utility local improvement districts, road improvement districts, and other improvement districts that a municipal corporation is authorized by law to establish;

(3) "Municipal corporation" means any city, town, county, water-sewer district, school district, port district, public utility district, metropolitan municipal corporation, public transportation benefit area, park and recreation district, irrigation district, fire protection district or any other municipal or quasi municipal corporation described as such by statute, or regional transit authority, except joint operating agencies under chapter 43.52 RCW;

(4) "Ordinance" means an ordinance of a city or town or resolution or other instrument by which the governing body of the municipal corporation exercising any power under this chapter takes formal action and adopts legislative provisions and matters of some permanency; and

(5) "Short-term obligations" are warrants, notes, capital leases, or other evidences of indebtedness, except bonds.

[2001 c 299 § 16; 1999 c 153 § 54; 1998 c 106 § 8; 1985 c 332 § 8; 1982 c 216 § 2.]

APPENDIX 2

RCW 4.96.020

**Tortious conduct of local governmental entities and their agents —
Claims — Presentment and filing — Contents.**

(3) 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.

[2006 c 82 § 3; 2001 c 119 § 2; 1993 c 449 § 3; 1967 c 164 § 4.]

APPENDIX 3

RCW 4.96.020

**Tortious conduct of local governmental entities and their agents —
Claims — Presentment and filing — Contents.**

(2) The governing body of each local governmental entity shall appoint an agent to receive any claim for damages made under this chapter. The identity of the agent and the address where he or she may be reached during the normal business hours of the local governmental entity are public records and shall be recorded with the auditor of the county in which the entity is located. All claims for damages against a local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, shall be presented to the agent within the applicable period of limitations within which an action must be commenced. The failure of a local governmental entity to comply with the requirements of this section precludes that local governmental entity from raising a defense under this chapter.

[2006 c 82 § 3; 2001 c 119 § 2; 1993 c 449 § 3; 1967 c 164 § 4.]

APPENDIX 4

RCW 4.96.010

Tortious conduct of local governmental entities — Liability for damages.

(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

(2) Unless the context clearly requires otherwise, for the purposes of this chapter, "local governmental entity" means a county, city, town, special district, municipal corporation as defined in RCW 39.50.010, quasi-municipal corporation, or public hospital.

(3) For the purposes of this chapter, "volunteer" is defined according to RCW 51.12.035.

[2001 c 119 § 1; 1993 c 449 § 2; 1967 c 164 § 1.]

APPENDIX 5

RCW 4.96.020

**Tortious conduct of local governmental entities and their agents —
Claims — Presentment and filing — Contents.**

(1) The provisions of this section apply to claims for damages against all local governmental entities and their officers, employees, or volunteers, acting in such capacity.

(2) The governing body of each local governmental entity shall appoint an agent to receive any claim for damages made under this chapter. The identity of the agent and the address where he or she may be reached during the normal business hours of the local governmental entity are public records and shall be recorded with the auditor of the county in which the entity is located. All claims for damages against a local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, shall be presented to the agent within the applicable period of limitations within which an action must be commenced. The failure of a local governmental entity to comply with the requirements of this section precludes that local governmental entity from raising a defense under this chapter.

(3) 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.

(4) No action shall be commenced against any local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious

conduct until sixty days have elapsed after the claim has first been presented to and filed with the governing body thereof. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty-day period.

[2006 c 82 § 3; 2001 c 119 § 2; 1993 c 449 § 3; 1967 c 164 § 4.]

APPENDIX 6

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LISA GATES,

Respondent,

v.

PORT OF KALAMA, a Washington
Municipal Corporation,

Petitioner,

LAM MANAGEMENT, INC., a
Washington Corporation, DBA ALLEN
& ASSOCIATES PROPERTY
MANAGEMENT

Defendant.

No. 37758-6-II

RULING GRANTING REVIEW

FILED
COURT OF APPEALS
08 JUN 25 AM 8:47
STATE OF WASHINGTON
BY *CMW*
DEPUTY

The Port of Kalama seeks review of a Cowlitz County Superior Court order denying the Port's motion for summary dismissal of Lisa Gates's personal injury claim. The Port contends that Gates's failure to personally verify her claim pursuant to the requirements of RCW 4.96.020 precluded subject matter jurisdiction, and the trial court's decision constitutes obvious or probable error,

justifying review under RAP 2.3(b)(1) and (2). In addition, the trial court has certified the matter to this court under RAP 2.3(b)(4), finding that its decision involves a controlling question of law as to which there is substantial ground for a difference of opinion, and immediate review may materially advance the ultimate termination of the litigation.

