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COURT OF APPEALS
DIVISION II

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NO. 41915-7-II

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

STATE OF WASHINGTON
BY
DEPUTY

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

Appellant,

v.

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.

BRIEF OF THE COUNTY RESPONDENTS

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TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. STATEMENT OF ISSUES	1
III. STATEMENT OF THE CASE.....	2
IV. ARGUMENT	6
A. Chapter 4.96, RCW is not unconstitutional because the legislature may condition its waiver of sovereign immunity	6
B. If the Court finds RCW 4.96.010 and .020 to be unconstitutional, it should invalidate the statutes in their entirety because the waiver of sovereign immunity cannot be severed from the condition of filing a pre-suit claim	20
C. The legislature’s amendment of Chapter 4.96, RCW, in 2009 does not apply retroactively	27
D. The county did not waive the requirement to file a pre-suit claim	31
E. The county should not be equitably estopped from asserting the defense of failing to properly file a pre-suit claim	37
F. Equitable tolling does not apply.....	48
V. CONCLUSION.....	48

TABLE OF AUTHORITIES

	Page
Cases:	
<u>American Discount Corp. v. United Collection Service, Inc.</u> , 129 Wn.App. 345, 120 P.3d 96 (2005).....	31
<u>Appel v. Appel</u> , 154 Wn.2d 52, 109 P.3d 405 (2005)	20-22
<u>Brown v. Owen</u> , 165 Wn.2d 706, 206 P.3d 310 (2009)	7
<u>Burnett v. Tacoma City Light</u> , 124 Wn.App. 550, 104 P.3d 677 (2004).....	47
<u>Carrick v. Locke</u> , 125 Wn.2d 129, 882 P.2d 173 (1994).....	7
<u>Chemical Bank v. WPPSS</u> , 102 Wn.2d 874, 691 P.2d 524 (1984)	39
<u>City of Fircrest v. Jensen</u> , 158 Wn.2d 384, 143 P.3d 776 (2006).....	7
<u>City of Seattle v. State</u> , 103 Wn.2d 663, 694 P.2d 641 (1985).....	22
<u>Clark v. Falling</u> , 92 Wn.App. 805, 965 P.2d 644 (1998).....	33
<u>Collier v. Tacoma</u> , 121 Wn.2d 737 (1993).....	21-22
<u>Cook v. State of Washington</u> , 83 Wn.2d 599, 521 P.2d 725 (1974).....	22-23, 25-26
<u>Coulter v. State of Washington</u> , 93 Wn.2d 205, 608 P.2d 261 (1980) ...	11
<u>Daggs v. Seattle</u> , 110 Wn.2d 49, 750 P.2d 626 (1988).....	12
<u>Department of Ecology v. Campbell and Gwinn, LLC</u> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	37
<u>Dyson v. King County</u> , 61 Wn.App. 243, 809 P.2d 769 (1991).....	36
<u>Estate of Connelly v. Snohomish PUD No. 1</u> , 145 Wn.App. 941	

187 P.3d 842 (2008).....	39
<u>Fircrest v. Jensen</u> , 158 Wn.2d 384, 143 P.3d 776 (2206).....	7
<u>French v. Gabriel</u> , 116 Wn.2d 584, 806 P.2d 1234 (1991).....	34
<u>Guard v. Jackson</u> , 83 Wn.App. 325, 921 P.2d 544 (1996)	22
<u>Griffin v. Eller</u> , 130 Wn.2d 58, 922 P.2d 788 (1996).....	21-22
<u>Gross v. Sunding</u> , 139 Wn.App. 54, 161 P.3d 380 (2007)	33
<u>Grubaugh v. St. Johns</u> , 384 Mich. 165, 180 N.W.2d 778 (1970)	23, 25
<u>Hagerman v. Seattle</u> , 189 Wash. 694, 66 P.2d 1152 (1937)	8, 14
<u>Hale v. Wellpinit School District No. 49</u> , 165 Wn.2d 494 198 P.3d 1021(2009).....	14
<u>Hardesty v. Stenchever</u> , 82 Wn.App. 253, 917 P.2d 577 (1996).....	46-47
<u>Hendrix v. Seattle</u> , 76 Wn.2d 142, 456 P.2d 696 (1969).....	14-15
<u>Hintz v. Kitsap County</u> , 92 Wn.App. 10, 960 P.2d 946 (1998).....	39, 47
<u>In re: F.D. Processing, Inc.</u> , 119 Wn.2d 452, 832 P.2d 1303 (1992)...	29-30
<u>In Re: Personal Restraint of Bonds</u> , 165 Wn.2d 135, 196 P.3d 672 (2008).....	48
<u>In Personal Restraint of Stewart</u> , 115 Wn.App. 319, 75 P.3d 521 (2003).....	31
<u>Johnson v. Morris</u> , 87 Wn.2d 922, 557 P.2d 1299 (1976).....	30
<u>Kelso v. City of Tacoma</u> , 63 Wn.App. 913, 390 P.2d 2 (1964).....	8, 13
<u>Kilbourn v. Seattle</u> , 43 Wn.2d 373, 261 P.2d 407 (1953).....	8, 13

<u>King v. Snohomish County</u> , 105 Wn.App. 857, 21 P.3d 1151 (2001).....	36, 40-41
<u>Kleyer v. Harborview Med. Ctr. of the UW</u> , 76 Wn.App. 542, 887 P.2d 468 (1995).....	45-47
<u>Lacey Nursing Center, Inc., v. Dept. of Revenue</u> , 128 Wn.2d 40 905 P.2d 338 (1995).....	17
<u>Landgraf v. USI Film</u> , 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).....	29
<u>Landreville v. Shoreline Community College Dist. No. 7</u> , 53 Wn.App. 330, 766 P.2d 1107 (1988).....	40
<u>Laymon v. Dept. of Natural Resources</u> , 99 Wn.App. 518, 994 P.2d 232 (2000).....	38, 42
<u>Lynden Transport, Inc., v. State</u> , 112 Wn.2d 115, 768 P.2d 475 (1989).....	22
<u>Leonard v. City of Spokane</u> , 127 Wn.2d 194, 897 P.2d 358 (1995) <i>aff'd</i> , 132 Wn.2d 660 (1997).....	22
<u>Lewis v. Mercer Island</u> , 63 Wn.App. 29, 817 P.2d 408, <i>rev</i> <i>denied</i> , 117 Wn.2d 1024, 820 P.2d 510 (1991)	12
<u>Locke v. City of Seattle</u> , 162 Wn.2d 474, 172 P.3d 705 (2007).....	13
<u>Lybbert v. Grant County</u> , 141 Wn.2d 26, 1 P.3d 1124 (2000).....	33-35, 39
<u>Meadowdale Neighborhood Comm. V. City of Edmonds</u> , 27 Wn.App. 261, 616 P.2d 1257 (1980).....	40
<u>Medina v. PUD No. 1 of Benton County</u> , 147 Wn.2d 303, 53 P.3d 993 (2002).....	9, 31
<u>Mid-Town Ltd. P'ship v. Preston</u> , 69 Wn.App. 227, 848 P.2d 1268 (1993).....	33

<u>Millay v. Cam</u> , 135 Wn.2d 193, 955 P.2d 791 (1998).....	48
<u>Minty v. Board of State Auditors</u> , 336 Mich. 370, 58 N.W.2d 106 (1953).....	23
<u>Nelson v. Duncan</u> , 69 Wn.2d 727, 419 P.2d 984 (1966).....	24
<u>O’Donoghue v. State</u> , 66 Wn.2d 787, 405 P.2d 258 (1965).....	24
<u>Overton v. Economic Assistance Auth.</u> , 96 Wn.2d 552, 637 P.2d 652 (1981).....	30
<u>Putman v. Wenatchee Valley Medical Center</u> , 166 Wn.2d 974, 216 P.3d 374 (2009).....	6, 15-16, 19
<u>Raymond v. Fleming</u> , 24 Wn.App. 112, 600 P.2d 614 (1979).....	34
<u>Reich v. State Hwy Department</u> , 386 Mich. 617 (1972).....	23, 25
<u>Renner v. City of Marysville</u> , 145 Wn.App. 443, 187 P.3d 283 (2008).....	42-43
<u>Rumjue v. Fairchild</u> , 60 Wn.App. 278, 803 P.2d 57, <i>rev. denied</i> , 116 Wn.2d 1026, 812 P.2d 102 (1991).....	35-36
<u>Schoonover v. State of Washington</u> , 116 Wn.App. 171, 64 P.3d 677 (2003).....	41-42
<u>Sprint Intern. Communications Corp. v. The Department of Revenue</u> , 154 Wn.App. 926, 226 P.3d 253 (2010).....	29
<u>State v. Long</u> , 104 Wn.2d 285, 705 P.2d 245 (1985).....	15
<u>State v. Moreno</u> , 147 Wn.2d 500, 58 P.3d 265 (2002).....	7
<u>State Ex Rel. Pierce County v Superior Court for Thurston County</u> , 86 Wash. 685, 151 P. 108 (1915).....	8, 25
<u>State Ex. Rel. Shoemaker v. Superior Court for King County</u> , 193 Wash. 465, 76 P.2d 306 (1938).....	9, 25-26

