

No. 42622-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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KATHERINE E. MORSMAN, Plaintiff/Appellant,

v.

CLARK COUNTY, Defendant/Respondent

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APPELLANT'S OPENING BRIEF

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**TABLE OF CONTENTS**

I. INTRODUCTION..... 1

II. ASSIGNMENTS OF ERROR..... 3

    A. First Assignment of Error..... 3

    B. Issue Pertaining to First Assignment of Error ..... 4

III. STATEMENT OF THE CASE..... 5

    A. Statement of Facts ..... 5

    B. Procedural History..... 11

IV. ARGUMENT..... 12

    A. Standard of Review ..... 12

    B. Equitable Estoppel and Its Application to Public Entities ..... 12

    C. Trial Court Erred Regarding the Nature of “Representation” .... 17

V. CONCLUSION..... 26

## TABLE OF AUTHORITIES

### Cases

|   |                            |
|---|----------------------------|
| Finch v. Matthews, 74 Wn2d 161, 443 P2d 833 (1968).....   | 24, 26                     |
| Korst v. McMahon, 136 Wn App 202, 206, 148 P3d 1081 (2006) .....  | 12                         |
| Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wn2d 738, 863 P2d<br>535 (1993).....                        | 13, 23, 24                 |
| Medina v. Pub. Util. Dist. No. 1 of Benton County, 147 Wash. 2d 303, 53<br>P3d 993, 997 (2002).....           | 19                         |
| Silverstreak, Inc. v. Washington State Dept. of Labor & Indus., 159 Wn2d<br>868, 154 P3d 891, 901 (2007)..... | 13, 14, 15, 16, 17, 21, 24 |
| Standing Rock Homeowners Ass'n v. Misich, 106 Wn App 231, 242–43,<br>23 P3d 520 (2001).....                   | 12                         |
| State v. Hill, 123 Wn2d 641, 644, 87 P3d 313 (1994).....  | 12                         |
| Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn2d 873, 880, 73 P3d<br>369 (2003).....                     | 12                         |

### Statutes

|                                     |                  |
|-------------------------------------|------------------|
| Clark County Code 2.95.030 .....    | 9                |
| Clark County Code 2.95.060(A).....  | 9                |
| Clark County Code 2.95.060(B) ..... | 10               |
| RCW 4.92.090 .....                  | 24               |
| RCW 4.96.020 .....                  | 6, 9, 18, 19, 20 |

## I. INTRODUCTION

This is a personal injury lawsuit for damages caused by the negligence of a Clark County employee. On August 12, 2005, Plaintiff Kristine Morsman (hereinafter "Plaintiff") was the occupant of a vehicle that was rear-ended by a vehicle driven by a member of the Clark County Sheriff's Office. Soon after the accident, Clark County's Risk Management Division performed an investigation and made payments for the property damage to Plaintiff's vehicle, and for some of her initial medical treatment. On August 8, 2008, Plaintiff served a pre-litigation Tort Notice on Clark County (hereinafter "the County"), advising it of her intent to pursue a claim for ongoing injuries. Plaintiff's attorney prepared the Tort Notice using a form supplied by the County, on which the words

### **"RISK MANAGEMENT DIVISION"**

were printed in the header, and the address, phone number and fax number for that County office were printed in the footer. Based on this language on the County's form, and also a discussion with personnel from the Risk Management Division about where the form was to be returned, Plaintiff's counsel had the Tort Notice hand delivered to the Risk Management Division office in the Public Service Center, located at 1300 Franklin Street in downtown Vancouver.

Not long after serving the Tort Notice, in October 2008, Plaintiff initiated the underlying lawsuit. In response to the lawsuit, in December 2010, the County filed a Motion for Summary Judgment, raising the defense that Plaintiff's Tort Notice was not properly delivered, and was therefore ineffective. The County argued that Plaintiff should not have delivered the Tort Notice to the Risk Management Division, as suggested by the form and its employee. Instead, the County said Plaintiff should have delivered it to the Clerk of the Board of the County Commissioners, whose office was about 30 feet away from the Risk Management Division, and who, upon receipt of a Tort Notice, is to deliver it to the Risk Management Division.

