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COURT OF APPEALS
DIVISION II

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No. 40828-7-II

STATE OF WASHINGTON
BY 
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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

JODY BROWN and JERI BROWN,

Respondents,

v.

NORTH THURSTON SCHOOL DISTRICT,

Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. The Browns Failed To Strictly Comply With RCW 4.96.

The undisputed evidence establishes that the Browns failed to strictly comply with the procedural requirements of the notice of claim statute, RCW 4.96, as they failed to properly serve a notice of claim upon the District's registered agent, the District's superintendent, but instead served the District's confidential secretary. As a result, the superior court's decision, upholding the Browns' failure to comply, should be reversed because it is in direct conflict with Washington precedent requiring strict compliance with the procedural filing requirements of the notice of claim statute, RCW 4.96. *Medina v. Pub. Util. Dist. No. 1*, 147 Wn.2d 303, 316, 53 P.3d 993 (2002); *see also, Hintz v. Kitsap County*, 92 Wn. App. 10, 14, 960 P.2d 946 (1998). Washington courts have consistently held that a failure to strictly comply with the claim filing requirements results in dismissal of the action. *Sievers v. City of Mountlake Terrace*, 97 Wn. App. 181, 183, 983 P.2d 1127 (1999). Furthermore, Washington courts have held that serving the governmental entity's designated agent is a filing requirement and failure to do so requires dismissal. *Kleyer v. Harborview Med. Ctr. of Univ. of Wash.*, 76 Wn. App. 542, 548-549, 887 P.2d 468 (1995); *Burnett v. Tacoma City*

Light, 124 Wn. App. 550, 558-559, 104 P.3d 1241 677 (2005). Dismissal of the Browns' claims was therefore required and the superior court's decision, excusing the Browns' failure to strictly comply, should be reversed.

The Browns' service of the incorrect person is also at odds with the plain language of the statute and well-settled Washington precedent. The plain language of RCW 4.96.020 requires service of the notice of claim only upon the governmental entity's designated agent:

...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...

RCW 4.96.020(2) (emphasis added). When interpreting and applying this statutory language, Washington courts have repeatedly held that service of the incorrect person or someone other than the designated agent requires dismissal. *Harberd v. City of Kettle Falls*, 120 Wn. App. 498, 513, 84 P.3d 1241 (2004) (court upheld dismissal because plaintiff served the mayor's secretary rather than the city clerk/treasurer); *Burnett*, 124 Wn. App. at 559-60 (court upheld dismissal of the plaintiffs' suit because they served the Tacoma City Attorney's Office and the Tacoma Public Utilities Department instead of the city clerk's office). The Browns' failure to properly serve the notice of claim upon the designated agent is

in direct conflict with the plain language of the statute and the above cited precedent. Thus, the superior court's denial of the District's motion for summary judgment was in error and the Browns' claims should be dismissed.

B. The Superior Court's Decision Is In Direct Conflict With Washington Precedent And The Common Law Principle Of Estoppel.

The superior court's decision should also be reversed because it is in direct conflict with well-settled Washington case law holding that plaintiffs and their attorneys bear the sole burden for ensuring their compliance with the notice of claim statute. If permitted to stand, the superior court's decision would shift this burden to local governmental entities to ensure a plaintiff's compliance with RCW 4.96. However, such a result flies in the face of the common law principle of estoppel requiring that a plaintiff's detrimental reliance in such a scenario must be justifiable. *Davidheiser v. Pierce County*, 92 Wn. App. 146, 153, 960 P.2d 998 (1998), (citing, *Kramarevcky v. Dept. of Social and Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993), (quoting, *Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d 78, 81, 530 P.2d 298 (1975))) (Equitable estoppel is based upon the principle that “ ‘a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good

faith relied thereon.’ ”). Furthermore, the party asserting estoppel must show both lack of knowledge of the facts and the absence of any convenient and available means of acquiring such knowledge. *Id.* The Browns are unable to satisfy these elements, as there is absolutely no question that the identity of the District’s registered agent was available in a public record on file with the county auditor. CP 31. Thus, the Browns and their attorneys had a convenient and available means of acquiring the information and any claimed reliance was not justifiable.