<u>Tomlinson v. Clarke</u> , 118 Wn.2d 498, 825 P.2d 706 (1992).....	29
<u>Troxell v. Rainier Publ. School Dist. No. 1</u> , 154 Wn.2d 345, 111 P.3d 1173 (2005).....	31
<u>Waples v. Yi</u> , 169 Wn.2d 152, 234 P.3d, 187 (2010).....	6, 14, 15-16, 19-20
<u>Washington Waste Sys., Inc., v. Clark County</u> , 115 Wn.2d 74, 794 P.2d 508 (1990).....	29
<u>Wilson v. City of Seattle</u> , 122 Wn.2d 814, 893 P.2d 1336 (1993) ..	8, 12-13
<u>Woods v. Bailet</u> , 116 Wn.App. 658, 67 P.3d 511 (2001)	28-29

Statutes:

Chapter 4.92, RCW.....	10
Chapter 4.96, RCW.....	1-2, 3-6, 16, 20, 26-27, 29, 37, 47
RCW 4.92.090	9, 24-25
RCW 4.92.100	22, 24-25, 42
RCW 4.92.110	11, 24-25, 46
RCW 4.96.010	2, 5, 12-13, 15-17, 18-20, 22, 46-47
RCW 4.96.020	2, 4-5, 20, 22, 27-31, 42-43, 46-47
RCW 7.70.100	14, 16-17, 20
RCW 7.70.150	16-17
RCW 35.31.030	12
RCW 82.32.180	17-19

Rules:

Article II, § 26, Washington State Constitution....	7, 9, 11, 13-14, 18, 24-25
CR 3	14, 16, 18-20
CR 23	17-18
CCC 2.95.060	3, 5, 39, 43
Laws of 1961, ch. 136 § 1	9
Laws of 1963, ch. 159, §§ 1 & 3.....	10
Laws of 1967, ch. 164, § 1	10

Laws of 1993, ch. 449 §§ 1-5.....	11
Laws of 2009, ch. 433 § 1.....	30
RAP 2.2.....	6

Other Resources:

56 Am.Jur.2d Municipal Corporations, Counties and Other Political Subdivisions § 680 (1971).....	12
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I. INTRODUCTION

In this appeal, it is uncontested that the plaintiff failed to file a pre-suit claim with the county designated agent prior to filing her lawsuit. The statute of limitations ran one week after she filed her lawsuit and the county filed an answer raising the affirmative defense of the failure to file the claim prior to any litigation activity occurring.

In an attempt to avoid dismissal of her lawsuit, the plaintiff argues that the claim filing requirements of Chapter 4.96, RCW, are unconstitutional; that the county waived or should be estopped from asserting the defense; and that the amendment of Chapter 4.96, RCW, to require only substantial compliance with claim filing requirements, should be applied retroactively. The trial court rejected the plaintiff's arguments and entered summary judgment dismissing the plaintiff's claims against the county. For the reasons that follow, the trial court's order should be affirmed.

II. STATEMENT OF ISSUES

1. May the legislature condition its waiver of sovereign immunity by requiring the filing of a pre-suit claim as a condition precedent to the filing of a lawsuit?

2. If the Court finds Chapter 4.96 to be unconstitutional, should it invalidate the statutes in their entirety because the waiver of sovereign immunity cannot be severed from the condition of filing a pre-suit claim?
3. Did the passage of HB 1553 in 2009 retroactively amend RCW 4.96.010 and RCW 4.96.020?
4. Do the equitable principles of waiver or estoppel apply to allegations that the county's conduct misled the plaintiff as to a legal matter; that being, the correct agent with whom a claim is to be filed?

III. STATEMENT OF THE CASE

The estate of William Lloyd Myles is seeking damages from the defendants for his death that resulted from a motor vehicle accident that occurred January 27, 2006.¹ On December 23, 2005, approximately one month before the fatal accident, defendant Villanueva-Villa was arrested by defendant Washington State Patrol trooper Brusseau for driving under the influence. According to the complaint, trooper Brusseau contacted the Clark County Sheriff's Office and was advised that it would not confirm that an arrest warrant was outstanding for Mr. Villanueva-Villa². According to the complaint, the Clark County Sheriff's Office was aware

¹ See paragraphs 2.45-2.47 of the Complaint at CP 3.

that there was an outstanding warrant for the arrest of Mr. Villanueva-Villa. However, the Sheriff's Office refused to confirm this warrant which, according to the complaint, "is code for the jail is full."³ Once informed of this, trooper Brusseau, decided to issue Mr. Villanueva-Villa a citation and released him to his sister.⁴ The plaintiff alleges that the conduct of the Clark County Sheriff's Office was negligent and was a proximate cause of the plaintiff's damages⁵

Clark County has designated a process for filing claims against it. In 1987, the Board of County Commissioners for Clark County adopted provisions of the county code consistent with Chapter 4.96 RCW to "provide procedures for dealing with claims and lawsuits for alleged tortuous conduct involving the county." Clark County Code 2.95.060 provides as follows:

- (A) Service and Filing. In accordance with state law, claims shall be filed with the Clerk of the Board and Summons and Complaint served upon the auditor.

² See paragraphs 2.35-237 of the Complaint at CP 3.

³ See paragraphs 3.2-3.3 of the Complaint at CP 3.

⁴ See paragraph 2.38 of the Complaint at CP 3.

⁵ See paragraph 3.1-3.13 of the Complaint at CP 3.

On July 8, 2003, consistent with an amendment to RCW 4.96.020, ⁶the Board of County Commissioners adopted Resolution 2003-07-05 appointing its clerk, Ms. Louise Richards, as the agent to receive claims for damages against Clark County and designated the address at which her office was located. This resolution was recorded under Clark County Auditor recording number 3672260.⁷

On October 30, 2008, the plaintiff filed a tort claim with the Risk Management Division of the Clark County Department of General Services⁸ On October 31, 2008, the Risk Manager for Clark County sent a letter to the attorney for the estate denying the claim.⁹ Inadvertently, another letter was generated on November 5, 2008, acknowledging receipt of the tort claim and indicating that a response would be generated within the next sixty days.¹⁰ Of course, the claim had already been denied.

The plaintiff filed her complaint on January 20, 2009, one week before the statute of limitations ran. Prior to filing the complaint, the plaintiff did not serve or file a tort claim notice with the county's

⁶ In 2001, the legislature amended the claim filing statute to require local governments to specify a person to receive claims. *LAWS OF 2001, ch. 119, § 2.*

⁷ See page 2 of Declaration of Louise Richards and Exhibit A thereto, CP 19.

⁸ See page 2 of Declaration of Mark Wilsdon and Attachment A thereto, CP 20.

⁹ See page 2 of Declaration of Mark Wilsdon and Exhibit B thereto, CP 20.

¹⁰ See page 2 of Declaration of Mark Wilsdon and Exhibit C thereto, CP 20.

designated agent, Ms. Louise Richards.¹¹ In its answer filed on May 8, 2009, the county raised the affirmative defense of failing to comply with the procedures for filing a tort claim as required by chapter 4.96 RCW.¹² No litigation activity occurred between the filing of the complaint and the filing of the answer.¹³

On October 30, 2009, the county filed its motion for summary judgment seeking the dismissal of the plaintiff's claims because she did not comply with the pre-suit claim filing requirements of RCW 4.96.010, RCW 4.96.020 and CCC 2.95.060. The plaintiff responded by arguing that the county waived the claim filing requirements; was estopped from asserting the claim filing requirements; and that the 2009 amendment to RCW 4.96.020 should be applied retroactively.¹⁴ On August 10, 2010, the trial court filed its opinion rejecting the plaintiff's contentions.¹⁵ However, the court deferred the entry of an order granting the county summary judgment until it could address the plaintiff's argument that RCW 4.96.020 is unconstitutional.¹⁶ On January 6, 2011, the trial court filed its opinion upholding the constitutionality of RCW 4.96.020. On February

¹¹ See page 2 of Declaration of Louise Richards, CP 19.

¹² See Answer at page 9, paragraph 2, CP 18.

¹³ See Clark County's Rebuttal Memorandum at page 2, CP 27.

¹⁴ See Plaintiff's Response to Motion for Summary Judgment, CP 24.

¹⁵ See Opinion of the Court, CP 55.

17, 2011, the court entered an order granting the county's motion for summary judgment and dismissing the plaintiff's claim against the county defendants. On March 17, 2011, the court entered findings pursuant to RAP 2.2 that there was no just reason for delay in the appeal of its order. On April 19, 2011, a commissioner of this court determined that the trial court's findings were sufficient and the order was appealable.