The trial court granted County's motion on the issue regarding whether the Notice was delivered to the correct office. However, in response to County's motion, Plaintiff had argued that County should be equitably estopped from asserting its defense relating to service of the Notice. This was because the County had made affirmatively misleading representations regarding the proper place to serve the Notice, both in the form it provided and during its employee's discussion with Plaintiff's counsel's staff. The trial court decided that a question of fact was present on the estoppel issue, and therefore scheduled a bench trial to receive evidence on that limited issue.

After a bench trial, the trial court held against Plaintiff, finding that she had not proven each element of estoppel, resulting in dismissal of the lawsuit. In this determination, the trial court erred. The error relates to a single element of estoppel, and is an issue of law. Because the trial court found for Plaintiff on some of the other elements of estoppel, and the remaining elements are shown to be satisfied, a determination that the trial court erred requires reversal of the judgment, and remand for trial.

## **II. ASSIGNMENTS OF ERROR**

### **A. First Assignment of Error**

The trial court erred in concluding that information contained on the County's Tort Notice form, along with representations made by its staff, was not an affirmative statement, act or admission that is inconsistent with the County's defense of failure by Plaintiff to comply with tort claim filing requirements. Specifically, the court erred in making the following conclusions of law:

2. The information contained on the tort claim notice form provided by the Risk Management Division of Clark County was not an affirmative action, statement or admission by the County which is inconsistent with its current defense. The form is ambiguous. It does not expressly direct the tort claimant to deliver the notice to any particular county office. While the form is ambiguous on this point, nothing on the form affirmatively instructs the tort claimant to file the notice with the Risk Manager.  
*CP 156.*

4. In this case, the plaintiff failed to establish by clear, cogent and convincing evidence that the courier who delivered the notice of tort claim was actively misled by County employees. The form alone is not enough to establish an actively inconsistent position by the County. No evidence was presented concerning any interaction between the courier and Risk Management personnel. *CP 156.*
5. The plaintiff has failed to establish that she acted in reliance upon the County's affirmatively inconsistent conduct, in misfiling her notice of tort claim. Although she is certainly injured by the result, and estoppel would not impair a government function, she has failed to establish all of the elements required for equitable estoppel. The County may assert the defense, and the effect of asserting the defense is dismissal of the action. *CP 157.*

The trial court's error in its conclusions of law led to (i) the determination that Plaintiff failed to prove that County should be equitably estopped, and (ii) the dismissal of her personal injury action.

As discussed below, the trial court found for Plaintiff on all elements of estoppel save the element of affirmative representation. If this Court agrees that the trial court erred, reversal of the judgment dismissing the action is necessary.

**B. Issue Pertaining to First Assignment of Error**

Did the trial court err in concluding the Tort Notice form supplied by the County, along with representations made by its staff, was not a statement, act or admission that is inconsistent with its defense of failure by Plaintiff to comply with tort claim filing requirements?

### III. STATEMENT OF THE CASE

#### A. Statement of Facts

The following factual background is taken largely from the trial court's findings of fact (*CP 151-159*), which are not challenged, together with other sources in the record:

On August 1, 2005, Plaintiff was the occupant of a vehicle that was involved in a rear-end collision with another vehicle driven by a member of the Clark County Sheriff's Office, an agent of the County. *CP 1 (Plaintiff's Complaint); CP 151-152, ¶ 1 (Trial Court's Findings of Fact and Conclusions of Law)*. Plaintiff claims that County's negligence caused the accident, which resulted in both damage to her vehicle and personal injuries. *Id.*

Soon after the accident, employees of Clark County's Risk Management Division were advised about it, the resulting property damage, and of Plaintiff's injuries. *CP 152, ¶ 2*. The Risk Management Division investigated the accident, interviewed Plaintiff, and obtained information about the cost of repairing her vehicle, and her medical expenses. The County paid for the property damage to Plaintiff's vehicle, and made one or more payments to her insurance company's subrogation claim for some medical treatment. *CP 152, ¶ 2*.