As noted in the District’s opening brief, Washington courts have specifically held that estoppel is inappropriate in cases identical to this case where the plaintiff claims to have relied upon statements or actions of government employees in attempting to determine who to serve a notice of claim upon. *King ex. rel. King v. Snohomish County*, 105 Wn. App. 857, 21 P.3d 1151, *review granted*, 145 Wn.2d 1001, 35 P.3d 380, *reversed*, 146 Wn.2d 420, 47 P.3d 563 (2001) (County was not equitably estopped from raising claim that parents failed to file claim with clerk of council in connection with minor’s injury, even if actions by county officials could have been construed as a recommendation not to file the claim with the clerk of the council, as the county code was explicit that claims against the county “shall be filed with the clerk of the council.”); *see also; Renner v. City of Marysville*, 145 Wn. App. 443, 187 P.3d 283 (2008) (City did not

waive right to assert claim filing defense; while claim filing form provided by city was arguably misleading, employee was under no obligation to use it and equally as able as the city to read the statute). These cases are identical to the situation at hand and in direct conflict with the superior court's decision.

In their response brief, the Browns failed to offer any arguments or legal authority in rebuttal to the above cited case law. Instead, the Browns simply ignored this precedent and continued to insist that the District had waived its right to assert the notice of claim defense because the District's risk manager allegedly advised the Browns' attorney to serve the incorrect person. However, the Browns' continued attempt to hold the District responsible for their error is without merit. In light of the above cited case law, there is no question that the Browns' attorneys were solely responsible for reading, interpreting and properly ensuring compliance with the notice of claim statute. The superior court's decision holding otherwise is in direct conflict with the above cited case law and principle of estoppel. As a result, the superior court's decision should be reversed and the Browns' claims dismissed.

C. Estoppel, Not Waiver, Is The Applicable Legal Principle.

The Browns repeatedly insisted in their briefing before the superior court, and continue to claim in their appellate briefing, that the District

waived the right to assert the notice of claim defense. Respondents' Brief, p. 7. However, waiver is incorrectly applied in this case. Instead, the applicable legal principle in this matter is estoppel. The terms while somewhat related and sharing similarities are not interchangeable and the distinction is significant in this matter.

The appropriate legal principle is estoppel because the Browns are claiming that the District's previous statements, specifically the alleged statements of the District's risk manager advising them to serve the District's confidential secretary, are inconsistent with the District's present defense that the notice of claim should have been served upon the District Superintendent. Furthermore, the Browns assert that they relied upon the statement of Tom Nelson to their detriment. Thus, estoppel is obviously the applicable principle, as it requires: 1) a statement inconsistent with the claim later asserted; and 2) reasonable reliance or action by the party to whom the statement was made, to his detriment. *Public Utility Dist. No. 1 v. Washington Public Power Supply System*, 104 Wn.2d 353, 365, 705 P.2d 1195 (1985). While the District does not believe the Browns are able to satisfy the elements of estoppel because reliance was not justifiable, there is nevertheless no question that estoppel is the appropriate legal principle to apply when analyzing the Browns' claims.

In contrast, waiver is defined as an “intentional relinquishment of a known right” and requires “unequivocal acts or conduct evincing an intent to waive.” *Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980). Intent will not be inferred from doubtful or ambiguous facts. *Id.* In addition, the person against whom waiver is claimed must have intended to permanently relinquish the right, and his or her conduct must be inconsistent with any other intent. *Bill McCurley Chevrolet, Inc. v. Rutz*, 61 Wn. App. 53, 57, 808 P.2d 1167 (1991). The Browns have failed to offer any case law or legal authority establishing that waiver is applicable in this matter. Furthermore, the undisputed evidence leaves no doubt that this is not a question of waiver, but one of estoppel, as the Browns’ claim of waiver is actually based upon alleged inconsistent statements not an “unequivocal act or conduct evincing an intent to waive.” *Wagner*, 95 Wn.2d at 102.