IV. ARGUMENT

A. Chapter 4.96, RCW, is not unconstitutional because the legislature may condition its waiver of sovereign immunity.

The plaintiff argues that the claim filing requirements of Chapter 4.96, RCW are unconstitutional because they violate the separation of powers doctrine. She relies upon the decisions of Waples v. Yi, 169 Wn.2d 152, 234 P.3d 187 (2010) and Putman v. Wenatchee Valley Medical Center, 166 Wn.2d 974, 216 P.3d 374 (2009). However, Waples and Putman are distinguishable from the present case because the enactment of Chapter 4.96 RCW and the imposition of a pre-suit claim filing requirement were an appropriate and lawful exercise of legislative authority to waive sovereign immunity and to condition that waiver on terms that the legislature deemed appropriate.

¹⁶ *Id.*

The Washington State Constitution does not contain a formal separation of powers clause. However, the division of our government into three co-equal branches has been presumed throughout the state's history. Brown v. Owen, 165 Wn.2d 706, 206 P.3d 310 (2009). The purpose of the doctrine of separation of powers is to prevent one branch of government from aggrandizing itself or encroaching upon the "fundamental functions cover" of another branch. State v. Moreno, 147 Wn.2d 500, 58 P.3d 265 (2002). The doctrine "does not depend upon the branches of government being hermetically sealed off from one another" and it allows government a measure of "flexibility and practicality." Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). It is permissible for two branches of government to engage in "coinciding activities." The doctrine is violated only when the activity of one branch "threatens the integrity of or invades the independence of another." City of Fircrest v. Jensen, 158 Wn. 2d 384, 394, 143 P.3d 776 (2006), quoting State v. Moreno, *supra*.

The enactment of pre-suit claim filing requirements was a proper exercise of the Legislature's function and did not invade the independence or integrity of the judicial branch because Article II, § 26 of the Washington State Constitution provides as follows:

The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.

The doctrine of sovereign immunity springs from the medieval concept that “the king can do no wrong”, Kelso v. City of Tacoma, 63 Wn. 2d 913, 914, 390 P. 2d 2 (1964), and that “one could not sue the king in his own courts.” Wilson v. City of Seattle, 122 Wn. 2d 814, 818 863 P.2d 1336 (1993). Municipal corporations, as subdivisions of the state, enjoy the same sovereign immunity as the state. Kelso v. City of Tacoma, *infra*; and Hagerman v. Seattle, 189 Wash. 694, 66 P.2d 1152 (1937).

Washington courts have “consistently held that the doctrine of governmental immunity is a matter of state policy which can only be changed by the Legislature.” Kelso v. City of Tacoma at 915; Kilbourn v. Seattle, 43 Wn.2d 373 (1953). “The rule of governmental immunity has become so firmly fixed as part of the law of municipal corporations that it is not to be disregarded by the courts until the legislature announces a change in public policy.” Kilbourn v. Seattle at 376.

When the Legislature decides to abrogate sovereign immunity, it may do so upon such conditions as it determines appropriate. As stated by the court in State Ex Rel. Pierce County, Superior Court for Thurston County, 86 Wash. 685, 688, 151 P. 108 (1915):

It is well settled that an action cannot be maintained against the state without its consent, and that the state, when it does so consent, can fix the place in which it may be sued, limit the causes for which the suit may be brought, and define the class of persons by whom it can be maintained. In other words, the state being sovereign, its power to control and regulate the right of suit against it is plenary; it may grant the right or refuse it as it chooses, and when it grants it, may annex such condition thereto as it deems wise, and no person has the power to question or gainsay the conditions annexed. This state has, by its Constitution, (Article II, § 26) empowered the Legislature to direct by law in what manner and in what courts suits may be brought against it .

...

See also, State Ex Rel. Shoemaker v. Superior Court for King County, 193 Wash. 465, 76 P.2d 306 (1938).

The Legislature has addressed the abrogation of sovereign immunity and the conditions of that abrogation on several occasions. While the Legislature partially abrogated sovereign immunity, it did so in a way to provide safeguards against unnecessary lawsuits. Medina v. PUD of Benton County, 147 Wn. 2d 303, 53 P. 3d 993 (2002).

In 1961, the Legislature abrogated the state's sovereign immunity for tort claims by enacting Laws of 1961, chapter 136, § 1 (currently codified as RCW 4.92.090). That legislation provides that the state "hereby consents to the maintaining of a suit or action against it for damages arising out of its tortious conduct to the same extent as if it were a private person." However, this waiver was not unconditional. The

Legislature went on to provide that “this section shall not affect any special statute relating to procedure for filing notice of claims against the state.”

In 1963, the Legislature amended chapter 4.92, RCW, to specify that claims against the state shall be brought in the superior court of Thurston County (as opposed to the county in which the cause of action arose); it enacted a specific process for presenting claims to the state; and it provided that “no action shall be commenced against the state . . . until a claim has first been presented . . .” *Laws of 1963, Ch. 159, §§ 1 and 3.*

In 1967, the Legislature expressly abolished sovereign immunity for all political subdivisions (including counties) and municipal corporations of the State of Washington for tortious conduct. In doing so, the Legislature included the following condition:

Provided, that the filing within the time allowed by law of any claim required shall be conditioned precedent to the maintaining of any action.

Laws of 1967, Ch. 164, § 1.

In 1993, the Legislature amended Chapter 4.92, RCW, to provide for a single, uniform procedure for bringing claims against local governmental entities. Numerous procedures for filing claims against

different types of entities were consolidated into one procedure set out in RCW 4.96.020. *Laws of 1993, Ch. 449, §§ 1 - 5.*

In Coulter v. State of Washington, 93 Wn.2d 205, 608 P. 2d 261 (1980), the court affirmed the dismissal of a claim because the plaintiff did not file a claim with the director of the state Office of Programming, Planning and Fiscal Management as required by RCW 4.92.110. In affirming the dismissal, the court noted that the imposition of a pre-suit claim filing requirement “is a matter within the legislature’s determination.” *Id.* at 207. The court went on to state:

This is not because the court says so, but because the constitution so states. Article II, Section 26 of *our constitution* provides: “The legislature shall direct by law, and in what manner, and in what courts, suits may be brought against the state.” This court must follow that mandate and uphold the filing requirement of this particular statute. . . .

The enactment of RCW 4.92.110 is clear that is providing “in what manner” suits shall be brought against the State. This is within the command and authority of Article II, Section 26. (*Italics original.*)

See Id.

The Legislature’s determination to require a pre-suit claim filing is not an invasion of a fundamental function of the judicial branch. Rather, it is an exercise of the Legislature’s constitutional authority to determine “in what manner” suit shall be brought against the state and its municipalities.

In Wilson v. the City of Seattle, *infra*, the court examined Seattle's pre-suit claim filing ordinance. The court stated that "[t]he issue in this case turns on the doctrine of sovereign immunity" Wilson at 818.

The court stated:

Municipal claims ordinances, such as SMC 5.24.005, are in part an exercise of sovereign immunity in that they place limitations or qualifications on the ability of individuals to sue the government. See, Daggs v. Seattle, 110 Wn.2d 49, 52, 750 P.2d 626 (1988). Under such ordinances, a city will require notice and presentation of a claim before allowing a suit for damages to be brought. *56 Am.Jur.2d Municipal Corporations, Counties and Other Political Subdivisions § 680 (1971)*. Compliance is mandatory, and the failure to comply bars a claimant from maintaining an action in court. See, Lewis v. Mercer Island, 63 Wn.App. 29, 32-33, 817 P.2d 408, *review denied*, 117 Wn.2d 1024, 820 P.2d 510 (1991); former RCW 35.31.030. Whether Seattle's claim-filing ordinance is a valid exercise of sovereign immunity, thus depends on whether it is authorized by its sovereign, the State.

and

RCW 4.96.010 does preserve a municipalities' right to require the filing of a damages claim with a municipality before bringing a lawsuit, but only for claims founding in tort.¹⁷

¹⁷ In Wilson, the court ultimately determined that the claim asserted by the plaintiff was not a claim "sounding in tort" and held that Seattle's pre-suit claim filing ordinance did not apply.

Wilson at 818-819. The significance of Wilson to the present action is that, in Wilson, the court expressly recognized that a local government's adoption of a pre-suit claim filing ordinance is a valid legislative exercise of sovereign immunity by conditioning the right to bring suit upon the filing of a pre-suit claim. The Wilson court recognized that this local legislative action was authorized by the state Legislature in RCW 4.96.010. The Legislature, in turn, derives its authority to condition the waiver of sovereign immunity upon the express constitutional authority found at Article II, § 26 of the Washington State Constitution.

Washington courts have consistently held that the waiver of sovereign immunity and the conditioning of that waiver are a legislative and not a judicial function. In Locke v. City of Seattle, 162 Wn.2d 474, 480, 172 P.3d 705 (2007), the court said, "The abolition of sovereign immunity is a matter within the legislature's determination." In Kelso v. City of Tacoma, *infra* at 915, the court observed:

This court has consistently held that the doctrine of governmental immunity is a matter of state policy, which can be changed only by the legislature.