Mark Wilsdon was, at all material times, employed as the County's Risk Manager, the head of the Risk Management Division. *CP 152, ¶ 3.* By March 2007, Plaintiff's claim was considered by the Risk Management Division to be on standby status, with no further action contemplated. *Id.*

In January, 2008, Plaintiff hired attorney Michael Gutzler to represent her in a claim for ongoing personal injuries caused by the accident. *CP 152, ¶ 4.* Mr. Gutzler gathered medical records and other documentation concerning the claim, and later researched the proper method of commencing a lawsuit against a government agency in Washington. *Id.* As part of this process, Mr. Gutzler reviewed RCW 4.96.020, and cases interpreting the statute. *Id.*

Mr. Gutzler was assisted by legal professional, Sherry Harney. Ms. Harney and Mr. Gutzler requested a police report concerning the accident from the Clark County Sheriff's Office. *CP 152, ¶ 5.* That office directed them to the Washington State Patrol, which provided a report. *Id.*

Based on this contact with the State, Mr. Gutzler sent a notice of tort claim to the Washington State Patrol's Risk Management Division. *CP 152, ¶ 5; RP 26-27 (Testimony of Sherry Harney).* This form was returned by the State Patrol, whose employees advised Mr. Gutzler to file the form with Clark County. *CP 152, ¶ 5.*

In July, 2008, Ms. Harney called the Civil Unit of the Clark County Sheriff's Office, seeking information on where to present a notice of tort claim. *CP 153*, ¶ 6. The Sheriff's Office directed Ms. Harney to contact the Risk Manager's office. She was also advised that a form of Tort Notice was available on the Risk Management Division website. *Id.*

On August 8, 2008, Harney contacted the Risk Management Division by telephone, and spoke to one of its employees at the office. *CP 153*, ¶ 7. The person at the Risk Management Division faxed the Tort Notice form to Ms. Harney, and advised her that it was to be completed and returned to 1300 Franklin Street. *Id.* After consulting with Mr. Gutzler, Ms. Harney did what had been suggested; she directed the completed Tort Notice to the Risk Management Division at the address provided on the form and by its employee. *CP 153*, ¶ 7; *Plaintiff's Trial Exhibit 2 (Notes from conversation and copy of fax received from Risk Management Division)*; *RP 28 -34 (Testimony of Sherry Harney)*.

Ms. Harney testified that her conclusion that the Tort Notice form was to be delivered to the Risk Management Division, rather than someplace else, stemmed from the fact that:

“[T]he information I had obtained by phone [from the Risk Management Division] matched everything on the form exactly.” *RP 37 (Testimony of Sherry Harney)*.

On August 8, 2008, Plaintiff's completed Tort Notice form was hand delivered to the Risk Management Division office, on the sixth floor of the Public Service Center, 1300 Franklin Street, in downtown Vancouver. *CP 153 at ¶ 8; CP 10 (Letter received by Risk Management Division)*. A letter from Mr. Gutzler accompanied the form, advising the County that he represented Plaintiff, and asking the recipient to let him know "if anything further is needed at this time." *Id.*

As regards the Tort Notice form provided by Clark County, the words "**RISK MANAGEMENT DIVISION**" were printed in the header on the first page, next to the County seal. *CP 153 at ¶ 9; CP 11-12 (Clark County Tort Notice Form) (emphasis in original)*. At the bottom of each page of the form is listed the Risk Management Division's mailing address, 1300 Franklin, Sixth Floor, PO Box 5000, Vancouver, WA 98666-5000. *Id.; RP 52-53 (Testimony of Mark Wilsdon)*. The form does not specifically direct the claimant regarding how to serve the Tort Notice. However, the only County office mentioned on the form is the Risk Management Division. *Id.*

Immediately below the address on the Tort Notice form, it lists the Risk Management Division's telephone and facsimile numbers. *CP 11-12; CP 154 at ¶ 10; RP 52-53*.