Regardless, even if waiver were applied in the analysis of this matter, the Browns have failed to even set forth, let alone satisfy, the elements of waiver. There in fact exists no evidence of an unequivocal act or conduct on the part of the District to relinquish the notice of claim defense requiring service of the designated agent. Even viewed in a light most favorable to the Browns, the alleged statements of the District’s risk manager are insufficient to establish an unequivocal relinquishment of the

District's Resolution #602, designating the District's superintendent as the District's agent to receive notice of claims. CP 31.

The document in question was clearly enacted by the entire District School Board while in session. CP 31. As such, there is no question that some action by the District's school board would be required to revoke or change Resolution #602. The Browns fail to provide any evidence or legal authority that Tom Nelson, the District's risk manager at the time of these events, was authorized or able to unilaterally revoke Resolution #602.¹ Thus, the Browns' claim that the District waived its right to assert the notice of claim defense is without merit and the superior court's decision should be reversed.

D. The Browns' Claim That The District Failed To Comply With The Notice Of Claim Statute Is Without Merit.

The Browns have repeatedly asserted that the District somehow waived its right to raise the notice of claim defense because it failed to comply with the statutory requirements of RCW 4.96. The statutory

¹ The Browns' claim that Tom Nelson was on the school board at the time Resolution #602 was enacted is correct. However, Tom Nelson was no longer a District school board member on September 20, 2008 when he allegedly provided legal advice to the Browns' attorney, but was instead serving as the District's risk manager at that time. Nelson served on the District's school board from January of 1994 to December of 2002. He then began working for the District as its risk manager in January of 2006. Thus, the Browns' claim that Tom Nelson was acting as a school board member when he allegedly advised the Browns' attorney is incorrect. Regardless, even if Tom Nelson were still a school board member the Browns' offer no evidence or legal authority to establish that he could unilaterally revoke the District School Board's resolution designating an agent to receive claims.

requirements applicable to the District in this matter are set forth in the following subsection of RCW 4.96:

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.

RCW 4.96.020(2) (emphasis added). The statutory language establishes that the only affirmative obligations placed upon the District are the following: 1) designate an agent to receive notice of claims; and 2) record that designation with the county auditor. As a result, the Browns' claim would arguably be true had the District actually failed to designate an agent to receive notice of claims or failed to record that designation with the county auditor. However, the undisputed evidence establishes that the District complied with the notice of claim statute and properly designated the District's superintendent as the agent to receive notice of claims. CP 31.

The Browns fail to offer any evidence contradicting these facts or establishing that the District failed to comply with the statute. Instead, the Browns weakly claim that misinformation allegedly provided by the District's Risk Manager somehow constituted a failure to comply with the statute. However, the Browns fail to offer any evidence or legal authority in support of this theory. Furthermore, the Browns' claim is contradicted by Washington case law specifically holding that local governmental entities have no other affirmative obligations under RCW 4.96. *Pirtle v. Spokane Public Schools Dist. 81*, 83 Wn. App. 304, 310, 921 P.2d 1084 (1996) ("The District had no affirmative obligations under the statute and was not required to make sure Ms. Pirtle complied with the filing requirements."). Thus, the Browns' claim that the District failed to comply with the notice of claim statute and thereby waived the notice of claim defense fails and the superior court's decision should be reversed.

E. The Browns' Claim That Service On The Incorrect Person At The Correct Address Was Sufficient Is Without Merit.

The Browns' claim that service on the incorrect person was sufficient because that person was located at the same address as the District's designated agent is without merit. Despite their unsupported claims to the contrary, the undisputed evidence establishes that the Brown's attorney served the incorrect person, Carmen Barriga, the

District's Confidential Secretary rather than the District's designated agent. CP 26. The Browns' feeble claim that such details are unimportant is contradicted by the plain language of the statute and Washington case law.