In Kilbourn v. City of Seattle, 43 Wn.2d 373, 261 P.2d 407 (1953), the court held that governmental immunity "is not to be disregarded by the

courts until the legislature announces a change in public policy.” *Citing, Hagerman v. Seattle*, 189 Wash. 694, 66 P.2d 1152 (1937).

The purpose of the separation of powers doctrine is to ensure that the “fundamental functions of each branch [of government] remain inviolate.” *Waples v. Yi*, at 158, *citing Hale v. Wellpinit School District No. 49*, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009). In *Waples*, the court found that the pre-suit claim filing requirement of RCW 7.70.100 conflicted with CR 3. The court did not find a fundamental legislative function related to the pre-suit claim filing requirement for medical malpractice claims. Conversely, there is a fundamental legislative function related to pre-suit claim filing requirements for claims against government. The Washington State Constitution, Article II, § 26 expressly authorizes the Legislature to prescribe the manner in which suits may be brought against the state. Washington courts have consistently recognized that the decision as to whether and how to waive sovereign immunity is a matter addressed to the discretion of the Legislature.

Courts should not abrogate legislative action unless the constitution requires it. Where a reasonable doubt exists as to whether or not a legislative enactment violates the separation of powers doctrine, doubts should be resolved in favor of the legislative action. *Hendrix v.*

Seattle, 76 Wn.2d 142, 456 P.2d 696 (1969), *overruled on other grounds*, State v. Long, 104 Wn.2d 285, 705 P.2d 245 (1985). In the present case, there is no doubt that the Legislature's conditioning of the waiver of sovereign immunity by requiring the filing of a pre-suit notice was a valid exercise of its constitutional authority. To the extent that there is any doubt, it must be resolved in favor of validating the legislation.

Finally, the irony behind using a separation of powers argument to ask the court to invalidate the Legislature's exercise of its constitutional authority is noted. The plaintiff asks this Court, part of the judicial branch, to invalidate the enactment of RCW 4.96.010 which has been repeatedly recognized as being a valid exercise of the Legislature's constitutional authority to prescribe the manner in which suit may be brought against the state. Doing so would be a greater violation of the separation of powers and a greater disregard of the Legislature's legitimate function than the alleged violation argued by the plaintiff.

An additional reason that Waples and Putman is distinguishable from the present matter is that chapter 4.96 RCW affects the primary rights of a claimant and is not merely procedural. In Putman, the court stated:

If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give affect to both, but if they cannot be harmonized, the court rule will prevail

in procedural matters and the statute will prevail in substantive matters.

Putman at 980.

In Waples, the court found that RCW 7.70.100 was a procedural statute because:

The statute does not address the primary rights of either party; it deals only with the procedure to effectuate those rights. Therefore, it is a procedural law and will not prevail over the conflicting court rules.

Waples at 161. The court went on to describe statutes dealing in substantive matters as follows:

“Substantive law ‘creates, defines and regulates primary rights, while procedures involve the operations of the courts by which substantive laws, rights and remedies are effectuated.’” Putman, 166 Wn. 2d at 984 (internal quotation marks omitted) (quoting Jensen, 158 Wn. 2d at 394). Like RCW 7.70.150, RCW 7.70.100(1) does not address the primary rights of either party and deals only with the procedures to effectuate those rights. Therefore, RCW 7.70.100(1) involves procedural law and will not prevail over CR 3(a).

Waples at 161.

Unlike RCW 7.70.100, RCW 4.96.010 addresses the primary rights of parties asserting tort claims against the government. It does not “deal only with the procedures to effectuate those rights.” The enactment of RCW 4.96.010 conditionally abolished sovereign immunity for counties for damages arising out of their tortious conduct. It created a right for

private parties where none previously existed. However, it conditioned the waiver of sovereign immunity and the right to prosecute a claim upon the filing of a pre-suit claim. Thus, RCW 4.96.010, unlike RCW 7.70.150 or 7.70.100, does not “deal only with the procedures.” Rather, it “creates, defines and regulates the primary rights” of parties. Thus, it is a statute that deals with substantive matters and it prevails over a conflicting court rule.

The interplay of the waiver of sovereign immunity through the enactment of a statute and a conflicting court rule was the subject of Lacey Nursing Center, Inc., v. Dept. of Revenue, 128 Wn.2d 40, 905 P.2d 338 (1995). In that case, a number of nursing homes brought a class action seeking the refund of state business and occupation taxes. The trial court granted a motion seeking the certification of the class. The Supreme Court granted direct discretionary review of that decision. The Supreme Court reviewed the interplay of RCW 82.32.180, which waived sovereign immunity for excise tax refunds, but did not authorize class actions, and CR 23 which allows for class actions. The nursing homes argued that RCW 82.32.180 was a procedural statute that could not prevail over a conflicting court rule. The court found that the “CR 23(a) requirement for class actions was generally satisfied,” Lacey Nursing at 51, but stated:

RCW 82.32.180 is a conditional, partial waiver of sovereign immunity afforded by *article II, section 26 of the Washington Constitution*. The right to bring excise tax refund suits must be exercised in the manner provided by the statute.

Supra at 52. The court went on to hold as follows:

The language of RCW 82.32.180 demonstrates that the Legislature intended excise tax refunds to be made only as prescribed by statute. That is, excise tax refunds may be properly appealed by a tax payer only if the tax payer satisfies the conditions specified under the statute.

and

82.32.180 contains no express language authorizing class actions and suits for tax refunds. Since the state waives sovereign immunity only to the extent provided in the statute, the statute must expressly authorize class actions. If the Legislature intended to permit class action suits for tax payers seeking excise tax refunds under RCW 82.32.180, it logically would have included such a provision permitting them. While the trial court correctly determined initially that CR 23 authorized a class action, its certification as a class action under RCW 82.32.180 was contrary to the intent of the Legislature.

Supra at 53. Although recognizing that the action was certifiable under CR 23(a), the court held that a class action was not permitted by the statute waiving sovereign immunity and thus was not available. This holding is dispositive of the plaintiff's argument in the present case. That is to say that, if CR 3(a) (relating to the commencement of a lawsuits) and RCW 4.96.010 (requiring the filing of a pre-suit notice) conflict, RCW 4.96.010

as the statute that conditionally waived sovereign immunity is substantive and prevails. An inapposite ruling is contrary to the intent of the Legislature.

RCW 4.96.010 is a statute which deals with substantive matters. It creates and regulates a cause of action against cities and counties for their tortious conduct but conditions that cause of action upon filing a pre-suit claim. It is not a statute dealing only with procedure. Therefore, if and to the extent that RCW 4.96.010 conflicts with CR 3, RCW 4.96.010 prevails.

Waples and Putman are distinguishable from the present action because they did not involve the waiver of sovereign immunity and the legislative authority to condition that waiver. The pre-suit filing requirement applicable of RCW 4.96.010 was adopted by the Legislature as a condition of its waiver of sovereign immunity from tort actions. The waiver of sovereign immunity and the conditioning of that waiver is has long been recognized as being a matter for the Legislature, not the judiciary, to address. The Legislature did not threaten the independence or integrity of the judicial branch by conditioning its waiver of sovereign immunity by requiring the filing of a pre-suit claim. If there is conflict between CR 3(a) and RCW 4.96.010, RCW 4.96.010 controls because it is

substantive and does not deal “only with procedures”. Waples at 161.

Any doubt as to the constitutionality of a legislative action is resolved in favor of a finding of validity.

B. If the Court finds RCW 4.96.010 and .020 to be unconstitutional, it should invalidate the statutes in their entirety because the waiver of sovereign immunity cannot be severed from the condition of filing a pre-suit claim.

RCW 4.96.010 and RCW 4.96.020, in relevant parts, state as follows:

4.96.010 (1) . . . Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. . . .

4.96.020 (4) . . . No action shall be commenced against any local governmental entity or against any local government entity’s officers, employees, or volunteers, acting in such capacity, for damages arising out of tortuous conduct until sixty days have elapsed after the claim has first been presented to and filed with the governing body thereof

If the court holds that the requirement to file a pre-suit claim for damages is unconstitutional, the court should invalidate the entire statute. The court is obligated to invalidate the entire statute unless it can conclude that the Legislature would have passed the statute absent the unconstitutional provisions. Appel v. Appel, 154 Wn.2d 52, 67, 109 P.3d 405 (2005). Complete invalidation is the proper remedy, rather than

changing the legislature's intent by invalidating only a portion of the statute. Appel, Id., *citing*, Griffin v. Eller, 130 Wn.2d 58, 69-70, 922 P.2d 788 (1996).

The law regarding the severability of portions of statutes is well-established in the State of Washington. Even if an enactment contains a severability clause, the court is not to invalidate only a portion of a statute under the following circumstances:

1. If the constitutional and unconstitutional provisions are so connected that it could not be believed that the legislature would have passed one without the other;

2. Where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature; or

3. If the result of striking down only the unconstitutional provisions is to give the remainder of the statute a much broader scope.

