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COURT OF APPEALS  
DIVISION II

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No 41915-7-II

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

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M. GWYN MYLES, individually and as Personal Representative of the  
Estate of WILLIAM LLOYD MYLES, deceased.

Appellant,

STATE OF WASHINGTON, a governmental entity; JOHN DOE  
EMPLOYEE(s) and JANE DOE EMPLOYEE(s), employees of the  
STATE OF WASHINGTON; CLARK COUNTY; a municipality; JOHN  
DOE EMPLOYEE(s) and JANE DOE EMPLOYEE(s), employees of  
CLARK COUNTY; CARLOS VILLANUEVA-VILLA and JANE DOE  
VILLANUEVA-VILLA, husband and wife, and the marital community  
composed thereof; and R.H. BRUSSEAU and JANE DOE BRUSSEAU,  
husband and wife, and the marital community composed thereof,

Respondents.

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APPEAL FROM SUPERIOR COURT OF CLARK COUNTY  
HONORABLE RICHARD MELNICK  
CLARK COUNTY CAUSE NO. 09-2-00347-9

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REPLY BRIEF OF APPELLANT

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RONALD W. GREENEN, WSB#6334  
Attorneys for Appellant  
GREENEN & GREENEN, PLLC  
1104 Main Street, Suite 400  
Vancouver, WA 98660  
Telephone: (360) 694-1571

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## **I. INTRODUCTION**

Plaintiff reasserts her request that the appellate court reverse the trial court's order granting Defendant's Motion for Summary Judgment on the basis that (a) the claim-filing notice requirements violate the separation of powers doctrine thus making them unconstitutional, (b) the 2009 Legislative amendments to RCW 4.96 are retroactive, (c) Defendant waived its right to assert the defense that Plaintiff failed to comply with the claim-filing provisions, (d) Defendant is equitably estopped from asserting the defense that Plaintiff failed to comply with the claim-filing provisions, (e) equitable tolling applies in this case and Plaintiff should be given additional time to cure any alleged defect in her claim-filing with Defendant, and (e) award attorney's fees and costs to Defendant under RAP 18.1.

## **II. APPELLANT'S POSITION**

### **A. Facts of the Case**

In Defendant's statement of facts, it states that the letter sent to Plaintiff on November 5, 2008, that acknowledged receipt of her tort claim, was inadvertently sent; however, the declaration of Mark Wilsdon does not state this. (CP 19) Rather the declaration states that "[o]n November 5, 2008, another letter was automatically generated by our (Defendant's) claim management system acknowledging the receipt of the

claim and indicating a response would be forthcoming.” (CP 19) There is nothing in the declaration of Mr. Wilsdon that states this letter was inadvertently sent. Further, there is nothing in the declaration that Plaintiff’s claim was handled any differently than any other claim.

**1. The trial court erred by granting Defendant’s Motion for Summary Judgment because the claim-filing procedures of RCW 4.96 violate the separation of powers doctrine and is therefore unconstitutional.**

The crux of Defendant’s argument that RCW 4.96.020 is not unconstitutional is based on the assertion that the pre-suit claim filing procedures are an appropriate exercise of the legislature’s authority. While generally speaking this assertion is correct, the legislature is not exempt from the separation of powers doctrine. As noted in Defendant’s brief, the separation of powers doctrine is violated when the activity of one branch “threatens the integrity of or invades the independence of another.” (See Respondent’s Brief, pg 7) This is what occurred with the enactment of the pre-suit claim filing requirement.

In its brief, Defendant cites *Coulter v. State of Washington*<sup>1</sup> for the notion that a pre-suit claim filing requirement is not a violation of the judicial branch’s authority and thus not a violation of the separation of

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<sup>1</sup> 93 Wn.2d 205, 608 P.2d 261 (1980)

powers doctrine, this is incorrect. The *Coulter* case is therefore not on point and should be disregarded.

Next, Defendant cites *Wilson v. The City of Seattle*<sup>2</sup> to further its argument that the legislature has the authority to condition its waiver of sovereign immunity. As in *Coulter*, *Wilson* also does not address the holding set forth in *Waples v. Yi*<sup>3</sup> where the court determined that “[r]equiring notice adds an additional step for *commencing* a suit to those required by CR 3(a). (Emphasis added). And, failure to provide notice required by RCW 7.70.100(1) results in a lawsuit’s dismissal . . . even where the complaint was properly filed and served pursuant to CR 3(a).”<sup>4</sup> The Court went on to hold that “[t]he conflict between RCW 7.70.100(1) and CR 3(a) cannot be harmonized and both cannot be given effect, thus violating the separation of powers doctrine. In *Wilson*, the court examined pre-suit claim filing requirements and discussed sovereign immunity but did not ultimately make its decision in the case based upon sovereign immunity. Rather, as set forth in Defendant’s brief, the court made its decision based upon an entirely different rationale, that the claim asserted by the plaintiff in the case was not a claim “sounding in tort” and therefore determined that Seattle’s pre-suit claim filing requirement did not apply.