Also on the bottom of each page of the County's Tort Notice form, the following language is printed: **"This Tort Notice conforms with RCW 4.96.020."** *CP 11-12; CP 154, ¶ 10* (emphasis added)

Based on the information listed on the County's form, and Ms. Harney's conversation with Risk Management Division personnel, she and Mr. Gutzler were led to believe that the Risk Management Division was the proper office to receive the completed Tort Notice. *CP 154, ¶ 10*. As noted above, at the direction of Mr. Gutzler, Ms. Harney instructed a courier to hand deliver the completed Tort Notice to the Risk Management Division. The Notice, along with Mr. Gutzler's letter, was stamped as "Received" by the Risk Management Division on August 8, 2008. *CP 10 – 12 (Letter and Tort Notice)*.

The Risk Management Division is the agency tasked with investigating claims threatened and/or raised against Clark County. *Clark County Code 2.95.030*. Nevertheless, and despite the information listed on the County's Tort Notice form, the County appointed the Clerk of the Board of County Commissioners as the recipient of claims. *Clark County Code 2.95.060(A)*. The Code section designating the Clerk as the recipient says:

"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." *Id.*

Although the Clerk is designated as agent for receipt of claims, his or her role is that of pass-through. Upon receipt of a claim, the Clerk is required to transmit a copy to the Risk Management Division within three days so an investigation can be performed. *Clark County Code 2.95.060(B)*.

The trial court determined that both the Risk Management Division and the Clerk of the Clark County Board of Commissioners had “peculiar, and potentially deceptive policies regarding how to respond to the receipt of tort claim notices and how to respond to inquiries about where to file tort claim notices.” *CP 154-155, ¶¶ 12-14 (Findings of Fact and Conclusions of Law)*. These policies were, in the view of the trial court, “based upon a strained interpretation of what constitutes giving or volunteering legal advice.” *Id.* Response to inquiries would vary, depending upon whether and how a specific inquiry was made, and whether a notice was received by mail, or delivered in person. *Id.* The policy also varied depending upon whether the tort claimant was represented by counsel. *Id.*

The precise courier who hand delivered the Tort Notice in August 2008 was not identified, and therefore did not testify. *CP 155, ¶ 15*. As a result, no evidence was presented regarding the interaction, if any, between the courier and Risk Management personnel when the Notice was

delivered. *Id.* After the form of Notice was delivered to, and accepted by, the Risk Management Division, it was not returned to Mr. Gutzler. *Id.*

The trial court specifically determined that allowing Plaintiff to pursue her claim for personal injuries “would not impair any government function.” *CP 156, ¶ 18.* Except for requiring a defense of the merits of Plaintiff’s claim, the County would not be prejudiced by allowing this action to proceed. *Id.* This type of “impairment” is no different than if the Tort Notice had been filed with the Clerk of the Board initially, and the clerk had then delivered the Notice to the Risk Management Division. *Id.*

#### **B. Procedural History**

On October 9, 2008, Plaintiff filed her Summons and Complaint. *CP 155 at ¶ 16.* On December 8, 2008, the Summons and Complaint were properly served on the Clark County Auditor. *Id.*

On or about December 8, 2010, County raised the defense of improper service of the tort claim notice, and filed a motion for summary judgment on that issue. *CP 16, et seq.* The trial court allowed County’s motion in part, finding that the tort claim notice was not timely filed, but that a bench trial was required on the limited issue of Plaintiff’s equitable estoppel counter defense. *CP 116-121.* Based on the trial court’s findings that followed the bench trial, the action was dismissed. *CP 180-181.*

#### IV. ARGUMENT

##### A. Standard of Review

Appellate review of findings of fact and conclusions of law following a bench trial is limited to determining whether substantial evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn App 231, 242–43, 23 P3d 520 (2001). The court reviews all reasonable inferences in the light most favorable to the prevailing party, *Korst v. McMahon*, 136 Wn App 202, 206, 148 P3d 1081 (2006), and unchallenged findings are verities on appeal. *State v. Hill*, 123 Wn2d 641, 644, 87 P3d 313 (1994).

Questions of law are reviewed *de novo*. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn2d 873, 880, 73 P3d 369 (2003).

##### B. Equitable Estoppel and Its Application to Public Entities

The sole issue on this appeal is whether the trial court correctly determined that Plaintiff was not entitled to the benefit of the doctrine of equitable estoppel as a counter-defense to County's tort claim notice defense.