Appel, supra; Guard v. Jackson, 83 Wn. App. 325, 333, 921 P.2d 544 (1996); Leonard v. City of Spokane, 127 Wn.2d 194, 201, 897 P.2d 358 (1995), *aff'd*, 132 Wn.2d 660 (1997); Griffin v. Eller, supra; Lynden Transport Inc. v. State, 112 Wn.2d 115, 123, 768 P.2d 475 (1989); Collier

v. Tacoma, 121 Wn.2d 737, 761 (1993); City of Seattle v. State, 103 Wn.2d 663, 678, 694 P.2d 641 (1985).

Unless the court can conclude that the Legislature would have passed the statute absent the unconstitutional provision, the proper remedy is complete statutory invalidation, rather than changing legislative intent by upsetting the legislative compromise. RCW 49.96.010 and 49.96.020 provide for a conditional waiver of sovereign immunity. Invalidating the portion of the statute requiring the pre-suit filing of claims, while leaving the remainder of the statute in place, would result in an absolute waiver of sovereign immunity and violate the legislature's intent of only conditionally waiving sovereign immunity. These parts of the legislation are intimately connected and invalidating one, while leaving the remainder intact, would not accomplish the purpose of the Legislature.

In Cook v. State of Washington, 83 Wn.2d 599, 521 P.2d 725 (1974), the Supreme Court examined the connection of the pre-suit claim filing requirement to the waiver of sovereign immunity. In that case, the plaintiff urged the court to invalidate RCW 4.92.100, which requires the filing of a pre-suit claim as a condition precedent to bringing suit against the State of Washington. While the court reinstated the plaintiff's claim on the basis that her disability tolled the time limit prescribed for filing of

claims, the court refused to strike down the pre-suit claim filing requirement because “to do so would, in our view, abolish all vestiges of the doctrine of sovereign immunity and implicitly invalidate every other state, county, municipal, and district non-claim statute, ordinance or provision.” Cook at 602.

In Cook, the court considered the Michigan Supreme Court decisions in Reich v. State Hwy Department, 386 Mich. 617 (1972); Grubaugh v. St. Johns, 384 Mich. 165 (1970) and Minty v. Board of State Auditors, 336 Mich. 370 (1953). In Reich, the Michigan Supreme Court held that the pre-suit claim filing requirement violated due process and equal protection; were void; and the waiver or sovereign immunity effective. In Grubaugh, it held that the statute waiving immunity for claims related to defective roads was an absolute, rather than conditional, waiver of sovereign immunity. *See*, Grubaugh at 175-177. Rejecting the result arrived at in Reich, Grubaugh and Minty, the Washington Supreme Court held as follows:

We find the Reich case distinguishable and its reasoning unpersuasive. The Michigan high court had previously interpreted the Michigan constitution and the tort claim statutes as providing an absolute waiver of sovereign immunity, thereby giving rise to a vested right of action. Grubaugh v. St. Johns, 384 Mich. 165, 180 N.W.2d 778 (1970); Minty v. Board

of State Auditors, 336 Mich. 370, 58 N.W.2d 106 (1953).

To the contrary, we in this state have not interpreted our tort claim waiver statutory scheme (RCW 4.92.090, .100 and .110) when viewed in *pari materia* and in light of Const. art. 2, § 26, as amounting to a total, absolute, irrevocable waiver of sovereign immunity. Rather, we have looked upon it as a somewhat limited and conditional waiver of sovereign immunity which does not, absent compliance with the notice requirement, *ipso facto* ripen into a viable vested right of action. Nelson v. Duncan, 69 Wn.2d 727, 419 P.2d 984 (1966); O'Donoghue v. State, 66 Wn.2d 787, 405 P.2d 258 (1965). Thus, the Michigan high court's determination that because of the vested right of action accruing under the absolute waiver of that state sovereign immunity, the claim statute erects an unconstitutional discrimination between subclasses of tortfeasors, i.e., private and governmental, and victims of negligent conduct, i.e., victims of private negligence and victims of governmental negligence, becomes unpersuasive against the interpretation of a constitutionally limited legislative waiver of sovereign immunity in this state.

We are satisfied that our legislature in granting its conditional waiver of governmental immunity, as evidenced by RCW 4.92.090, .100, and 110, was justifiably cognizant of its responsibilities under Const. art. 2, § 26 and of the realistic and practical differences between private tortfeasors and the state and its political subdivisions as potential tortfeasors. The state and its political subdivisions with multitude of departments, agencies, officers and employees and their diverse and widespread activities, touching virtually every aspect of life within the state, rendered the state and its subdivision inherently different from any other private tort-feasor. Public funds as opposed

to private funds are involved. The number of claims against governmental agencies is vastly greater than any individual private tortfeasor. An ordinary private tortfeasor is normally immediately aware of an incident involving potential liability whereas the claim filing statute is usually the only sure and certain means by which the state or its subdivisions may be alerted to potential liability arising from a government activity. These considerations we believe adequate to sustain the import of RCW 4.92.100 and .110 against the constitutional challenge on due process and equal protection grounds advanced by Reich.”

Cook at 602-604.

Unlike the Michigan Supreme Court, which in Grubaugh rejected the principle that the legislature could attach conditions to the waiver of sovereign immunity (*see, Grubaugh* at 175-176), the Washington Supreme Court held that, pursuant to Const. art. 2, § 26, the waiver of sovereign immunity was properly conditioned upon such terms as the Legislature deemed wise. Const. art. 2, § 26; *see, State ex rel Pearce County v. Superior Court for Thurston County*, 86 Wash 685, 151 P. 108 (1915) and *State ex rel Shoemaker v. Superior Court for King County*, 193 Wash 465, 76 P.2d 306 (1938).

This prolonged quotation from Cook is important to the court’s consideration of the issue of severability because it demonstrates that the Legislature’s waiver of governmental immunity was conditional and the

policy considerations underlying that conditional waiver. Because the waiver was conditional, the requirement to file a pre-suit claim is strongly connected to the other provisions of the statutes and it is respectfully submitted that the court cannot conclude that the Legislature would have passed the statute absent the provision requiring pre-suit claim filing. If the pre-suit claim filing requirement is unconstitutional, then the proper remedy is invalidation of the entire statute waiving sovereign immunity. To provide the relief requested by the plaintiffs, that is, striking only the provision requiring pre-suit claims and leaving the waiver of immunity intact, would create an absolute waiver of immunity. This result would directly contravene the holding and reasoning of Cook that the Legislature only conditionally waived sovereign immunity.

The pre-suit claim filing requirement of chapter 4.96 RCW is constitutional. However, if it was found unconstitutional, the pre-suit claim filing provision is not severable from the remainder of the statutes and the proper remedy is invalidation of the statutes waiving sovereign immunity. The Washington legislature conditionally waived sovereign immunity and to invalidate only the pre-suit claim filing requirement, while leaving the remainder of the statute intact, would convert the waiver

to an absolute waiver of immunity and contravene the intent of the Legislature.

C. The legislature's amendment of Chapter 4.96, RCW, in 2009 does not apply retroactively.

Subsequent to the filing of the plaintiff's pre-suit claim and lawsuit, in the 2009 legislative session, the Legislature passed HB 1553 which amended RCW 4.96.020 to provide that substantial compliance with its procedural requirements would suffice.

The effective date of HB 1553 was July 26, 2009.¹⁸ This amendment was made in recognition of the courts' interpretation that the statute required strict compliance. The Bill Analysis prepared by the House Office of Program Research for HB 1553 explained that "(c)hanges are made to the claim filing statutes applicable to local governmental agencies."¹⁹ That analysis further recognized that "courts have generally required strict compliance with the procedural requirements of the claim filing statute and failure to strictly comply leads to dismissal of the action."²⁰ The Legislature is presumed to know how courts are interpreting its laws. In fact, the Bill Analysis demonstrates that the Legislature

¹⁸ See HB 1553 attached to County's Motion for Summary Judgment, CP 21.

¹⁹ See House Bill Analysis for HB 1553 attached to County's Motion for Summary Judgment, CP 21.

²⁰ *Id.*

understood that courts were requiring strict compliance with claim filing and, yet, the Legislature did not provide for the retroactive application of HB 1553.

The plaintiff argues that in Woods v. Bailet, 116 Wn. App. 658, 67 P. 3d 511 (2001), “the Court of Appeals previously has recognized that amendments to RCW 4.96.020 are remedial and should be applied retroactively when the retroactive application would promote their remedial purpose.”²¹ The plaintiff also argues that the trial court’s determination that the 2009 amendments were not remedial or curative was “in direct contradiction to the Appellate Court’s ruling that the 2001 amendments were to be retroactively applied.”²² Here is what the Court actually stated in 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 to her case. We disagree.

Woods at 669. The plaintiff’s argument mischaracterizes the holding of Woods and should be disregarded.

²¹ See Appellant’s Brief at page 20.