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<sup>2</sup> 122 Wn.2d 814, 863 P.2d 1336 (1993).

<sup>3</sup> 169 Wn.2d 152, 234 P.3d 187 (2010).

<sup>4</sup> *Id.*

As with *Coulter*, the court should disregard Defendant's discussion of *Wilson* as it does not address the issue of separation of powers.

Next, Defendant goes onto cite numerous cases for the notion that the legislature can condition sovereign immunity. While this may be correct, none of the cases cited by Defendant specifically address the issue before this Court, which is the separation of powers doctrine and whether the legislature has the authority to infringe on the functions of the judicial branch by proscribing pre-suit claim filing requirements. Therefore, these cases should also be disregarded.

Defendant states in its brief that in *Waples* “[t]he court did not find a fundamental legislative function related to the pre-suit requirement for medical malpractice claim” and that “there is a fundamental legislative function related to pre-suit filing requirements for claims against government.”<sup>5</sup> However, Defendant cites no authority that where a “fundamental legislative function” exists a separation of powers doctrine violation cannot occur.

Defendant next goes on to make a statement that it is ironic that Plaintiff is asking the court to invalidate the Legislature's action in regard to the pre-suit claim filing when RCW 4.96.010 has been previously recognized as valid. The problem with this statement is that the argument

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<sup>5</sup> Respondent's Brief, pg 14.

that RCW 4.96.010 violates the separation of powers doctrine is an issue of first impression. None of the cases cited by Plaintiff deal specifically with whether the pre-suit claim filing procedure set forth in former RCW 4.96.010 violates the separation of powers doctrine. The only cases that are comparable are *Waples* and *Putnam* as set forth in Plaintiff's initial brief.

Defendant argues that *Waples* and *Putnam* are distinguishable from the present case because chapter 4.96 RCW affects the primary rights of a claimant and is not procedural. Defendant's assertion that RCW 4.96.010 affects a primary right and not procedural is incorrect. The present case is identical to those of *Waples* and *Putnam*. Plaintiff was required, pursuant to RCW 4.96.020(4), to file notice with Defendant prior to *commencing* its lawsuit. The claim notice requirement in RCW 4.96.020(4) is almost identical to the claim notice requirement in RCW 7.70.100(1). RCW 4.96.020(4) is procedural in nature, as it does not create, define, or regulate primary rights; rather it functions as an operation of the courts by which substantive law, rights and remedies are effectuated. RCW 4.96.020(4) directly conflicts with the requirements of CR 3(a) and conflicts with the judiciary's power to set court procedures and therefore is unconstitutional.

Lastly, Defendant cites *Lacey Nursing Center, Inc. v. Dept. of Revenue*<sup>6</sup> and states that this case is dispositive of ours. This is incorrect. In *Lacey*, the Court looked at whether a group of nursing homes had *properly certified* under CR 23 when filing a claim under RCW 82.32.180, not whether they *could* certify under CR 23. The Court determined that in this specific incident the plaintiffs had generally satisfied the requirements of CR 23(a) but that RCW 82.32.180 imposed additional requirements applicable to excise tax refunds suits which the respondents did not meet (such as not stating the amount of B & O tax paid in the last 4 years).<sup>7</sup> *Lacey* is distinguishable from this case because the Supreme Court, despite Defendant's assertions, did not base this decision on sovereign immunity or separation of powers. Further, the Supreme Court did not find that CR 23 and RCW 82.32.180 conflicted with each other in any way, as CR 3 and RCW 4.96 do in this case.

RCW 4.96.020(4) is procedural in nature, as it does not create, define, or regulate primary rights; rather it functions as an operation of the courts by which substantive law, rights and remedies are effectuated. RCW 4.96.020(4) directly conflicts with the requirements of CR 3(a) and conflicts with the judiciary's power to set court procedures and therefore is unconstitutional. Therefore, the court erred in granting Defendant's

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<sup>6</sup> 128 Wn.2d 40, 905 P.2d 338.

<sup>7</sup> *Id.* at 51-52.

Motion for Summary Judgment and ruling that RCW 4.96.020(4) is not unconstitutional.