Equitable estoppel prevents a party from taking a position inconsistent with a previous one where inequitable consequences would

result to another party who has justifiably and in good faith relied on the estopped party's acts or statements. *Silverstreak, Inc. v. Washington State Dept. of Labor & Indus.*, 159 Wn2d 868, 887, 154 P3d 891, 901 (2007), (citing, *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn2d 738, 743-744, 863 P2d 535 (1993)). When equitable estoppel is asserted against the government, the party asserting estoppel must establish five elements:

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

To establish an "injury" for equitable estoppel purposes, a party need only establish he or she justifiably relied to his or her detriment on the words or conduct of another. *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn2d 738, 747, 863 P2d 535 (1993). Under Washington law, injury, prejudice and detrimental reliance are used interchangeably to express the requirement that a party asserting equitable estoppel must show a detrimental change of position. *Id.*

The party asserting equitable estoppel must establish the elements with clear, cogent and convincing evidence. *Id.* The element of “manifest injustice” seems to be an issue of law for the court based upon the evidence. *Silverstreak*, 159 Wn2d at 890.

*Silverstreak* provides a good example of a case in which government actions misleading private individuals were held subject to equitable estoppel, and is a case with similarities to this one.

*Silverstreak* stemmed from work performed in 1998 at the Sea-Tac Airport’s “third runway project.” *Silverstreak*, 159 Wn2d at 876-877.

The project involved construction of an embankment using delivered fill material. *Id.* A company named City Transfer of Kent, Inc. (CTI) bid to supply the fill material, assuming payment of “market wages” for dump truck drivers. *Id.* After being awarded the contract, CTI contracted with another company, Suppliers, to supply and deliver fill material. *Id.* Suppliers paid their truck drivers “market wages.” *Id.*

When preparing their bid, Suppliers relied upon a 1992 Department of Labor & Industries policy memorandum on “Delivery of Materials.” *Id.* The memorandum discussed the Washington Administrative Code on “prevailing wages” which dictates when certain activities performed by a driver trigger the requirements of Washington’s Prevailing Wage Act. *Id.* The memorandum suggested that “prevailing

wages” (higher than market wages) need not be paid to drivers whose activities are limited to dumping material at the site, as opposed to drivers whose work involved “incorporation of materials into the job site”. *Id.*

About one year after completion of the third runway project, the Department of Labor & Industries issued a notice of violation to Suppliers under the Prevailing Wage Act, along with a letter stating that prevailing wages were owed to the dump truck drivers. *Id.* The Notice and letter were based on the Department’s decision that the applicable Washington Administrative Code required payment of prevailing wages, despite the suggestion to the contrary in its 1992 memorandum. *Id.* at 877, 881-883. The difference between “prevailing wage” and wages actually paid to the end-dump truck drivers was approximately \$500,000. *Id.* at 877.

In Suppliers’ administrative appeal, it argued, amongst other things, that the Department should be estopped from imposing a notice of violation inconsistent with its policy memorandum position. *Id.* at 886-887. The evidence demonstrated that before submitting a bid, a vice-president from CTI (not Suppliers) received a copy of the memorandum from the head of the Department’s prevailing wage section. *Id.* at 887-888.

Initially, the Department’s actions were upheld. *Id.* An administrative law judge rejected the estoppel argument based on a lack of

reasonable reliance. The ALJ noted that Suppliers did not contact the Department directly, and concluded that Suppliers could not maintain their claim based on an alleged contact to the Department from CTI. *Id.* However, that determination was eventually reversed by the Washington Supreme Court. The Court explained that the 1992 memorandum was a publicly available statement of department policy, which the Department sent to bidders on the Third Runway Project, expressly suggesting that drivers like those employed by Suppliers need not be paid “prevailing wages.” *Id.* Although this memorandum was later deemed inconsistent with the applicable Administrative Code, the Court said it was reasonable for Suppliers to rely on it. *Id.*