²² *Ibid.* at 21.

Generally, an amendment applies prospectively only. As stated in Sprint Intern. Communications Corp. v. The Department of Revenue, 154 Wn.App. 926, 938-939, 226 P.3d 253 (2010):

We presume that a statutory amendment is prospective. This strong presumption is “deeply rooted in our jurisprudence.” A party can overcome this presumption in certain circumstances, such as when the amendment is clearly curative. But we generally disfavor retroactivity.

See also, In re F.D. Processing, Inc., 119 Wn.2d 452, 832 P.2d 1303 (1992); and Landgraf v. USI Film, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). However, an amendment may apply retroactively if it is curative or remedial and intended to clarify rather than change the law. Tomlinson v. Clarke, 118 Wash. 2d 498, 510-11, 825 P. 2d 706 (1992).

An amendment is curative if it clarifies or technically corrects an ambiguous, older statute, without changing prior case law. F.D. Processing, at 461, Washington Waste Sys., Inc., v. Clark County, 115 Wn.2d 74, 78, 794 P.2d 508 (1990). The 2009 amendment did not clarify or technically correct RCW 4.96.020. Rather, it purposely changed the strict compliance standard mandated by prior case law to one of substantial compliance. It is not curative.

Even remedial amendments do not apply retroactively when they contradict previous judicial interpretations of the statutes they amend. As

previously noted, the courts for over thirty years have repeatedly found strict compliance with the procedural requirements of RCW 4.96.020 to be a condition precedent to maintaining a lawsuit. Any attempt by the Legislature to retroactively contravene the courts' construction of a statute "is disturbing in that it would effectively be giving license to the legislature to overrule this court, raising separation of powers problems." Johnson v. Morris, 87 Wn.2d 922, 926, 557 P.2d 1299 (1976). *Accord* Overton v. Economic Assistance Auth., 96 Wn.2d 552, 558, 637 P.2d 652 (1981).

The Legislature did not expressly make the 2009 amendment retroactive. In fact, House Bill 1553 provides that becomes effective July 26, 2009.²³ Additionally, the Legislature's intent to have HB 1553 apply prospectively is evidenced by its provision that the use of newly-designated claim forms apply only to "claims for damages presented after July 26, 2009." *See Laws of 2009, ch. 433 § 1*. Even had the Legislature intended HB 1553 to apply retroactively, it could not constitutionally do so. The intent of the Legislature to have legislation apply retroactively in contravention of a prior interpretation of a statute by the Supreme Court or the Court of Appeals violates the separation of powers principle. In

Personal Restraint of Stewart, 115 Wn. App. 319, 337, 75 P.3d 521 (2003); American Discount Corp. v. United Collection Service, Inc., 129 Wn. App. 345, 120 P. 3d 96 (2005).

The provision of HB 1553 to only require substantial, as opposed to strict, compliance with the procedural requirements of the claim filing statute is in direct contravention of decision of both the Supreme Court²⁴ and the Court of Appeals. It can only be constitutionally applied to claims filed after HB 1553's July 26, 2009 effective date.

D. The county did not waive the requirement to file a pre-suit claim.

The plaintiff argues that the county waived its right to assert the defense of her failure to file a pre-suit claim because the County Risk Manager sent her two letters (the first denying the claim and the second acknowledging the receipt of the claim and stating that it would be evaluated) and that the county did not file its answer until May 8, 2009.²⁵

Waiver requires the intentional abandonment or relinquishment of a known right and it must be shown by unequivocal acts or conduct

²³ See HB 1553 at page 1 attached to County's Motion for Summary Judgment, CP 21.

²⁴ See Medina v. Public Utility District No. 1 of Benton County, 147 Wn.2d 303, 53 P.3d 993 (2002) and Troxell v. Rainier Publ. School Dist. No. 1, 154 Wn.2d 345; 111 P.3d 1173 (2005), both holding that strict compliance with the procedural requirements of RCW 4.96.020 is required.

²⁵ See Appellant's brief at pages 23 and 25.

showing an intent to waive, and the conduct must also be inconsistent with any intention other than to waive. Gross v. Sunding, 139 Wn. App. 54, 161 P. 3d 380 (2007); Clark v. Falling, 92 Wn. App. 805, 812-13, 965 P.2d 644 (1998) (quoting Mid-Town Ltd. P'ship v. Preston, 69 Wn. App. 227, 233, 848 P.2d 1268 (1993)). A concise review of the facts of the present action will establish that the county did not waive the defense.

The County Risk Management Office received the plaintiff's claim on October 30, 2008.²⁶ On the very next day, the Risk Management Office sent the plaintiff's attorney a letter denying the claim.²⁷ On November 5, 2008, another letter was automatically generated by the claim management system, which acknowledged receipt of the claim and stated that it was under evaluation.²⁸ The plaintiff acknowledges that she received the denial letter on November 3, 2008.²⁹ The plaintiff does not make any argument that she was confused as to whether or not her claim was denied. On January 20, 2009, the plaintiff filed her complaint.³⁰ The county filed a Notice of Appearance on January 26, 2009. The plaintiff admits that the statute of limitations on her claim expired just one week later on January

²⁶ See page 2 of Declaration of Mark Wilsdon filed October 30, 2009, CP 20.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See Appellant's Brief at page 23.

³⁰ See Complaint at CP 3.

27, 2009.³¹ Prior to any discovery or any other litigation occurring, the county filed its answer on May 3, 2009, in which it asserted the defense of the plaintiff's failure to properly file her pre-suit claim.³² There is no evidence that the county engaged in any dilatory conduct before the statute of limitations ran or, for that matter, afterwards.

In Lybbert v. Grant County, 141 Wn. 2d 29, 39, 1 P. 3d 1124 (2000), the Supreme Court held that a defendant may, "in certain circumstances", waive the right to assert the defense of insufficient service of process. As will be discussed below, the circumstances of the present case are nothing like those of Lybbert or other cases where waiver has been found.

The most important distinction is that, in the present case, the county did not engage in delay or inconsistent litigation conduct while the statute of limitations expired. In Lybbert, the court stated:

Of particular significance is the fact that the Lybberts served the County with interrogatories that were designed to ascertain whether the defendant was going to rely on the defense of insufficient service of process. Had the County timely responded to these interrogatories, the Lybberts would have had several days to cure the defective service. The County did not answer the interrogatories but instead waited until after the statute of limitations expired to file its answer and for the first time assert the defense.

³¹ See Plaintiff's Appellant's Brief at page 24.

³² See page 9 of County's Answer at CP 18.

Lybbert at 42. This particularly significant fact of Lybbert is in stark contrast to the present case where the statute of limitations expired only seven days after the complaint was filed and the county raised the defense before any further litigation activity occurred. While the plaintiff did submit interrogatories to the county³³, she did so over eight months after the statute of limitations expired.

The Lybbert Court noted that the only case where it previously addressed waiver of insufficient of process was French v. Gabriel, 116 Wn. 2d 584, 806 P. 2d 1234 (1991). In French, the defendant raised the defense of insufficient service of process in an answer filed eight months after the filing of the complaint. The defendant did not move for dismissal based on insufficient service until trial. The court held that the defendant did not waive the defense by waiting until trial to move to dismiss. The court found that once the defense was preserved in an answer; the defendant did not waive it by engaging in discovery; or by opposing motions for summary judgment brought by the plaintiff. The court contrasted the defendant's conduct to that of the defendant in Raymond v. Fleming, 24 Wn. App. 112; 600 P.2d 614 (1979), where the defendant

³³ See Appellant's Brief at page 24.

repeatedly requested extensions of time to file an answer until the statute of limitations expired. In the present case, the county did not engage in any delaying tactics to the detriment of the plaintiff. The statute of limitations expired a mere seven days after the complaint was filed. The county asserted the defense prior to any discovery or litigation activity. The county's conduct did amount to "trial by ambush" or lying in wait as asserted by the plaintiff.³⁴

In finding waiver, the Lybbert Court found "the well-reasoned" decision of Rumjue v. Fairchild, 60 Wn. App. 278, 803 P. 2d 57, *review denied*, 116 Wn. 2d 1026, 812 P. 2d 102 (1991), was "instructive." Lybbert at 40. In Rumjue, the defendants' attorney, after filing a notice of appearance, sent the plaintiff interrogatories and requests for production. The plaintiff's attorney sent interrogatories to the defendant, along with a letter expressing the plaintiff's understanding that the defendants had been properly served. The attorney for the defendants did not respond to the letter, but rather, waited until the statute of limitations ran before asserting the defense of insufficient service of process. Rumjue at 281. The court found that by engaging in discovery, ignoring the plaintiff's letter and

³⁴ *Ibid.* at page 22.

waiting until the statute of limitations expired before asserting the defense, the defendants waived the defense.