The plain language of the notice of claim statute specifically requires that notice of claims "shall be presented to the agent," not the District's main address or even the address of the person designated to receive notice of claims. RCW 4.96.010(1). A careful examination of the evidence establishes that the Browns failed to comply with this statutory language. CP 26. Rather than present a notice of claim to the District's agent, the Browns served a notice of claim on Carmen Barriga, the District's confidential secretary, rather than the District's designated agent. CP 26. Despite the Browns' attempt to twist or ignore the statutory language and the undisputed evidence, there can be no doubt that they failed to satisfy the statutory requirement and served the incorrect person.

Well-settled Washington case law directly contradicts the Browns' claim that service on the wrong person at the correct address is sufficient. Washington courts have consistently held that service of the incorrect person, even at the same office or governmental entity, is insufficient and requires dismissal. *Harberd*, 120 Wn. App. at 513 (court upheld dismissal because plaintiff served the mayor's secretary rather than the city

clerk/treasurer); *Burnett*, 124 Wn. App. at 559-60, 104 P.3d 677 (2005) (court upheld dismissal of the plaintiffs' suit because they served the Tacoma City Attorney's Office and Tacoma Public Utilities Department instead of the city clerk's office). This Washington case law, especially when viewed in combination with the plain language of RCW 4.96, establishes that service on the incorrect person in this case was unacceptable, despite the Browns' unsupported claim that the address on the form is tantamount. In fact, Washington courts have gone so far as to "have rejected similar arguments, even when officials knew of the claim." *Burnett*, 124 Wn. App. at 682, (citing, *Kleyer*, 76 Wn. App. 542). Thus, the Browns' claim that they complied with the notice of claim statute fails and the superior court's decision should be reversed.

F. The Brown's Claims Of Injustice And Allegations That The District Is Attempting To Misuse RCW 4.96 Are Contrary to Washington Case Law.

The Browns' argument that reversal of the superior court's decision would result in an injustice or misuse of the notice of claim statute is unsupported by the evidence and contrary to Washington precedent requiring strict compliance with the procedural requirements of RCW 4.96. The evidence before the Court fails to support the Browns' allegations of "fraud and misrepresentation." In fact, at best, the evidence viewed in a light most favorable to the Browns establishes that a District

employee mistakenly provided incorrect information to the Browns' attorney. Furthermore, it is striking that the Browns repeatedly fail to recognize their own failings or the failing of their own counsel to ensure their compliance with the notice of claim statute. That failure should not be ignored in the Court's analysis of this alleged injustice or when allocating blame for the Browns' failure to comply with RCW 4.96, as evidenced by the case law relating to estoppel cited above.

Despite the Browns' claim that injustice will result, there is no question that the Washington case law requires strict compliance with the notice of claim statute even if a "harsh and technical" result occurs. *Shannon v. Department of Corrections*, 110 Wn. App. 366, 369, 40 P.3d 1200 (2002), quoting, *Levy v. State*, 91 Wn. App. 934, 942 P.2d 1272 (1998). The Browns' attempt to twist and/or ignore this case law fails, as Washington courts have consistently dismissed claims for failure to strictly comply with the notice of claim statute in cases involving factual scenarios nearly identical to the one at hand. *King ex. rel. King*, 105 Wn. App. 857; see also; *Renner*, 145 Wn. App. 443. The dismissal of the claims in each of these cases was no doubt just as significant to the plaintiffs involved and no doubt seemed "harsh and technical." Nevertheless, strict compliance was required in those cases and should be required in this case as well. The superior court's decision is plainly at

odds with this case law and should be reversed, despite the Browns' baseless claims of "fraud and misrepresentation."