The following facts are undisputed. Gates's alleged injury occurred on October 22, 2004 while she was viewing a rental property owned by the Port. On January 28, 2005, she sent a letter to the Port explaining in general terms what had happened on October 22, 2004. She signed the letter, but did not verify its contents. Nevertheless, an adjuster from the Port contacted her to obtain additional information. When the Port asked for a recorded statement, she obtained an attorney. That attorney contacted the Cowlitz County Auditor's office in order to determine who the Port's designated agent was. A deputy auditor told him that the Port had not identified an agent.

On October 5, 2005, the Port's attorney conducted a telephone interview of Gates. On August 10, 2007, Gate's attorney sent a letter to the Port detailing her claim and proposing a settlement. Gates did not sign that letter. Because the Port did not respond to the letter, and the statute of limitations would run on October 22, 2007, Gates filed this lawsuit on October 17. The Port answered, raising as a defense, Gates's failure to verify her claim.

RCW 4.96.020(2) requires local governmental entities to designate an agent to receive claims, and to record that information with the county auditor.

The statute further provides that “[t]he failure of a local governmental entity to comply with the requirements of this section precludes the local governmental entity from raising a defense under this chapter.” RCW 4.96.020(2). When Gates’s attorney requested a declaration from the auditor that the Port had failed to designate an agent as required, the deputy auditor informed him that her earlier statement had been incorrect, that the Port had recorded its agent information in 2001. At that point, counsel sent a proper, verified claim to the Port.

The Port moved for summary judgment. The trial court denied that motion, finding that “in reliance upon the express representation of the Cowlitz County Auditor, the Plaintiff filed suit in the Cowlitz County Superior Court without first complying with the requirements of RCW 4.96.020(3).”¹

Much of the law regarding suits against local government is well settled. RCW 4.96.020(3) requires a complainant to personally verify his or her claim before presenting it to the local governmental entity in question. In Washington, verification means attesting to the truth of the matter under oath. See *Haynes v. City of Seattle*, 87 Wash. 375, 377-78 (1915), *disapproved on other grounds in*, *Cook v. State*, 83 Wn.2d 599 (1974). A signature, alone, does not satisfy the requirement for verification. *Levy v. State*, 91 Wn. App. 934, 943 (1998). A complainant cannot cure the defect of an unverified claim by supplying the

¹ Mot. for Disc. Rev., Appendix at 4.

missing oath after the filing period has expired. *Dillabough v. Brady*, 115 Wash. 76, 79-80 (1921).

Dismissal of an action for lack of subject matter jurisdiction is required if the tort claim submitted under 4.92 RCW does not strictly comply with the statutory procedure. Substantial compliance is not enough. *Troxell v. Rainier Pub. Sch. Dist.*, 154 Wn.2d 345, 350-51 (2005); *Reyes v. City of Renton*, 121 Wn. App. 498, 502, *review denied*, 152 Wn.2d 1031 (2004). Personal verification is a statutory filing requirement. See *Reyes*, 121 Wn. App. at 502-04; *Schoonover v. State*, 116 Wn. App. 171, 184 (2003).

Gates asserted equitable estoppel in defense of the summary judgment motion, alleging that (1) the Port conducted substantial investigation of the claim without suggesting any procedural inadequacy, and (2) she relied to her detriment on the Auditor's misrepresentations. Equitable estoppel may apply in a situation where one party makes an admission, statement, or act that another party justifiably relies on to its detriment. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 362 (2004). A party asserting equitable estoppel against the government must prove by clear, cogent, and convincing evidence:

(1) a statement, admission or act by the party to be estopped, which is inconsistent with its later claims; (2) the asserting party acted in reliance upon the statement or action; (3) injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action; (4) estoppel is "necessary to prevent a manifest injustice"; and (5) estoppel will not impair governmental functions.