The Supreme Court also explained that, in Washington, the “injury” element requires the party asserting equitable estoppel to show a detrimental change of position based upon the government’s representation. *Id.* at 889. Because Suppliers had premised its bid upon the expectation of paying market wages, and was later faced with the prospect of having to pay significantly more, the Court decided the injury element was met. *Id.*

The Supreme Court further determined that a manifest injustice was involved, explaining it would be self-evidently unfair to permit the Department to publicly distribute a memorandum and later take a contrary

position after contractors relied upon it to their detriment. *Id.* Therefore, based on the facts and circumstances present, the Court ultimately decided that each of the elements of equitable estoppel were met. *Id.*

**C. Trial Court Erred Regarding the Nature of “Representation”**

The trial court’s error in this case was its conclusion that the Tort Notice form supplied by County, along with the verbal representations made by the Risk Management Division staff that supplied the form, was not a sufficient “representation” for purposes of equitable estoppel.

As noted, the court’s conclusions of law included the determination that:

The information contained on the tort claim notice form provided by the Risk Management Division of Clark County was not an affirmative action, statement or admission by the County which is inconsistent with its current defense. The form is ambiguous. It does not expressly direct the tort claimant to deliver the notice to any particular county office. While the form is ambiguous on this point, nothing on the form affirmatively instructs the tort claimant to file the notice with the Risk Manager. *CP 156 at ¶ 2*(emphasis supplied).

The form is, of course, a publication by a public body, just like the administrative memorandum involved in *Silverstreak*. Its publication is an “act”; its contents are, to the extent they state or imply facts, “representations” by County.

The trial court's conclusion ignores both the essential elements of the form itself and the other circumstances that accompanied its provision to Plaintiff's counsel by the Risk Management Division.

The County's Tort Notice form itself is deceptive. It appears designed to (i) induce claimants to return the form to the wrong office, and (ii) assure them that such Notice is adequate under RCW 4.96.020 (the statute governing tort claim notice that the form says it complies with).

Although the 2008 version<sup>1</sup> of Clark County's Tort Notice form was not supposed to be returned to the Risk Management Division, it had, in large, bold heading, the words "**RISK MANAGEMENT DIVISION**" next to the County seal. The form then provided the correct mailing address for the Risk Management Division, in addition to its telephone and fax numbers. The Clerk of the Board, who was supposed to receive the form and then immediately pass it along to the Risk Management Division, was nowhere mentioned on either the form or other documents provided by the County to tort claimants.

Returning the form to the Risk Management Division, using the information listed on the form, is of course a pit fall. It provides the County with a technical defense to a claim before it can be adjudicated on

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<sup>1</sup> In July 2009, the County revised its form of Tort Notice to conform with changes the Legislature made to RCW 4.96.020, which required local government entities to make available a form that includes instructions on how the form is to be presented. RCW 4.96.020(3)(c).

its merits, even in situations when, like here, the County has ample opportunity to perform the type of investigation contemplated by the tort claim notice requirements. *See, e.g. Medina v. Pub. Util. Dist. No. 1 of Benton County*, 147 Wash. 2d 303, 310, 53 P3d 993, 997 (2002) (purposes of claim filing provisions is to allow government entities time to investigate claims).

Even more misleading than the office name and address listed on the County's form is the fact it states unequivocally: "**This tort notice conforms with RCW 4.96.020.**" This is an "affirmative" representation, and a very misleading one.

RCW 4.96.020 is the statute that designates to whom tort notice should be directed. In 2008, it provided in relevant part that:

- (1) The provisions of this section apply to claims for damages against all local governmental entities.
- (2) *The governing body of each local government entity shall appoint an agent to receive any claim for damages made under this chapter. The identity of the agent and the address where he or she may be reached during the normal business hours of the local governmental entity are public records and shall be recorded with the auditor of the county in which the entity is located. All claims for damages against a local governmental entity shall be presented to the agent within the applicable period of limitations within which an action must be commenced. (Emphasis supplied). RCW 4.96.020 (2008).*

Clark County's Tort Notice form's explicitly asserts that it "conforms with" RCW 4.96.020, which relates to the question of to whom tort claim notice is to be given. This amounts to a representation of fact that (i) if the form were used according to its terms, then (ii) the correct person or office from the County would be receiving Notice. In the context of the underlying facts of this case, the statement on the form regarding RCW 4.96.020 could serve no other reasonable purpose.

