

No. 40828-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

JODY BROWN and JERI BROWN,

Respondents,

v.

NORTH THURSTON SCHOOL DISTRICT,

Appellant.

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STATE OF WASHINGTON
BY  COUNTY CLERK

COURT OF APPEALS
DIVISION II

RESPONDENTS' OPENING BRIEF

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I. INTRODUCTION

Appellant seeks review by the Washington State Court of Appeals Division II of the Order Denying Defendant's Motion for Summary Judgment (CP 144) entered on May 4, 2010, and the Order Denying Defendant's Motion for Reconsideration (CP 146) entered on May 20, 2010, before the Honorable Richard Hicks, Thurston County Superior Court Cause Number 09-2-02478-0.

Judge Hicks correctly denied Appellant's motions and found that service upon Appellant was proper when all facts were taken into account, including the fact that: (1) Appellant **instructed** Respondent to serve Respondent's Notice of Tort Claim upon Carmen Barriga and, therefore, it would be manifest injustice to permit Appellant to escape liability based upon its own misrepresentation, (2) Appellant's Notice of Tort Claim **strictly complied** with RCW 4.96 by serving the office of the District's Superintendent, and (3) the Washington Supreme Court has ruled that the primary purpose of RCW 4.96 is to allow the government time to investigate and to encourage settlement between the parties—both of which were provided to Appellant in this case.

II. ASSIGNMENTS OF ERROR

Did the trial court commit error in holding that Appellant was

properly served when (1) Appellant instructed Respondents' counsel to name Carmen Barriga on the Notice of Tort Claim, (2) Respondents complied with RCW 4.96 by serving the Office of the District's Superintendent at the correct address more than 60 days prior to filing suit, and (3) the Washington Supreme Court has ruled that the primary purpose of chapter 4.96 RCW is to allow the government time to investigate and to encourage settlement between the parties—all of which were provided to Appellant?

III. STATEMENT OF THE CASE

A. Statement of Facts.

On October 27, 2006, Respondents' daughter suffered permanent disability to her hand while attending science class at Timberline High School when a chemistry beaker shattered in her hand, thereby severing four tendons, two arteries, and several nerves. CP 4-7. Respondents' daughter was engaged in an experiment at the time of the incident, and was following directions when the beaker shattered. *Id.* Unfortunately, her hand lost much of its function as a result of her injuries, thereby leaving Respondents' daughter partially disabled for the rest of her life. *Id.*

In compliance with RCW 4.24.010, Respondents served a Notice of Tort Claim upon North Thurston Public Schools more than 60 days prior to filing suit. CP 44-47. The Notice of Tort Claim was served upon the

following address pursuant to Resolution No. 602. CP 49.

North Thurston Public Schools
305 College Street NE
Lacey, WA 98516

Immediately prior to service, Tom Nelson from North Thurston Public Schools contacted Respondents' counsel and instructed them to serve Carmen Barriga with the Notice of Tort Claim at the address listed above. *See Declaration of Matt Brown*, CP 51-52. Tom Nelson is a high-level employee of North Thurston Public Schools, and one of the Board Members who signed Resolution No. 602 (the document that appoints an agent for service of process). CP 49. Resolution No. 602 only appoints the agent by title, it does not appoint anyone by name. *Id.*

The conversation with Tom Nelson was noted in the firm's computer system by a paralegal, Matt Brown, who specifically made note of Tom Nelson's directions to serve Carmen Barriga with the Notice of Tort Claim. CP 54. The computer also placed a time/date stamp on these notes. *Id.* Respondents' counsel then served the Notice of Tort Claim upon Carmen Barriga at the address listed on Resolution No. 602 as directed by Tom Nelson. Respondents' counsel acted in reliance upon the express directions of Tom Nelson when doing so.

It should be noted for the record that the School District has not

denied instructing Respondent's counsel to serve Carmen Barriga, and Appellant's counsel informed this Court during oral argument that the School District is not disputing this fact on appeal.