**2. If the Court finds RCW 4.96.010 and .020 to be unconstitutional, it should invalidate on the notice provisions because it can be severed from the remainder of the statutes.**

The Court should strike only the notice provisions of RCW 4.96.010 because it contains a severability clause and therefore it is apparent that the legislature would have enacted this statute without the notice requirement. Defendant argues that in order to sever a portion of a statute and leave the remainder in tact the court must apply three factors before doing so. In applying the three factors set forth in Defendant's brief, it is evident that the Court can sever the notice provisions of RCW 4.96.010 and .020 and leave the remainder intact.

The first criteria set forth by Defendant is that “[i]f the constitutional and unconstitutional provisions are so connected that it could not be believed that the legislature would have passed one without the other” then the court cannot sever the unconstitutional portion of the statute. It is evident that is not the case here. Striking the notice provision contained in RCW 4.96.010 would render RCW 4.96.020 inapplicable. “Ordinarily the part of an enactment that is constitutionally infirm will be

invalidated, leaving the rest intact.”<sup>8</sup> The presence of an applicable severability clause is even greater evidence that the legislature would have enacted the constitutional portions of the statute without the unconstitutional portions.<sup>9</sup>

RCW 4.96.010 contains a severability clause. The severability clause states that “[i]f any provision of this act or its application to any person or circumstances is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.” (CP 150) The inclusion of a severability clause in RCW 4.96.010 demonstrates that the legislature did not want the entire statute stricken if a portion of it was found to be unconstitutional. Further, the inclusion of a severability clause demonstrates that the notice requirement of RCW 4.96.010 is not so intimately connected with the balance of the statute as to make it useless to accomplish the purpose of the legislature, which was to waive sovereign immunity for local governments, such as Defendants.

As Defendant fails to address the other two criteria set forth by Defendant in its brief, Plaintiff requests that the Court hold that these two criteria do not prevent severability in this case.

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<sup>8</sup> *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 67, 109 P.3d 405 (2005), citing *Guard v. Jackson*, 83 Wn. App. 325, 333, 921 P.2d 544 (1996).

<sup>9</sup> *C.A.M.A.*, 154 Wn.2d at 67-68, citing *State v. Anderson*, 81 Wn.2d 234, 236, 501 P.2d 184 (1972).

Defendant next cites *Cook v. State of Washington*<sup>10</sup> for the proposition that the notice provisions of RCW 4.96 are not severable from the remainder of the statute; however, as with the previous cases cited by Defendant, *Cook* does not address the specific issue in dispute in our case, whether or not the pre-suit claim requirements violate the separation of powers doctrine. *Cook* specifically addressed the issues of due process and equal protection.<sup>11</sup> In addition, the Supreme Court in *Cook*, as noted by Defendant in its brief, did not base its decision on striking down the pre-suit claim requirements, and it actually “reinstated plaintiff’s claim on the basis that her disability tolled the time limit prescribed for filing claims.”

Similar to the action the Supreme Court took in *Waples*, the Court in this case should rule the tort notice claim provision to be unconstitutional and strike only the notice requirement of RCW 4.96.010, thus rendering RCW 4.96.020 inapplicable, and leaving the remainder of RCW 4.96.010 intact.

**3. The legislature’s amendment of Chapter 4.96 RCW in 2009 does apply retroactively.**

The trial court erred as a matter of law in finding that the Legislature’s 2009 amendment to RCW 4.96.020, HB 1553 did not apply

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<sup>10</sup> 83 Wn.2d 599, 521 P.2d 725 (1974).

<sup>11</sup> *Id.* at 602.

retroactively. In its reply brief, Defendant states that Plaintiff mischaracterized the holding in *Woods v. Bailet*<sup>12</sup> when that is exactly what Defendant did in its reply brief. Defendant cites the following from *Woods*:

Woods next argues that the legislature's 2001 amendments to chapter 4.96 RCW, which require local governmental entities to designate an agent to receive claims, should apply retroactively. We disagree.