Compounding the issues with the form itself is the way it was supplied by the County in this instance. Ms. Harney called the Clark County Sheriff's Office to inquire about tort notices, and was directed to the Risk Management Division. When Ms. Harney contacted the Risk Management Division, its personnel (i) sent a copy of the Tort Notice by fax and (ii) told Ms. Harney to return the form to the very address that was listed on the form, which she did. The information on the form matched the information given to Ms. Harney by the Risk Management Division. She discussed this fact, and its impact on her decision making, at trial:

Q. Are you able to recall what facts led to the conclusion that the form was to be sent to the Risk Management Division?

A. Just the information I had obtained by phone matched everything on the form exactly. *RP 37 (Testimony of Sherry Harney).*

The trial court made much of the fact that the form does not make *affirmative misrepresentations*, saying it does not *expressly* direct claimants to file notices with the Risk Management Division. This, however, ignores the sum total of the facts and circumstances. Ms. Harney made specific inquiries to the County about its tort claim notice procedures. In response, a County employee provided verbal instruction about where Ms. Harney should send the Notice, along with a faxed copy of the form, which included information that matched the verbal instructions. Although the form did not include the words “return this document to the Risk Management Division,” the misleading language on the form, coupled with the manner in which it was provided, was sufficient to establish that the County made a “statement, admission, or act \* \* \* [that was] inconsistent with its later claims.” *Silverstreak*, 159 Wn2d at 887. The County’s statements and actions led Plaintiff down the proverbial primrose path, assuring her that delivery of the Tort Notice to the Risk Management Division was appropriate. The County then turned around and sought to dismiss Plaintiff’s claim based on the fact she followed its statements and actions.

Rather than centering on the County’s misleading statements and actions that led to the decision to deliver the Tort Notice to the Risk Management Division, the trial court focused on whether the County made

affirmative representations to the unknown courier who dropped off the tort claim notice. This was a non-issue. The courier was not Plaintiff's agent. To the extent evidence regarding the courier bears on the issue before this court, it is only because of the Risk Management Division's failure to direct the courier to the right place (the Clerk of the Board, 30 feet away), or to return it, as the Risk Manager testified was done with mailed notices his office receives. *RP 101-02 (Testimony of Mark Wilsdon)*.

If the court agrees that the evidence and the trial court's findings require the legal conclusion that the County's Tort Notice form, together with the contacts between Plaintiff's counsel's office and the Risk Management Division, amount to "a statement, admission, or act by [the County that] is inconsistent with its later claims," other elements of estoppel fall into place.

The trial court found that "[b]ased on the information on the forms, Mr. Gutzler and Ms. Harney believed the Risk Management Division was the proper office to receive the tort claim notice." *CP 154*. Ms. Harney's undisputed testimony is she concluded that the Risk Management Division was the proper recipient for the notice because its contact information exactly matched the only contact information on the form, which did not so much as mention the Clerk of the Board. *RP 37*. The trial court's

findings and the other evidence compel the conclusion that Plaintiff, through her counsel, acted in reliance on the misleading Tort Notice form, together with the other information gleaned from Risk Management Division personnel, in determining that the form should be returned to the Risk Management Division.

“Injury” to the party seeking estoppel, as noted, means *detrimental* reliance on the acts or statements of the government body. *Kramarevcky*, 122 Wn2d at 747. The “injury” requirement is satisfied here. Absent the application of equitable estoppel, plaintiff’s case will be dismissed and her ongoing injuries will go uncompensated. “Detriment” to plaintiff on a failure to estop the County is clear.

The trial court determined that the County would suffer no “impairment of government functions” through the application of estoppel. Its only “impairment” would be the need to defend plaintiff’s claim on its merits, which would have been the case even if there were no issue of tort claim notice timeliness. This finding is well supported by the record.