Silverstreak, Inc. v. Dep't. of Labor & Indus., 159 Wn.2d 868, 887 (2007). 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.

It does not appear that investigation of a claim prior to the filing of a lawsuit can be the basis for estoppel or waiver. Filing a claim with the governmental entity is a prerequisite to commencement of an action, not to the initiation of settlement negotiations. See *King v. Snohomish County*, 105 Wn. App. 857, 866 (2001), *rev'd on other grounds*, 146 Wn.2d 420 (2002); *Kleyer v. Harborview Med. Center*, 76 Wn. App. 542, 549 n.6 (1995).

As to Gates's other argument, and apparently the basis of the trial court's decision, there is no clear authority for the proposition that the Port can be constrained by the Auditor's misrepresentation. None of the cases cited by the parties involve misrepresentations or acts by a third party, and this court found only one such case, *Strand v. State*, 16 Wn.2d 107 (1943). *Strand* is not analogous, but it is instructive. Strand, et al, purchased property, including tidelands, from the state commission of public lands. Thereafter, the legislature designated all of the tidelands in the section containing Strand's property as public hunting lands, and the game commission attempted to post the property as such. Strand successfully brought suit to quiet title. In reviewing the matter, the Supreme Court applied the doctrine of equitable estoppel, treating state government as one entity.

As the equitable doctrine is the only means by which this case can continue, resolution of that issue may materially advance the termination of this litigation. Accordingly, it is hereby

ORDERED that review is granted. Further proceedings in the trial court are stayed pending disposition of this appeal.

DATED this 25th day of July, 2008.



Ernetta G. Skerlec
Court Commissioner

cc: Gregory B. Curwen
Elizabeth Thompson
Kurt Anagnostou
Dennis J. LaPorte
Hon. James E. Warme

APPENDIX 7

CFitzgerald v. City of Bangor
Me., 1999.

Supreme Judicial Court of Maine.
Charles FITZGERALD
v.
CITY OF BANGOR.
Docket No. Pen-98-423.

Argued March 3, 1999.
Decided March 30, 1999.

Taxpayer brought action against city challenging city's exercise of eminent domain power to acquire building for which tax lien was deemed foreclosed upon expiration of taxpayer's right to redeem. The Superior Court, Penobscot County, Delahanty, J., entered judgment for city. Taxpayer appealed. The Supreme Judicial Court, Saufley, J., held that city was not equitably estopped from asserting title to building through foreclosure of tax lien, on basis of apparent lack of information given by accounts clerk to taxpayer.

Affirmed.

West Headnotes

[1] Estoppel 156 ↪55

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k55 k. Reliance on Adverse Party. Most

Cited Cases

Doctrine of "equitable estoppel" requires proof that plaintiff relied upon declarations or acts of defendant and was thereby induced to do something to his detriment, something which he otherwise would not have done.

[2] Appeal and Error 30 ↪964

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k963 Proceedings Preliminary to Trial

30k964 k. In General. Most Cited Cases

Supreme Judicial Court reviews grant of motion in limine for abuse of discretion by trial court.

[3] Appeal and Error 30 ↪964

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k963 Proceedings Preliminary to Trial

30k964 k. In General. Most Cited Cases

To have properly exercised its discretion with respect to grant of motion in limine, Superior Court must have applied correct law to facts that were not clearly erroneous.

[4] Estoppel 156 ↪62.1

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k62 Estoppel Against Public,

Government, or Public Officers

156k62.1 k. In General. Most Cited

Cases

Rationale for rule precluding assertion of estoppel against government in tax cases is to assure that no officer of government has ability to interfere inadvertently with government's fundamental sovereign power to tax its citizens.

[5] Estoppel 156 ↪62.1

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k62 Estoppel Against Public,

Government, or Public Officers

156k62.1 k. In General. Most Cited

Cases

Taxation 371 ↪2900

371 Taxation

371III Property Taxes

371III(L) Sale of Land for Nonpayment of

Tax

371k2900 k. In General. Most Cited Cases
(Formerly 371k614)

Foreclosure of tax lien is procedure governed by statute, which cannot be rescinded because of misstatements of government employee to taxpayer. 36 M.R.S.A. § 943.