G. *Davidheiser And Landreville Are Applicable And Consistent With The Other Cited Case Law Establishing That Estoppel Is Inapplicable To The Case At Hand.*

The Browns' attempt to distinguish the *Davidheiser*, 92 Wn. App. 146, and *Landreville v. Shoreline Comm. College Dist. No. 7*, 53 Wn. App. 330, 766 P.2d 296 (1986), cases completely misses the point of the District's briefing as they raise only minor distinctions and continue to ignore the other case law cited in the District's briefing. First, while the Browns are correct in noting that these cases involve service of a summons and complaint rather than a notice of claim there is still no question that each case serves to establish the District's point that estoppel is inappropriate in a scenario such as this where a plaintiff is attempting to rely upon the local governmental entity for instruction and legal advice.

Second, the Browns' attempt to distinguish these cases because they involve low level employees, as opposed to a board member, is without merit. Respondent's Brief, p. 12. It is telling that the Browns offer no legal authority in support of this distinction, as none exists. Furthermore, the Browns' distinction is unsupported by the facts and actually erroneous. As noted previously, Tom Nelson did serve on the District's school board in 2001 when the District enacted Resolution # 602

appointing the District Superintendent as the agent to receive claims. However, Tom Nelson was no longer a member of the school board in 2008 and instead served as an employee of the District in the role of risk manager, a role he continues to serve in at this time.

Lastly, the Browns' attempt to distinguish the *Davidheiser* and *Landreville* cases fails because the Browns' analysis ignores those cases in which Washington courts have specifically applied the same principles as those referenced in *Davidheiser* and *Landreville* to situations involving a plaintiff's failure to comply with the notice of claim statute. *King ex. rel. King*, 105 Wn. App. 857; see also; *Renner*, 145 Wn. App. 443. When viewed in combination with the *King ex. rel. King* and *Renner* cases, there can be no doubt that the *Davidheiser* and *Landreville* cases provide guidance to the Court regarding the application of the principle of estoppel, even if they address the issue of service of process of a summons and complaint rather than service of a notice of claim. Despite the Browns' unsupported claims otherwise, the legal principle of estoppel is the same whether it is applied in regards to the service of process of a notice of claim or a summons and complaint. Thus, the Browns' attempt to distinguish the *Davidheiser* and *Landreville* cases fails and the superior court's decision should be reversed.

II. CONCLUSION

The District respectfully requests that the Court of Appeals reverse the superior court's decision and dismiss the Browns' claims in their entirety. The undisputed evidence establishes that the Browns failed to comply with the notice of claim statute. Furthermore, the Browns' claims of waiver, or more properly estoppel, are without merit and contrary to well-settled Washington precedent. Ultimately, Washington case law and the plain language of RCW 4.96 are clear in placing the sole responsibility for the Browns' compliance with RCW 4.96 upon the Browns and their attorneys. The failure of the Browns' attorneys to properly read, interpret and comply with the notice of claim statute is not the fault of the District or its employees, despite the Browns' unsupported assertions to the contrary. Allowing the superior court's decision to stand would incorrectly shift the burden of ensuring a plaintiff's compliance with the notice of claim statute to local governmental entities and their employees. Such a result is obviously contrary to the statutory framework of RCW 4.96 and Washington precedential authority. Thus, the Court of Appeals should rectify this error and reverse the superior court's decision thereby dismissing the Browns' claims in their entirety.

Dated this 13th day of January 2011.

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I, Barbara Fairleigh, certify under penalty of perjury under the laws of the State of Washington that I caused the following documents:

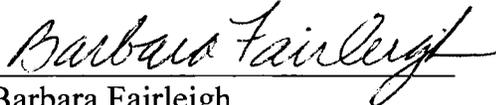
1. Appellant's Reply Brief; and
2. Declaration of Service.

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COURT OF APPEALS
DIVISION II

DATED at Mercer Island, Washington this 14th day of January, 2011.


Barbara Fairleigh