That leaves only one element, which the trial court did not address; whether estoppel is necessary in this case to prevent “manifest injustice.” Case law suggests this element is an issue of law for the court based on the evidence, and that “manifest injustice” equates to an “inequitable”

outcome for the injured party combined with that party's innocence in causing the problem. *See Silverstreak*, 159 Wn2d at 890; *Kramarevcky*, 122 Wn2d at 748-49.

The court in *Finch v. Matthews*, 74 Wn2d 161, 443 P2d 833 (1968), focused on unjust enrichment of a public entity in finding that a "manifest injustice" would result from permitting a city from challenging an "irregular" deed it had issued to plaintiff, on the basis that the deed was illegal. In that case, the plaintiff had made improvements to the property and otherwise acted in reliance on his ownership of it. The court noted:

Governmental immunity from estoppel is a derivative of the doctrine conferring the sovereign entity with immunity from suit without its consent. The legislature of this state has indicated that sovereign immunity in tort actions is no longer desirable or acceptable. RCW 4.92.090. *The modern trend in both legislative and judicial thinking is toward the concept that the citizen has a right to expect the same standard of honesty, justice and fair dealing in his contact with the state or other political entity, which he is legally accorded in his dealing with other individuals. Therefore, the rule against estopping a governmental body should not be used as a device by a municipality to obtain unjust enrichment or dishonest gains at the expense of a citizen. Finch*, 74 Wn2d at 176 (emphasis supplied; citations omitted).

Under these standards, "manifest injustice" would result to Plaintiff in this case if the County is not estopped from its defense of improper delivery of the Tort Notice. She would be barred from compensation for her injuries, in a case in which liability for the accident

at issue appears to be a non-issue. This bar would not be related in any way to the merits of Plaintiff's claim. Rather, it is a procedural bar induced by the County's misleading approach to communicating about Tort Notices. In this regard, the County would be unjustly enriched to the extent of Plaintiff's damages.

Notwithstanding the misleading information the County provided, it will no doubt argue that Plaintiff, acting through her counsel, should have "dotted the proverbial i's and crossed the proverbial t's" by specifically researching County Code to make absolutely certain that the correct entity was being served with the Tort Notice. However, as Mr. Gutzler testified:

A [by Michael Gutzler]: Well my experience over the years has been that with government agencies, they're – they're not trying to hide the ball. And it's – it's – if they're subject to being sued and if there's someone to be served, they're usually more than willing to tell you who that is. It's different than a – than a private party who you can't really expect they're going to volunteer much of anything. With – with the government I've always had success calling and I'll get – when I do it myself I'll get one of – of a limited numbers of answers. One is that here's who it goes to. And here's where it's provides. And here's the form and here's where you can get it.

Or if there's any question about it, they may say we can't provide that information but – you know – you have to go look it up or whatever or we're – you know – we can't – this may – may go here or there and if there's any question about it then that's – that's what we do. But as often as not, there's not any real dispute about it. *RP 12-13*.

Just as the Supreme Court observed in *Finch*, Mr. Gutzler had the right to expect that County to adhere to “the same standard of honesty, justice and fair dealing in [Gutzler’s] contact with the [County] which he is legally accorded in his dealing with other individuals.” This would include not taking steps that appear designed to mislead members of the public about the procedures applicable to tort claim notice, or at a minimum to correct obvious misimpressions. The County’s former system of handling tort claim notices, in the abstract and as they played out in this case, actively misled Mr. Gutzler about those procedures in such a way as to seemingly eliminate any incentive for Gutzler to specifically research the County Code. The County should not be permitted to engage in behavior toward members of the public that misleads them as to proper service of tort claim notices, then blame those members of the public for not being sufficiently skeptical about the deception. “Manifest injustice” would result if County were not estopped from relying on its tort claim notice defense.

#### V. CONCLUSION

The judgment should be reversed, and the matter remanded to the trial court for entry of an Order determining that County is equitably estopped from its tort claim notice defense and setting plaintiff’s claims



# KILMER, VOORHEES & LAURICK

## January 17, 2012 - 2:36 PM

### Transmittal Letter

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Court of Appeals Case Number: 42622-6

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