[6] Estoppel 156 ↪ 62.1

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k62 Estoppel Against Public, Government, or Public Officers

156k62.1 k. In General. Most Cited

Cases

Ability of party to assert estoppel defense against government may be limited depending upon totality of circumstances involved, including nature of government official or agency whose actions provide basis for claim and governmental function being discharged by that official or agency.

[7] Estoppel 156 ↪ 62.4

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k62 Estoppel Against Public, Government, or Public Officers

156k62.4 k. Municipal Corporations in General. Most Cited Cases

City was not equitably estopped from asserting that it acquired title to building through foreclosure of its tax lien, on basis of apparent lack of information given by accounts clerk to taxpayer, in case in which taxpayer allegedly had enough money to pay amount due on either of his two buildings, but not both, on day that redemption period was to expire for both properties and taxpayer paid taxes on other building without being informed by clerk that mortgagee had already paid taxes for that building earlier that day.

[8] Equity 150 ↪ 64

150 Equity

150I Jurisdiction, Principles, and Maxims

150I(C) Principles and Maxims of Equity

150k64 k. Equity Aids the Vigilant, Not

Those Who Sleep on Their Rights. Most Cited Cases
Equity will not protect party who has slept on his rights or failed to act with reasonable diligence.

***1253** George Z. Singal (orally), James R. Wholly, Gross, Minsky, Mogul & Singal, P.A., Bangor, for plaintiff.

Erik M. Stumpf (orally), City Solicitor, Bangor, for defendant.

Richard P. Flewelling, Maine Municipal Association, Augusta, for amicus curiae.

Before WATHEN, C.J., and CLIFFORD, RUDMAN, DANA, SAUFLEY, ALEXANDER, and CALKINS, JJ.

***1254** SAUFLEY, J.

[¶ 1] Charles Fitzgerald appeals from the judgment of the Superior Court (Penobscot County, *Delahanty, J.*) in favor of the City of Bangor on the City's claim of title to real property through the foreclosure of a tax lien. Fitzgerald asserts that he should have been allowed to assert equitable estoppel as a defense to the City's claim. We affirm the judgment.

I. BACKGROUND

[¶ 2] In 1994, Charles Fitzgerald owned, among others, two properties in Bangor. The properties, known as the "Freese's Building" and the "Dakin's Building," were subject to a first mortgage held by Bruce Slovin. Because Fitzgerald had failed to pay property taxes on both buildings for several years, the City had placed tax liens on each property. At issue in this matter are the liens for tax year 1993. Fitzgerald does not dispute the City's process in placing liens on the property.

[¶ 3] The 18-month period of redemption on the 1993 liens was to expire as to both properties on December 7, 1994. To prevent the automatic foreclosure of the liens, Fitzgerald was required to pay \$7,996.63 on the Dakin's Building, and \$21,102.01 on the Freese's Building by the end of the business day on December 7, 1994. Unbeknownst to Fitzgerald, Slovin paid the full amount due on the Dakin's Building midway through the afternoon of December 7, 1994.

[¶ 4] Fitzgerald arrived at the Bangor City Hall late in the afternoon of December 7, 1994 intending to pay

the taxes on the Dakin's building. He asked the accounts clerk to tell him the amount that was due on the two buildings. Because a different clerk had waited on Slovin, and because payments made after noon are not posted until the following day, the clerk told him (incorrectly) that \$7,996.63 was still due on the Dakin's Building. Fitzgerald then paid that amount in full. The City accepted his payment on the Dakin's building and, when the double payment was discovered, Fitzgerald's payment was credited to more recent outstanding tax obligations on the Dakin's building. See 36 M.R.S.A. § 906 (1990) (requiring a municipality to apply any property tax payment received against outstanding or delinquent taxes due on that property).

[¶ 5] Fitzgerald alleges that he had decided to pay the taxes on the Dakin's building because he had limited resources and because the Dakin's building was occupied by paying tenants, whereas the Freese's building was unoccupied. He was aware that he would lose the Freese's building to the City. He asserts, however, that on December 7 he had enough money to pay the amount due on either the Dakin's Building or the Freese's Building, but not both. Therefore, he argues, had he been given the correct information, he could have used his money to pay the amount due on the Freese's Building.