This however was not the entire Court's ruling. Defendant has simply selected a small portion for its benefit and failed to include the reasoning behind the Court's decision. In all actuality what the court held was that:

[A]lthough the amendments are remedial, we will not apply them retroactively in this case because to do so in this case would not further their remedial purpose. *Humphrey*, 139 Wn.2d at 63, 983 P.2d 1118. The remedial purpose of the amendment was to alleviate confusion regarding where to file claims against government entities. But this is not a case in which plaintiff attempted to file a claim but sent it to the wrong office or agent. *Cf. Kleyer v. Harborview Med. Ctr. of Univ. of Wash.*, 76 Wn.App 542, 545-46, 887 P.2d 468 (1995). Further, Woods does not assert she failed to file a claim because she could not determine where to send it. Rather, Woods, who filed this lawsuit on the day the statute of limitations expired, failed to file a claim because she did not know that PacMed was a government entity or that claim filing was required at all. So even if the amendments had been in place earlier, they would not have helped Woods. For this reason, the amendments, although remedial, do not apply retroactively in this case.<sup>13</sup>

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<sup>12</sup> 116 Wn. App. 658, 67 P.3d 511 (2001).

<sup>13</sup> *Id.* at 670-71.

It is apparent that the Court in *Woods* found the amendments to 4.96 RCW to be remedial in nature and would have applied them retroactively in a case such as the present case where the confusion lay with the filing of a pre-suit claim with the wrong office or agent. Therefore, Plaintiff requests that the Court disregard Defendant's statement that she mischaracterized the holding of *Woods*.

The 2009 amendments made by the Legislature to the claim-filing procedure relate to practice, procedures, and remedies and do not affect a substantive or vested right and are therefore remedial and curative. The testimony in support of the 2009 amendments was almost exactly the same as that of the testimony in support of the 2001 amendments. The 2009 amendments were made for the exact same reason that the 2001 amendments were made, to restore the original intent of the statutes of providing notice so that the government can get the facts of the claim and investigate.<sup>14</sup> The claim-filing statutes were not meant to be "gotcha" statutes.<sup>15</sup> In making these amendments, the Legislature relied on testimony about cases being dismissed based upon technical interpretations of the statutes and the fact that prior to these amendments local governments were being rewarded for deception hidden in the claim

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<sup>14</sup> HB 1553 Report, pg. 4.

<sup>15</sup> *Id.*

forms.<sup>16</sup> It is apparent that the 2001 amendments did not remedy the confusion and additional amendments were required. Therefore, the trial court erred in granting Defendant's Motion for Summary Judgment and this decision should be reversed.

**4. The county did waive the requirement to file a pre-suit claim.**

The trial court erred as a matter of law in finding that Defendant had not waived its right to assert the defense that Plaintiff failed to properly file her tort claim because Defendant did take litigious action in this case and induced defendant into thinking it would defend the case on the merits and not the claimed procedural defect. Defendant has waived its right to assert the defense that Plaintiff failed to comply with the claim filing provisions because the assertion of this defense is inconsistent with Defendant's prior behavior and Defendants were dilatory in asserting the defense.

Defendant argues in its reply brief it did not waive its right to assert this defense because there is no evidence that the county engaged in dilatory conduct even though there is direct evidence to the contrary. First, it is evident that Defendant wanted to delay Plaintiff from having any chance of curing any alleged defect in its service of the pre-suit claim with the Defendant by sending her two conflicting letters just days apart.

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<sup>16</sup> *Id.*

The first letter acknowledged receipt of the claim and the second one denying her claim. These two letters led Plaintiff to believe that the Defendant had properly received her claim and that no further action was needed until a lawsuit had to be filed due to the expiration of the statute of limitations. Further, the Defendant admits it waited over three months to file its answer asserting this defense. This is additional evidence of the Defendant's dilatory conduct.

Lastly, Defendant cites numerous cases where waiver was found and argues that the facts of these cases are more egregious than the actions of Defendant. While this may be the case, it does not excuse Defendant's dilatory actions which lulled Plaintiff into a belief that she had properly filed her pre-suit claim with Defendant. Based upon Defendant's dilatory and inconsistent prior behavior in this matter the doctrine of waiver should apply to Defendant's assertion that Plaintiff failed to comply with RCW 4.96. Genuine issues of material fact exist and therefore the trial court erred as a matter of law in finding that Defendant had not waived its right to assert the defense that Plaintiff failed to properly file her tort claim because Defendant did take litigious action in this case and induced defendant into thinking it would defend the case on the merits and not the claimed procedural defect.