In Dyson v. King County, 61 Wn.App. 243, 809 P.2d 769 (1991), the court found that the county waived the right to assert the defense when it was not raised in the county's answer; the county proceeded to engage in discovery and litigate the case for two years without raising the defense; and waited until the statute of limitation had passed before asserting the defense. In King v. Snohomish County, 105 Wn.App. 857, 21 P.3d 1151 (2001); *rev'd on other grounds*, 146 Wn.2d 420, 47 P.3d 563 (2002), waiver was found where the county engaged in litigation for over three years; waited for the statute of limitations to expire and then move for dismissal on the day before trial.

The present case factually stands in stark contrast to cases where waiver has been found. Here, the plaintiff filed her claim on October 30, 2008 and it was denied the next day. She waited until January 20, 2009, seven days before the statute of limitations ran, to file her lawsuit. The county appeared on January 26, 2009. The statute of limitations ran on January 27, 2009. No other litigation activity occurred in the case until May 8, 2009 when the county filed its answer and raised the issue of failing to properly file a pre-suit claim. When the plaintiff fails to follow

codified procedures for filing a claim and then waits until seven days before the statute of limitations runs to file her lawsuit, she is not in a position to make equitable arguments of waiver and estoppel. There is no evidence that the county waived its right to assert the defense of plaintiff's failure to comply with Chapter 4.96 RCW.

E. The county should not be equitably estopped from asserting the defense of failing to properly file a pre-suit claim.

The plaintiff argues that the county should be estopped from asserting the defense of her failure to properly file a pre-suit claim because: (1) she was confused by the county claim form; (2) the Risk Manager first sent her a letter denying her claim and then five days later sending her a letter that her claim form had been received and was being evaluated; and (3) the county waited approximately three months after the statute of limitations ran to file its answer.³⁵ The plaintiff's arguments do not withstand scrutiny.

Equitable estoppel only applies when a party's actions are both reasonable and justifiable. Department of Ecology v. Campbell and Gwinn, LLC, 146 Wn.2d 1, 19-20, 43 P.3d 4 (2002). Estoppel does not apply where the representation relied upon relates to a legal matter.

³⁵ See Appellant's Brief at pages 28-39.

Laymon v. Dept. of Natural Resources, 99 Wn.App. 518, 526, 994 P.2d 232 (2000).

Throughout her Appellant's Brief, the plaintiff states that she sent the claim form to the "address specified" on the form.³⁶ This statement is misleading because the claim form does not specify where it is to be returned to.³⁷ Rather, the claim form does have, at its bottom, an address of "1300 Franklin Sixth Floor PO Box 500 Vancouver WA 98666-5000;" however, this is the address for the Clark County Mail Center as can be seen from the certified mail receipt.³⁸ The plaintiff's failure to file the claim form with the designated agent has nothing to do with the address appearing on the claim form because, as the plaintiff admits, the address is the same for both the Risk Management Office and the designated agent.³⁹ Rather, the failure is the result of the plaintiff's assumption that the Risk Management Division was the designated agent simply because its name appears in one place on the form despite the designation the clerk of the board of county commissioners as the agent in both the published county code and in the recorded resolution.

³⁶ See Appellant's Brief at pages 2, 5, 19, 23, 28 and 31.

³⁷ See claim form attached at Exhibit A to the Declaration of Mark Wilsdon, CP 20.

³⁸ See receipt attached at Exhibit A, Plaintiff's Response to Clark County's Motion for Summary Judgment, CP 24.

³⁹ See Appellant's Brief at page 7.

The requirement to file a claim with the Clerk to the Board of County Commissioners has been part of the published Clark County Code since 2003.⁴⁰ The Board of County Commissioner resolution appointing its Clerk as the agent to receive claims for damages is also a matter of public record being recorded at Clark County Auditor Recording No. 3672260.⁴¹

In Lybbert, *supra*, the court held:

Where both parties can determine the law and have knowledge of the underlying facts, estoppel cannot lie.

Lybbert at 35, *citing*, Chemical Bank v. WPPSS, 102 Wn.2d 874, 905, 691 P.2d 524 (1984). The court further stated:

Given the clear statutory mandate to serve the county auditor, it was not at all reasonable, much less justifiable, for the Lybberts to rely on the county's failure to expressly claim, prior to the expiration of the statute of limitations, that the service upon it was ineffective.

Lybbert at 36.

“Failure to strictly comply with the procedural requirements of the claim filing statute is a well-established defense for local governmental entities.” Estate of Connelly v. Snohomish PUD No. 1, 145 Wn. App. 941, 187 P. 3d 842 (2008). *Citing* Hintz v. Kitsap County, 92 Wn. App. 10, 14,

⁴⁰ CCC 2.95.060.

⁴¹ See resolution attached as Exhibit A to the Declaration of Louise Richards, CP 19.

960 P.2d 946 (1998). One of the procedural requirements of the statute is that the plaintiff must serve the claim on the correct person. Where a statute designates a particular person upon whom service is required, “no other person” is a substitute. Meadowdale Neighborhood Comm. V. City of Edmonds, 27 Wn. App. 261, 264, 616 P. 2d 1257 (1980). It is incumbent upon the plaintiff to conduct the legal research necessary to determine the proper agent with whom a claim is to be filed. Any reliance upon the statements of another regarding the proper agent for service “is not reasonable.” Landreville v. Shoreline Community College Dist. No. 7, 53 Wn. App. 330, 332, 766 P. 2d 1107 (1988).

A case that is very factually similar to the present case is King v. Snohomish County, 105 Wn.App. 857, 21 P.3d 1151 (2001); *rev'd on other grounds*, 146 Wn.2d 420, 47 P.3d 563 (2002). In King, the claimant was given a phone number and a claim form addressed to the risk manager of Snohomish County. Snohomish County’s code designated the clerk of the council as the agent to receive claims. The plaintiff sent the claim form to the county prosecuting attorney’s office. A claims adjuster working for the prosecuting attorney’s office sent her a letter acknowledging receipt of her claim and asked her for additional information. Subsequently, the claims adjuster denied the claim. The

claimant filed a lawsuit and she and the county engaged in discovery and litigation over the following three years. On the day before trial, the county filed a motion to dismiss for the failure to file the claim with the clerk of the county council, as required by county ordinance. The trial court ruled that the county was estopped from asserting the defense of failure to properly file a claim. The Court of Appeals reversed the trial court's determination that equitable estoppel applied. The court noted that the Snohomish County code designated the proper agent with whom the claim is to be filed. The court stated:

Equitable estoppel is based upon the notion that "a party should be held to a representation made or position assumed where equitable consequences would otherwise result to another party who is justifiably and in good faith relied thereon." The party asserting the doctrine must establish "by clear, cogent, and convincing evidence" that there was (1) an admission, (2) action by another in reasonable reliance upon the admission, and (3) injury to the relying party. "Where both parties can determine the law and have knowledge of the underlying facts, estoppel cannot lie."

King at 863 (internal citations omitted).

The principle that an attorney representing a plaintiff cannot reasonably and justifiably rely on a claim form for legal and procedural direction is demonstrated in Schoonover v. State of Washington, 116 Wn.App. 171, 64 P.3d 677 (2003). There, the plaintiff argued that the

state should be equitably estopped from raising his failure to comply with the claim filing process because the state had provided him an “outdated claim form” that included instructions that the form could be signed by the claimant or the claimant’s attorney, whereas, state law authorized an attorney’s signature in limited circumstances. The court stated:

Even assuming Schoonover’s attorney relied on the outdated claim form in preparing and filing his claim, his equitable estoppel argument fails. As noted, equitable estoppel does not apply where the representation is a legal matter. Laymon, 99 Wn.App. at 526. The interpretation of a statute, in this case, RCW 4.92.100, is purely legal. As such, equitable estoppel does not apply.

Schoonover at 181.

Another decision rejecting a party’s reliance on a claim form is Renner v. City of Marysville, 145 Wn.App. 443, 187 P.3d 283 (2008). In Renner, a plaintiff filled out a claim form provided by the city that asked for the plaintiff’s address, but not his address for the previous six months. RCW 4.96.020 required a statement of the claimant’s address for the previous six months. The court found that equitable estoppel did not apply, even though the claim form did not ask for the claimant’s address for the prior six months. The court stated:

While the form supplied by Marysville was arguably misleading, Renner was under no obligation to use it. He was equally as able as the city to read the statute and understand what information he had to provide.

Renner at 451. The court held “where both parties can determine the law and have knowledge of the underlying facts, estoppel cannot lie.” Renner at 450.⁴²

The county claim form did not instruct the plaintiff to return it to the Risk Management Division. Rather, the plaintiff made an assumption that the proper recipient was that office because its name appears at the top of the form. The determination of the proper agent with whom to file a claim is a matter of law. CCC 2.95.060 clearly specifies that “claims shall be filed with the clerk of the board.” Resolution 2003-07-05 designating the clerk as the agent to receive claims is a public record recorded with the Auditor as specified by RCW 4.96.020. The plaintiff simply made an assumption and did not take the steps necessary to determine the proper agent to receive the claim. Her equitable estoppel argument premised upon the claim form is thus properly rejected.