[¶ 6] Because no payment was made on the Freese's Building on December 7, 1994, Fitzgerald's right to redeem the property expired by statute, and the City's tax lien was deemed to have been foreclosed. See 36 M.R.S.A. § 943 (1990 & Supp.1998).^{FN1}

^{FN1}. Approximately six weeks later, Fitzgerald attempted to recover the Freese's Building by tendering the total amount owed to the City in back taxes and other charges, but the Bangor City Council declined to allow Fitzgerald to redeem the property.

[¶ 7] The present case was commenced when Bruce Slovin brought an action against Fitzgerald and the City of Bangor seeking to foreclose his mortgage on the Freese's Building and requesting the Superior Court to determine the priorities of the parties holding interests in the property. Slovin and Fitzgerald eventually entered into a settlement, and the court denied the City's motion for summary judgment. The City then began administrative

proceedings to use its eminent domain power to acquire the Freese's Building.^{FN2} Fitzgerald responded by filing an *1255 action challenging the exercise of eminent domain power by the City, and that action was consolidated with the foreclosure action originally filed by Slovin.

^{FN2}. The Bangor City Council approved a resolution initiating the exercise of the City's eminent domain power to "complete" its acquisition of the Freese's property. The City Council appears to have decided to institute eminent domain proceedings because efforts to confirm its title to the property through court action had been delayed on the Superior Court calendar, and city plans to convert the building into elderly low-income housing required the City to obtain marketable title to the property expeditiously.

[¶ 8] In preparation for trial, the City filed a motion in limine, asking the court to exclude all evidence proposed to be offered at trial in support of Fitzgerald's claim that, as a result of the incorrect information given to Fitzgerald by the clerk on December 7, the City was equitably estopped from asserting that it had acquired title to the Freese's Building through foreclosure of its tax lien. After a hearing, the Superior Court granted the City's motion, holding that Fitzgerald's estoppel theory "may not be invoked against the City of Bangor in the exercise of its responsibilities involving taxation."

[¶ 9] By agreement, Fitzgerald voluntarily dismissed the remainder of his claims with prejudice, facilitating the appeal of his estoppel claim. The Superior Court, pursuant to Fitzgerald's motion under M.R. Civ. P. 54(b)(1), entered an order certifying as a final judgment its decision to grant the City of Bangor's motion in limine, which effectively foreclosed any defense Fitzgerald may have offered to the City's claim of title and resulted in a judgment for the City. This appeal followed.

II. DISCUSSION

[1][2][3] [¶ 10] Fitzgerald argues that the court erred either in determining that a taxpayer may never assert a defense of equitable estoppel against a municipality exercising its taxation authority, or in determining

that the City was, in fact, exercising that authority when its accounts clerk gave Fitzgerald incomplete or inaccurate information.^{FN3} We review the grant of a motion in limine for an abuse of discretion by the trial court. See *Jones v. Route 4 Truck & Auto Repair*, 634 A.2d 1306, 1308 (Me.1993). To have properly exercised its discretion, the Superior Court must have applied the correct law to facts that were not clearly erroneous. See *Hamill v. Liberty*, 1999 ME 32, ¶ 4, 724 A.2d 616. Thus, we must determine whether the court correctly held that the city clerk was acting in the exercise of the City's taxation authority and, if so, whether the court's conclusion that equitable estoppel will not lie against the government in this matter was correct.

^{FN3}. The doctrine of equitable estoppel requires proof that the plaintiff relied upon declarations or acts of the defendant and was thereby induced to do something which he otherwise would not have done. See *Shackford & Gooch, Inc. v. Town of Kennebunk*, 486 A.2d 102, 105-06 (Me.1984).

A. The Clerk's Actions

[¶ 11] In its decision addressing the City's motion in limine, the court held that “[t]he dispensing of information regarding taxes due and the accepting of tax payments by a collections clerk working for the City of Bangor are two duties that serve to further the City's aim of collecting taxes.” We agree. The entire process of collecting taxes, from valuation and assessment of property to the provision of information regarding amounts due and the acceptance of the funds for payment are part of a unitary process intended to assure that the government is carrying out its “paramount function [of taxation] by which it is enabled to exist and function at all.” *Maine School Admin. Dist. No. 15 v. Reynolds*, 413 A.2d 523, 533 (Me.1980). Fitzgerald argues that, by giving him accounting information and taking his money, the clerk was not exercising the City's authority to tax but was simply performing the clerical task of receiving funds on behalf of the City.