**5. The county should be equitably estopped from asserting the defense of failing to properly file a pre-suit claim.**

The trial court erred as a matter of law in finding that Defendant was not equitably estopped from asserting the defense that Plaintiff failed to comply with the claim provisions of RCW 4.96 and Clark County Code §2.95.060 and granting Defendant's Motion for summary Judgment. Defendant is equitably estopped from asserting the defense that Plaintiff failed to comply with the claim filing provisions because allowing for the assertion of this defense would allow for a manifest injustice.<sup>17</sup>

Defendant starts its argument against equitable estoppel by stating that the claim form used by Defendant at the time Plaintiff filed her claim did not specify to where it was to be returned. Defendant does however acknowledge that at the bottom of its claim form in bold print is the address of "1300 Franklin, Sixth Floor, PO Box 5000, Vancouver, WA 98666-5000" but then asks the court to believe that an individual would not believe this to be the address to which the claim is to be returned. This is disingenuous at best. If this address is not the mailing address for where the pre-suit claim form is to be sent why is it on the form provided by the Defendant. The address on the form is misleading and deceptive at best, thus only bolstering Plaintiff's assertion of equitable estoppel.

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<sup>17</sup> *In re Decertification of Martin*, 154 Wn. App. 252 (2009).

As noted in its opening brief, in its opinion the trial court stated that Plaintiff's assertion of equitable estoppel was more difficult for it but it is not the place of the trial court to make new law. (CP 131). Plaintiff asserts that this Court is in the position to do so and that based upon the justifiable reliance of Plaintiff on Defendant's statements that her claim had been received and was being reviewed, Defendant should be equitably estopped from asserting the defense that Plaintiff failed to comply with the claim filing requirements. Therefore, the trial court erred in granting Defendant's Motion for Summary Judgment and its decision should be reversed on the basis of equitable estoppel.

**6. The trial court erred by granting Defendant's motion for summary judgment because equitable tolling applies and therefore Plaintiff should be given time to cure any alleged defect.**

Defendant argues that Plaintiff cannot establish the exercise of diligence by Plaintiff when the assurances by the Defendant relate to matters of law but cites no authority for this assertion. Therefore, Plaintiff requests that the Court disregard this statement. In the present case, all the predicates for equitable tolling exist. First, Defendant made false assurances, the two letters sent to Plaintiff acknowledging receipt of the claim and denying the claim. Second, Plaintiff exercised due diligence throughout this litigation process by mailing her tort claim to Defendant to

the address listed on its form, waited the required 60-days before filing a lawsuit, and then filed her lawsuit within the statute of limitations period. Plaintiff should not be punished for the false assurances given by Defendant. Therefore, the trial court erred in granting Defendant's Motion for Summary Judgment and its decision should be reversed on the doctrine of equitable tolling and Plaintiff should be allowed to cure any defect.

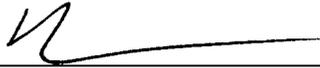
It appears that neither of the opinions issued by the trial court specifically addressed the issue of equitable tolling. (CP 128, 151) Therefore, at a minimum, Plaintiff asks the Court to remand this issue back to the trial court for a decision on this issue.

### **III. CONCLUSION**

In conclusion, Plaintiff requests that the appellate court reverse the trial court's orders granting Defendant's Motion for Summary Judgment on the basis that (a) the claim-filing notice requirements violate the separation of powers doctrine thus making them unconstitutional, (b) the 2009 Legislative amendments to RCW 4.96 are retroactive, (c) Defendant waived its right to assert the defense that Plaintiff failed to comply with the claim-filing provisions, (d) Defendant is equitably estopped from asserting the defense that Plaintiff failed to comply with the claim-filing provisions, and (e) equitable tolling applies in this case and Plaintiff

should be given additional time to cure any alleged defect in her claim-filing with Defendant.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of August, 2011.



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**RONALD W. GREENEN**, WSB #6334  
of Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2011, I submitted the foregoing REPLY BRIEF OF APPELLANT for service via Vancouver Legal Courier Service (to be delivered on August 11, 2011) to:

E. Bronson Potter  
Clark County Prosecuting Attorney's Office  
Civil Division  
604 W. Evergreen Blvd.  
PO Box 5000  
Vancouver, WA 98666-5000

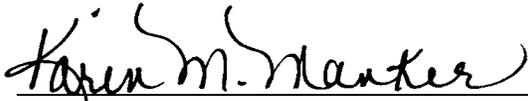
by serving a copy thereof certified by me as such, contained in a sealed envelope, to said offices at their regular address as noted above.

I further certify that on August 10, 2011, I served the foregoing REPLY BRIEF OF APPELLANT by regular US Mail to:

Mark Jobson, Torts Division  
Assistant Attorney General  
7141 Cleanwater Drive, SW  
PO Box 40126  
Olympia, WA 98504-0126

by serving a copy thereof certified by me a such, contained in a sealed envelope, to said offices at their regular address as noted above.

Dated this 10th day of August, 2011.

  
\_\_\_\_\_  
KAREN M. MANKER