The plaintiff next complains that she received two letters from the county Risk Manager. The first received on November 3, 2008, advised

⁴² Ultimately, the court held that dismissal was not warranted because the information relating to the claimant’s address related to content and that content requirements only require substantial compliance; whereas claim filing requirements must be strictly complied with.

her that her claim has been received and was denied.⁴³ The second letter was a letter that is automatically generated by the county claim management system and acknowledged receipt of the claim and indicated that an evaluation could take 60 days.⁴⁴ This letter was received by the plaintiff on November 6, 2008.⁴⁵ There is no evidence that the Plaintiff was confused by the second letter or that she made any attempt to contact the Risk Manager to determine the reason for the second letter. Rather, the next action taken by the plaintiff was the filing of her complaint on January 20, 2009.⁴⁶

The plaintiff offers no explanation as to how these two letters in any way support her equitable estoppel argument. She does not claim that she relied upon them in any way to her detriment. Rather, she makes the conclusory statement that “the letters are cogent, convincing evidence of Defendant’s statement and Plaintiff’s reliance upon the statements that she had properly filed her claim with Defendant is reasonable.”⁴⁷ Of course, the letters do not contain any statement that the plaintiff “properly filed” her claim form. Rather, at the most, she made an assumption that the

⁴³ See Appellant’s Brief at page 23 and letter attached as Exhibit B to the Declaration of Mark Wilsdon, CP 20.

⁴⁴ See page 2 and Exhibit C of Declaration of Mark Wilsdon, CP 20.

⁴⁵ See Appellant’s Brief at page 23.

⁴⁶ See Appellant’s Brief at page 24.

claim was properly filed because she received two letters stating that the claim was received.

The fact that a defendant communicates with a claimant, even though the claim was not filed with the proper agent, does not preclude the defendant from asserting the defense of failing to properly file the claim. In Kleyer v. Harborview Med. Ctr. of the UW, 76 Wn.App 542, 887 P.2d 468 (1995) the court dealt with an argument similar to the plaintiff's. In Kleyer, the plaintiff's attorney filed a tort claim with the University of Washington's risk management office. The proper office for filing the claim was the risk management office in Olympia. The University's claim manager wrote the plaintiff's attorney a letter denying liability for one of the plaintiff's injuries and offering an \$8,000 settlement for another of the plaintiff's injuries. The risk manager did not advise the plaintiff's attorney that the claim should have been filed in Olympia. Kleyer at 544. Kleyer filed suit and the University filed an answer raising defense of insufficient filing of the claim. Despite the actions of the University's risk manager, the court affirmed the dismissal of the plaintiff's complaint for failure to strictly comply with the tort claim filing statute. The court found that the

⁴⁷ See Appellant's Brief at page 29.

plaintiff had not properly preserved the issues of waiver or estoppel.

However, the court stated the following:

Even if we were inclined to address Kleyer's [waiver and estoppel] arguments, they would fail on the merits. Under RCW 4.92.110, filing a claim with the office of risk management in Olympia is a prerequisite to the commencement of an action, not the initiation of settlement negotiations. Therefore, the University's attempt to settle Kleyer's claim had no impact on Kleyer's statutory obligation to file a claim with the office of risk management in Olympia before filing a suit against the University.

Kleyer at 549. Likewise, in the present case, the county's risk manager's communications with the plaintiff's attorney had no impact on the obligation to file her claim with the agent designated by the county, as required by RCW 4.96.010 and 4.96.020.

In Hardesty v. Stenchever, 82 Wn.App. 253, 917 P.2d 577 (1996), the claimant filed her claim with the risk manager of the University of Washington, rather than the state risk management office in Olympia. In response to a motion for summary judgment, the claimant argued that the state should be equitably estopped from asserting the defense of her failure to comply with the claim filing process because the University of Washington risk management office did not inform her that she was also required to file the claim in Olympia. The court observed that "Washington courts have consistently held that strict compliance with the

requirements of notice of claim statutes is a condition precedent to recovery.” Hardesty at 259. The court also stated that Hardesty’s argument that the result was “manifestly unfair” was “irrelevant.” *id.*

The plaintiff has not shown that she reasonably and justifiably relied upon the letters to her detriment. As in Kleyer, the county risk manager was not obligated to tell the plaintiff’s attorney how to properly file a claim. Her claim was denied and she subsequently filed her lawsuit.

Finally, the plaintiff argues that estoppel should apply because the county waited until May 8, 2009 to file its answer.⁴⁸ As explained previously, this is not a material fact. The statute of limitations ran on the plaintiff’s claim on January 27, 2009, just seven days after she filed her complaint. Dismissal of her lawsuit was mandatory because she had not properly file a pre-suit claim prior to the statute running. Courts are required to strictly enforce the procedural requirements of Chapter 4.96 RCW without any requirement for a showing of prejudice. Hintz v. Kitsap County, 92 Wn. App. 10, 14, 960 P. 2d 1272 (1998). Absent the proper filing of a claim for damages, the Court is without jurisdiction and dismissal is the only remedy. Burnett v. Tacoma City Light, 124 Wn. App. 550, 558, 104 P. 3d 677 (2004).

F. Equitable tolling does not apply.

The predicates for equitable tolling are bad faith, deception or false assurances by the defendant and the exercise of diligence by the plaintiff. Millay v. Cam, 135 Wn.2d 193, 955 P.2d 791 (1998). It is an exception to this statute of limitations that should be used “sparingly” and in “narrow circumstances.” In Re: Personal Restraint of Bonds, 165 Wn.2d 135, 141, 196 P.3d 672 (2008). There is no evidence that the county engaged in actions that were either undertaken in bad faith, or deceptive, or false assurances. Additionally, consistent with the analysis of the inapplicability of equitable estoppel, the plaintiff cannot establish the exercise of diligence when the alleged assurances by the county related to matters of law – *i.e.*, the proper agent with whom to file a claim.

V. CONCLUSION

The material facts are not in dispute. The plaintiff failed to file her pre-suit claim with the agent designated by the county code. The Legislature exercised its constitutional authority to require pre-suit claims when it conditionally waived sovereign immunity. When, in 2009, the Legislature passed HB 1553 it made the changes to claim forms

⁴⁸ See Appellant’s Brief at page 29.

prospective and it recognized that its adoption of a substantial compliance standard was in response to previous judicial holdings requiring strict compliance with claim filing requirements. Thus, the enactment of HB 1553 can only apply prospectively. The county did not engage in conduct that would support a finding of waiver or estoppel. Estoppel does not apply to legal matters which the determination of the proper agent with whom to file a claim is. The trial court order granting summary judgment should be affirmed.

DATED this 14th day of July, 2011.

RESPECTFULLY SUBMITTED:

Attorneys for Respondent

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington



E. BRONSON POTTER, WSBA #9102
Chief Civil Deputy Prosecuting Attorney

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CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

NO. 41915-7-II

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

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

Appellant,

v.

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.

CERTIFICATE OF SERVICE

ANTHONY F. GOLIK
Prosecuting Attorney for Clark County, Washington

E. BRONSON POTTER, WSBA #9102
Chief Civil Deputy Prosecuting Attorney
Attorney for Respondent Clark County and John Doe
and Jane Doe, Employees of Clark County

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STATE OF WASHINGTON
BY DEPUTY

COURT OF APPEALS
DIVISION II

Clark County Prosecutor's Office
Civil Division
PO Box 5000
Vancouver, WA 98666-5000
Telephone: (360) 397-2478

I, Thelma Kremer, hereby certify and state the following: I am a citizen of the United States of America and a resident of the State of Washington; I am over the age of eighteen years; I am not a party to this action; and I am competent to be a witness herein.

On this 14th day of July, 2011, I electronically filed *Brief of the County Respondents* and *Certificate of Service* with the Court of Appeals of the State of Washington, Division II, by email using the following address: coa2filings@courts.wa.gov

On this 14th day of July, 2011, true and correct copies of *Brief of County Respondents* and *Certificate of Service* were served on the parties by email, at those addresses specified below, and copies of such were sent out by U.S. mail, postage prepaid, on the 15th day of July, 2011, as follows:

Mark Jobson	<input checked="" type="checkbox"/>	U.S. Mail
Asst. Attorney General	<input type="checkbox"/>	Facsimile
Torts Division	<input type="checkbox"/>	Federal Express
PO Box 40126	<input type="checkbox"/>	Hand Delivered
Olympia WA 98504-0126		
<input checked="" type="checkbox"/> Email at:	markj@atg.wa.gov and	
	torolyef@atg.wa.gov	

Ronald W. Greenen	<input checked="" type="checkbox"/>	U.S. Mail
Greenen & Greenen, PLLC	<input type="checkbox"/>	Facsimile
1104 Main Street #400	<input type="checkbox"/>	Federal Express
Vancouver WA 98660	<input type="checkbox"/>	Hand Delivered
<input checked="" type="checkbox"/> Email at:	ron@greenenpllc.com	

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.


Thelma Kremer