

NO. 447053

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**COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON**

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**CHRISTINE M. LEE,**

**Appellant,**

**vs.**

**METRO PARKS TACOMA, a municipal agency, and  
GREATER METRO PARKS FOUNDATION, a  
Washington nonprofit corporation,**

**Respondent.**

2013 JUL 15 PM 12:00  
STATE OF WASHINGTON  
BY   
COURT OF APPEALS  
DIVISION II

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**APPELLANT'S BRIEF**

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I.

**ASSIGNMENTS OF ERROR**

**A. The trial court erred in granting defendants' motion for summary judgment to dismiss plaintiff's Amended Complaint for a claimed failure to comply with the requirements regarding presentment and filing under RCW 4.96.020.<sup>1</sup>**

1. RCW 4.96.020 is to be liberally construed so that substantial compliance is satisfactory.

2. Plaintiff substantially complied with the requirements of RCW 4.96.020.

II.

**STATEMENT OF THE CASE**

**A. Factual Background.**

Christine Lee, a resident of Walla Walla, was visiting family and friends in Tacoma on June 28, 2009. CP 1. She and others spent part of the day at Point Defiance Owen Beach. CP 1. Inside one of the covered picnic pavillions at the Beach was a concrete

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<sup>1</sup> There were two issues raised by defendants in their Motion for Summary Judgment: (1) dismissal based on RCW 4.96.020 because the plaintiff did not wait 60 days after filing her Claim for Damages to file her amended complaint and (2) dismissal of Greater Metro Parks Foundation because it did not owe a duty to the plaintiff. Plaintiff did not challenge/object to Greater Metro Parks Foundation being dismissed as a party defendant. That issue is not before this court.

floor. A slab of concrete, part of the larger pavillion concrete floor, was raised about one inch above an adjoining concrete slab. CP 2. Ms. Lee caught her toe on the raised concrete and fell forward into a brick fireplace, hitting her face and causing serious injury. CP 2.

**B. Procedural History.**

On June 5, 2012, Ms. Lee sent a Claim for Damages to Metro Parks Tacoma, a municipal entity. It was received on June 8, 2012. CP 22.

On June 20, 2012, Ms. Lee filed her Complaint for Damages. CP 1-4. The only named defendant was Greater Metro Parks Foundation. CP 1.

On June 22, 2012, Ms. Lee filed a First Amended Complaint for Damages. CP 5-8. Metro Parks Tacoma was added as a defendant. CP 5-8.

On June 25, 2012, Alan Peizer filed a Notice of Appearance on behalf of both defendants. CP 9-10.

On October 19, 2012, defendants filed their Answer to Plaintiff's First Amended Complaint for Damages. CP 11-14. In their Answer, and for the first time, defendants alleged, as an affirmative defense, "that plaintiff's claim is barred by the statute of limitations." CP 13. No further action was taken at that time.

On January 8, 2013, Ms. Lee filed a Note for Arbitrability. CP 15-16. On February 15, 2013, the Pierce County Superior Court issued a Notice of Appointment of Arbitrator. CP 18. Timothy Malarchick, an attorney in Gig Harbor, was appointed to serve as the arbitrator. CP 18.

On February 18, 2013, defendants filed a Motion for Summary Judgment. Hearing on the Motion was scheduled for March 22, 2013. CP 19-20, 21-33.

On March 22, 2013, defendants argued their Motion for Summary Judgment to Judge Vicki L. Hogan. Judge Hogan granted the Motion for Summary Judgment and on that day signed and filed an Order Granting Summary Judgment. CP 59-60. This appeal followed. CP 61-62.

### **III. ARGUMENT**

#### **A. Standard of Review.**

This is an appeal from an Order Granting Summary Judgment. In reviewing an Order of Summary Judgment a Court of Appeals engages in the same inquiry as a trial court. *Callahan v. Walla Walla Housing Auth.*, 126 Wn. App. 812, 818, 110 P.3d 782 (2005). A Court of Appeals reviews an Order Granting Summary Judgment de novo. *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App.

438, 445, 177 P.3d 1152 (2008). Summary judgment is appropriate only if the nonmoving party fails to produce sufficient evidence which, if believed, would support the essential elements of his/her/their claim. *Id. Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001).

The appellate court should consider all facts and reasonable inferences in a light most favorable to the nonmoving party. *Woodall v. Freeman Sch. Dist.*, 136 Wn. App. 622, 628, 146 P.3d 1242 (2006); *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). The court must determine whether a genuine issue of material fact exists and must not resolve an existing factual issue. *Woodall v. Freeman Sch. Dist.*, 136 Wn. App. at 628; *Thoma v. C.J. Montag & Sons, Inc.*, 54 Wn.2d 20, 26, 337 P.2d 1052 (1959). A material fact is a fact upon which the outcome of the litigation depends, in whole or in part. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

**B. The trial court erred in granting defendants' Motion for Summary Judgment to dismiss plaintiff's Amended Complaint for a claimed failure to comply with the requirements regarding presentment and filing under RCW 4.96.020.**

As framed by the defendants, the issue before the court was:

"Has plaintiff failed to comply with the requirements regarding

presentment and filing under RCW 4.96.020, resulting in plaintiff's claim being barred by the statute of limitations?" CP 23.

RCW 4.96.020(4) and (5) state:

(4) No action subject to the claim filing requirements of this section shall be commenced against any local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct until sixty calendar days have elapsed after the claim has first been presented to the agent of the governing body thereof. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty calendar day period. For the purposes of the applicable period of limitations, an action commenced within five court days after the sixty calendar day period has elapsed is deemed to have been presented on the first day after the sixty calendar day period elapsed.