After this case was filed in superior court and the statute of limitations for service had lapsed, Appellant then brought a motion for summary judgment seeking full dismissal of this action solely on the theory that Respondents named the wrong person on the Notice of Tort Claim. CP 14. Appellant failed to alleged prejudice or any timeliness issues in its motion, which would have been inappropriate because Appellant received the Notice of Tort Claim more than 60 days before this suit was filed, and because Appellant received the Notice of Tort Claim at the address specified in Resolution No. 602 (the Office of the District's Superintendent). CP 44-49.

Accordingly, the sum of Appellant's argument is that Respondents' claim should be dismissed in its entirety because Respondents placed Carmen Barriga's name on the Notice of Tort Claim, rather than the District Superintendent's name, even though the Notice of Tort Claim was served upon the Office of the District Superintendent and even though Appellant **expressly instructed** Respondents to name Carmen Barriga on the Notice of Tort Claim. Appellant's attempt to create a hyper-technicality in this fashion is inappropriate at best, and raises the very real specter of intentional

misrepresentation at its worst, considering Appellant instructed Respondents' counsel to serve the Notice of Tort Claim in this manner. CP 51-52.

Furthermore, Appellant's arguments are without merit because Respondents complied with chapter 4.96 RCW when serving the office of the District's Superintendent. Also, under the standards set forth by the Washington Supreme Court, Respondents' service fulfilled the purpose of the statute, which is intended to provide a government entity time to investigate, respond and settle a tort claim. Therefore, the superior court acted properly in denying Appellant's motion. Accordingly, the Washington State Court of Appeals Division II should rule in favor of Respondent and find that the Superior Court acted properly when denying Appellant's motion.

B. Procedural History.

On October 16, 2009, the Browns (Respondents) filed this lawsuit in Thurston County District Court seeking damages related to their daughter's permanent injuries and disfigurement that occurred during a high school chemistry class. CP 4-7. On November 4, 2009, the North Thurston School District (Appellant) filed its Answer. CP 8-12.

On January 15, 2010, the School District filed its Motion for Summary Judgment (CP 14-19) asking the Trial Court to completely dismiss this case based on an incorrect reading of RCW 4.96 and the School District's

own misleading behavior. In its motion, the School District argued that the Browns are not entitled to their day in Court because even though the District's employee—who is a signatory to Resolution 602—told them to serve Carmen Barriga at the correct address, Ms. Barriga was not the right person. *Id.* In sum, the District not only argued that it is acceptable for its high-level employees to engage in deceptive acts, but that the District should be rewarded for its behavior by having the Brown's claim dismissed after the statute of limitations has expired.

On May 4, 2010, the superior court heard oral argument and rejected the School District's arguments in their entirety. CP 144. On May 20, 2010, the superior court denied the School District's motion for reconsideration and entered an order certifying this matter for appeal pursuant to RAP 2.3(b)(4). CP 101-102. The School District filed a notice of discretionary review with the superior court on June 4, 2010. CP 141-147.

IV. ARGUMENT

A. The standard of review for summary judgment orders.

The standard of review for the denial of a summary judgment order is *de novo*, and the appellate court performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). When reviewing a summary judgment order, the Court of Appeals only

considers the evidence and issues raised below. *Douglas v. Jepson*, 88 Wn. App. 342, 945 P.2d 244 (1997), *rev. denied*, 134 Wn.2d 1026, 958 P.2d 313 (1998).

Issues regarding statutory interpretation are issues of law to be determined *de novo* by an appellate court. *Sheehan v. Central Puget Sound Regional Transis Authority*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005). Summary judgment is appropriate when there is no issue of material fact and the moving party is entitled to judgment as a matter of law. *CR 56; Mutual of Enumclaw Ins. Co. v. Jerome*, 122 Wn.2d 157, 160, 856 P.2d 1095 (1993).

B. The District waived its right to improper service as an affirmative defense when it instructed the Brown family to serve Carmen Barriga.