[¶ 12] In this context, however, there is no principled basis for recognizing a distinction between the actions of a clerical worker responsible for providing

information relative to the collection of taxes and the actions of an administrator or official responsible for making discretionary decisions concerning the government's tax power. The dissemination of information and receipt of funds are actions as integral to the collection of taxes as are the actions that result in the assessment of the taxes.

[4][5] [¶ 13] The rationale for the rule precluding the assertion of estoppel against *1256 the government in tax cases is to assure that no officer of government has the ability to interfere inadvertently with the government's fundamental sovereign power to tax its citizens. See *A.H. Benoit & Co. v. Johnson*, 160 Me. 201, 207-10, 202 A.2d 1 (1964). This rationale should logically apply to the clerk who supplied Fitzgerald with incorrect information. The foreclosure of a tax lien is a procedure governed by statute, see 36 M.R.S.A. § 943 (1990 & Supp.1998), which cannot be rescinded because of the misstatements of a government employee to the taxpayer. See *Flower v. Town of Phippsburg*, 644 A.2d 1031, 1031 (Me.1994). We therefore decline to treat the more clerical aspects of the government's taxation activities as distinct from its other taxation activities for purposes of examining the taxpayer's ability to assert a defense of equitable estoppel against the government.

B. Application of Equitable Estoppel Against the Government

[6] [¶ 14] The common law prohibition against the assertion of equitable estoppel against the government or its officials has been relaxed in recent decades, and we have held unequivocally that application of equitable estoppel based on the discharge of governmental functions is not completely barred. See *M.S.A.D. No. 15*, 413 A.2d at 533. Nonetheless, the ability of a party to assert an estoppel defense against the government may be limited depending upon the “totality of the circumstances involved, including the nature of the government official or agency whose actions provide the basis for the claim and the governmental function being discharged by that official or agency.” *F.S. Plummer Co. v. Town of Cape Elizabeth*, 612 A.2d 856, 861 (Me.1992) (emphasis added).

[7] [¶ 15] When the governmental function at issue is the discharge of responsibilities regarding taxation,

we have consistently held that estoppel may never be invoked. See *Town of Freeport v. Ring*, 1999 ME 48, ¶ 13, 727 A.2d 901; *Flower*, 644 A.2d at 1031; *A.H. Benoit & Co.*, 160 Me. at 210, 202 A.2d 1; *Dolloff v. Gardiner*, 148 Me. 176, 186-87, 91 A.2d 320 (1952); *Town of Milo v. Milo Water Co.*, 131 Me. 372, 378-79, 163 A. 163 (1932).^{FN4}

FN4. We first announced this rule in 1932, holding that estoppel cannot be raised to challenge the collection of taxes lawfully assessed, because to hold otherwise would impair the fundamental sovereign right of a state to assess and collect taxes. See *Town of Milo*, 131 Me. at 378-79, 163 A. 163. In 1964, we expanded on this rationale, noting with approval cases from other jurisdictions holding that an administrative officer charged with the duty of collecting taxes had neither the power to abrogate the state's sovereign power to tax nor the power to grant an exemption to a taxpayer; thus, estoppel could not lie against the municipality for the administrator's actions. See *A.H. Benoit & Co.*, 160 Me. at 207-10, 202 A.2d 1. This rationale was reaffirmed in 1980 and 1994, when we concluded that the government could not be estopped in tax matters because taxation was "the paramount function of government by which it is enabled to exist and function at all." *M.S.A.D. No. 15*, 413 A.2d at 533, quoted in *Flower*, 644 A.2d at 1031.