It is well-established, black letter law that a defendant can authorize alternative forms of service of process. *See e.g., Thayer v. Edmonds*, 8 Wash. App. 36, 41-42 (1972) (“We can discern no reason of public policy why a defendant should not be able to authorize delivery in a manner not enumerated in the statute.”). In the instant case, the District contacted the Browns’ counsel and directed them to serve Carmen Barriga with the Notice of Tort Claim. CP 51-54. The Browns’ counsel did so in good faith reliance upon the District’s directions. Simply stated, the District waived any affirmative defense regarding this issue when it issued these instructions, and it would be **manifest injustice** to allow the District to agree to service in one

way only then to change its mind after service has taken place and the statute of limitations has run. The District's actions are untenable at a minimum, and, respectfully, raise potential issues of fraud and misrepresentation. Therefore, the District's appeal should be denied.

C. RCW 4.96.010 expressly bars the District from raising improper service as a defense in this case because it failed to comply with the statute.

As the District pointed out in its motion for summary judgment, RCW 4.96.010(1) states in pertinent part the following:

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 ... 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.** [Emphasis added.]

In the instant case, the District failed to comply with the statute that requires service upon a *recorded agent* when it instructed the Brown's counsel to serve Carmen Barriga instead. Accordingly, under the same statute, the District cannot raise a defense under chapter 4.96 in its entirety—including its affirmative defense of improper service per RCW 4.96 for placing Carmen Barriga's name of the Notice of Tort Claim. Therefore, the District's appeal

should be denied for this reason as well.

D. A careful reading of 4.96.010 indicates that the Browns complied with the statute when presenting a Notice of Tort Claim to the Office of the District's Superintendent.

The District argues that the Browns did not comply with RCW 4.96.010 because Carmen Barriga was named on the Notice of Tort Claim rather than the District's Superintendent. However, it is undisputed that the Browns served the address listed on Resolution No. 602, and it is undisputed that this address is the correct address for the District's Superintendent who is named (by title) in Resolution No. 602 as the agent for North Thurston Public Schools. CP 44-54. In other words, the Browns served the correct address with a valid Notice of Tort Claim.

The District is simply arguing that it does not count because it had Carmen Barriga's name on it rather than the name of the District Superintendent. The District relies entirely upon the language in RCW 4.96.010 when making its argument. However, a careful reading of RCW 4.96.010 shows that the statute only requires a Notice of Tort Claim to be "presented to the agent," which was accomplished when the Notice of Tort Claim was served upon the District Superintendent's office. Moreover, the statute most certainly does not say that the Browns cannot name someone else on the Notice of Tort Claim when directed to do so by the very person who

appoints the agent. *Id.* Therefore, for these reasons as well, the District's appeal should be denied.

E. The District seeks to misuse the purpose of RCW 4.96 – The Washington Supreme Court ruled that RCW 4.96 exists primarily to allow the government to conduct an investigation and settle the claim, not as an escape clause to promote misrepresentation to avoid liability.

In its motion, the District relies significantly upon *Medina v. Pub. Util. Dist. No. 1*, 147 Wn.2d 303, 316 (2002) and the standards set forth therein by the Washington Supreme Court. However, the Court specifically addressed chapter 4.96 RCW as follows:

While we recognize that the statute sets forth a substantial compliance standard for the content of a claim, we must apply the Legislature's liberal construction directive in a manner that promotes the purpose of the claim filing statutes. It is generally accepted that one of the purposes of the claim filing provisions is to allow governmental entities time to investigate, evaluate, and settle claims. *See e.g., Daggs v. City of Seattle*, 110 Wn.2d 49, 57 (1988); *Williams v. State*, 76 Wash. App. 237, 248 (1994).

...

As was mentioned earlier, the state interest reflected in chapter 4.96 RCW is to encourage negotiation and settlement of claims against the government. *Hall*, 97 Wn.2d at 582.

It should be noted that the internal citations above refer to lawsuits that were filed without first serving a Notice of Tort Claim. In the instant case, the District received a Notice of Tort Claim, and had more than a year to investigate, negotiate and settle this claim. CP 44-47. Accordingly, the

Browns complied with the intent and purpose of chapter 4.96 RCW under the standards set forth by the Washington Supreme Court.

Furthermore, the District relies on *Shannon v. Dept. of Corrections*, 110 Wash. App. 366, 369 (2002) and *Levy v. State*, 91 Wash. App. 934, 942 (1998) for its position that the filing requirements of chapter 4.96 RCW are strictly interpreted even if the result is “harsh and technical.” However, both cases involved litigants who failed to sign their Notice of Tort Claim when the statute expressly required them to do so. More importantly, the District left out the most important part of the quotation in its motion for summary judgment: “**While the filing requirements are not so rigid as to demand unjust results**, compliance is mandatory even if the requirements seem ‘harsh and technical.’” See *Shannon*, 110 Wash. App. at 369, quoting *Levy*, 91 Wash. App. at 934.

In the instant case, incorrectly twisting the service statutes to support the District’s position will result in manifest injustice to the Brown family, especially since the District instructed the Browns’ counsel to place Carmen Barriga’s name on the Notice of Tort Claim and then waited until **after** the expiration of the statute of limitations to raise these issues.

F. *Davidheiser and Landreville are not on point and do not apply to the facts in this case.*

In *Davidheiser v. Pierce County*, 92 Wn.App. 146, 153-54, 960 P.2d

998 (1998), the Court held that a series of events resulted in improper service of a Summons and Complaint, including the fact that plaintiff knew it had served the wrong person and failed to re-serve even though there was time to act before the statute of limitations ran. The Court also held that an unidentified employee who stated she could accept service was not sufficient to trigger equitable estoppel.

In *Landreville v. Shoreline Comm. College Dist. No. 7*, 53 Wn. App. 330, 332, 766 P.2d 296 (1986), the Court held that it was improper to rely upon an administrative assistant who said she had authority to accept service. Both of these cases involved low-level employees (one unidentified) who were claiming they could accept service on behalf of someone else. In both cases, plaintiffs came to them and left process with them for the other person so named in the documents. Accordingly, the Court said that reliance was not justified.

In the instant case, the very person who appoints the agent for service of process contacted the Brown's attorney and instructed them to serve Carmen Barriage instead of someone else. CP 49-54. This very high level Board Member is nothing like an unidentified secretary accepting service on someone else's behalf. To the contrary, the Board Member clearly had the highest level of authority and directed the Brown family to serve Carmen

Barriga instead of whoever was previously named (by title only) in the Resolution. By doing so, the District waived its right to service upon someone other than Carmen Barriga. Moreover, by doing so, the Board Member as the highest appointing authority also misrepresented who should be served. Furthermore, the District then waited until after the statute of limitations expired to raise this issue. It should also be noted that the two above cases deal with service of a Summons and Complaint, which are bound by different case law and rules than a Notice of Tort Claim. *See Section E, supra, discussing the Washington Supreme Court's Reasons and Standards for Notice of Tort Claims under RCW 4.96.*

Under the circumstances, these two cases cited by the District do not apply, and the Court should deny the District's motion because the superior court did not misapply Washington case law. To the contrary, the superior court correctly upheld Washington case law and dismissed the District's unfair position that misrepresentation should be permissible as a way to insulate itself from tort claims.

V. CONCLUSION

The Court should deny the District's appeal for the reasons set forth above. The District's own Board Member, employee, and person who appoints the agent for service of process expressly instructed the Brown

family to serve Carmen Barriaga with the Notice of Tort Claim. CP 44-54. This is uncontested by the District. CP 14-19. The District's characterization of this Board Member as a "lay person" is without merit, and the District's attempt to finesse Washington case law to allow government entities to engage in fraud and misrepresentation should be categorically denied.

DATED: December 13, 2010

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury of the laws of the State of Washington that on the date stated below I caused to be served the foregoing document titled Respondent's Opening Brief and this Declaration of Service upon:

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DEPUTY

DATED: December 15th, 2010, at Olympia, Washington.



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