¶ 16] Notwithstanding the consistent application of the prohibition in past cases, Fitzgerald urges us to relax the rule. Even if we were to consider a relaxation of the rule, however, we would not do so on the facts presented here.^{FN5}

FN5. Although many states continue to apply the traditional rule that estoppel does not apply to state or local governments in tax matters, see, e.g., *Westminster-Canterbury of Hampton Roads, Inc. v. City of Virginia Beach*, 238 Va. 493, 385 S.E.2d 561, 566-67 (1989), it appears that the trend among state courts is to relax or abandon the rule. See, e.g., *Valencia Energy Co. v. Arizona Dept. of Revenue*, 191 Ariz. 565, 959 P.2d 1256, 1267 (1998) (en banc);

Illinois Comm'l Men's Ass'n v. State Bd. of Equalization, 34 Cal.3d 839, 196 Cal.Rptr. 198, 671 P.2d 349, 359 (1983) (citing *United States Fidelity & Guar. Co. v. State Bd. of Equalization*, 47 Cal.2d 384, 303 P.2d 1034 (1956)); see also Michael A. Rosenhouse, Annotation, *Estoppel of State or Local Government in Tax Matters*, 21 A.L.R.4th 573 (1983).

[8] [¶ 17] Equity will not protect a party who has slept on his rights or failed to act with reasonable diligence. See *Searles v. Bar Harbor Banking & Trust Co.*, 128 Me. 34, 40, 145 A. 391 (1929).^{FN6} Fitzgerald simply did not act with the reasonable diligence necessary for us to consider a change in our longstanding rule that the government cannot*1257 be estopped from exercising its power of taxation. Fitzgerald neither claims that he was misled as to the status of the lien on the Freese's building, nor that he made an attempt to pay the taxes on the Freese's building. Rather, he made a calculated decision to allow the City to foreclose the lien on the Freese's building, and chose instead to wait until the very last minute to pay the taxes on the Dakin's building.

FN6. See also 2 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE §§ 418, 419, 419c at 169-72, 175-77 (5th ed.1941).

¶ 18] Although Fitzgerald correctly asserts that the law allows him to pay the taxes in the last hour of the final day in the period of redemption, if he chooses to delay until that time, he may do so to his detriment. His eleventh hour decision, even if based on misinformation obtained from the city clerk, is not the solid foundation which we would require before considering the application of the doctrine of equitable estoppel in this context. On these facts, we decline to reexamine the rule that equitable estoppel may not be applied against the government when it is acting to discharge its responsibilities regarding taxation.^{FN7}

FN7. The United States Supreme Court's jurisprudence concerning the invocation of estoppel against the federal government in tax cases appears to be consistent. Indeed, the Court has "come close to saying that the government can never be equitably estopped

based on a false or misleading statement of one of its agents no matter how much an individual has relied on that statement to her detriment or how reasonable her reliance.”
2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 13.1 at 229 (3d ed.1994). The rationale for this approach is as follows:

Estopping the government based on the misrepresentations of its agents would have a series of adverse effects. The most immediate result would be a financial loss of some magnitude to the government. If the government began to lose much money as a result of estoppel cases, agencies would respond by limiting severely the availability of information and advice from government employees. That, in turn, would cause extreme harm to the public for four reasons: (1) All citizens need advice concerning a variety of complicated government programs; (2) most of the advice provided by government employees is accurate and helpful; (3) advice from government employees is free; and (4) advice from alternative sources that may be more reliable is often very expensive.

Id. § 13.1 at 230.

[¶ 19] Fitzgerald may not, therefore, invoke equitable estoppel to challenge the City of Bangor's claim of title to the Freese's Building through foreclosure of its tax lien. The Superior Court properly applied the correct law to the facts and did not exceed the bounds of its discretion in granting the City's motion in limine.

The entry is

Judgment affirmed.

Me., 1999.

Fitzgerald v. City of Bangor
726 A.2d 1253, 1999 ME 50

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COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

LISA GATES

Respondent

vs.

PORT OF KALAMA, a Washington Municipal Corporation, *et al*

Appellant

**APPELLANT PORT OF KALAMA'S PROOF OF SERVICE
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I , Elizabeth C. Thompson, counsel for Petitioner Port of Kalama, hereby certify that on September 23, 2008, a copy of the Brief of Appellant was forwarded via overnight mail, to be delivered no later than September 25, 2008, to Plaintiff's counsel and to counsel for Lam Management at the address below:

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DATED this 23rd day of September, 2008.

Respectfully submitted,

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