(5) With respect to the content of claims under this section and all procedural requirements in this section, this section must be liberally construed so that substantial compliance will be deemed satisfactory.

Ms. Lee sent her claim to Metro Parks Tacoma, a municipal agency, on June 5, 2012. She filed her initial Complaint on June 20, 2012. CP 1-4. The only named defendant was Greater Metro Parks Foundation, a Washington nonprofit corporation. Ms. Lee filed her First Amended Complaint for Damages on June 22, 2012. CP 5-8. This Amended Complaint added/named Metro Parks Tacoma, a municipal agency, as a defendant. CP 5.

There is no dispute that Ms. Lee did not wait 60 days between filing her Claim for Damages and her First Amended Complaint for Damages. The issue before the trial court was, and the issue before this court is, whether Ms. Lee substantially complied with the requirements of RCW 4.96.020.

1. **Substantial compliance is the standard.**

Effective July 26, 2009, RCW 4.96.020 was amended. For the purpose of the issue to be decided by this court, a significant change in that statute was the addition of new section 5 which reads, in its entirety:

(5) With respect to the content of claims under this section and all procedural requirements in this section, **this section must be liberally construed so that substantial compliance will be deemed satisfactory.**

RCW 4.96.020(5) (emphasis added).

Prior to July 26, 2009, RCW 4.96.020 had no comparable language. Strict compliance, not substantial compliance, was required. All of the cases cited by defendants in support of their Motion for Summary Judgment, with one exception (to be discussed below), dealt with RCW 4.96.020 prior to the July 26, 2009 amendment and the change to "substantial compliance." The defendants cited only one post-July 26, 2009 case, *Myles v. Clark*

*County*, 170 Wn. App. 521, 289 P.3d 650 (2012). That case does not support defendants' argument.

**2. Myles v. Clark County.**

William Myles was killed in a two-car accident on January 27, 2006. On October 27, 2008, his widow sent a damage claim to the Clark County Risk Management Division. On October 31, 2008, the Clark County Risk Management Services Manager sent a reply to Myles. That reply denied the claim "for both liability and indemnity." 170 Wn. App. at 525. Five days later, the Clark County Risk Management Division sent an unsigned letter to Myles stating that it received her tort claim notice and that the initial claim evaluation would take as "many as 60 days or more." *Id.* Myles made no attempt to clarify the discrepancy between the two letters. On January 20, 2009, she filed a lawsuit against Clark County in Clark County Superior Court. *Id.* Clark County answered on May 8, 2009 and affirmatively raised the defense that Myles "failed to properly file a claim against the [county] as required by Chapter 4.96 RCW." *Id.*

The Myles complaint was filed prior to the effective date of new RCW 4.96.020. On October 30, 2009, after the effective date of new RCW 4.96.020, Clark County moved for summary judgment

on jurisdictional grounds. Clark County argued that Myles improperly filed her claim with the Risk Management Division and not with the Clerk specifically designated as the agent to receive claims for damages against Clark County. 170 Wn. App. at 526. The County argued that strict compliance with RCW 4.96.020 was required. The superior court granted the motion for summary judgment. Ms. Myles appealed.

As explained by the Court of Appeals, the trial court ruled that:

. . . legislative amendments to former RCW 4.96.020 allowing for “substantial compliance” with a tort claim filing statute (rather than the “strict compliance” previously required by legal precedent) did not apply retroactively, that Clark County did not waive the affirmative defenses of Myles’s failure to comply with the claim filing procedures, and that Clark County was not equitably estopped from asserting the improper claim filing defense.

*Myles v. Clark County*, 170 Wn. App. at 526-527 (fn omitted).

On appeal, the legal issues were the constitutionality of RCW 4.96.020 and whether the July 2009 changes in the statute should apply retroactively. The Court of Appeals reversed and remanded for further proceedings. 170 Wn. App. at 533.

With respect to the change in RCW 4.96.020(5) from strict compliance to substantial compliance, the *Myles v. Clark County* court said:

Here, on July 26, 2009, the legislature added a fifth section to former RCW 4.26.090, which reads, "With respect to the content of claims under this section and all procedural requirements in this section, this section must be liberally construed so that substantial compliance will be deemed satisfactory." CP at 39; Laws of 2009, ch. 433, § 1. The House Bill Report generated during deliberation over the statutory amendments, stated the position in support of the amendments, in part, as follows:

Injured plaintiff's claims are being denied because of the strict claim filing statutes. The original intent of the statutes was to provide notice so that the government can get the facts of the claim and investigate. They were not meant to be "gotcha" statutes. Some of the procedural requirements are tricky. Cases are being dismissed based on technical interpretations of the statute. The bill is aimed at restoring the original intent. It corrects historical unfairness and makes the statute functional. It requires notice to the government, but eliminates the barnacles of judicial bureaucracy.

H.B. Rep. on Engrossed Substitute H.B. 1553, at 3, 61<sup>st</sup> Leg., Reg. Sess. (Wash. 2009); CP at 87.

*Myles v. Clark County*, 170 Wn. App. at 531-532.

**3. RCW 4.96.020 should not be used as a "gotcha" statute.**

As explained by the Court of Appeals in *Myles v. Clark County*, quoting from the House Bill Report, the intent of the statute, even before the 2009 amendment to liberal construction

and substantial compliance, “was to provide notice so that the government can get the facts of the claim and investigate.” *Myles v. Clark County*, 170 Wn. App. at 532. RCW 4.96.020 should not be used, as it has been used by the defendants in this case, as a “gotcha” defense.

With respect to the *Myles v. Clark County* court’s reference to “gotcha” statutes, in this case the defendants want to use RCW 4.96.020 for that very “gotcha” purpose. Ms. Lee filed her tort claim on June 5, 2012; it was received on June 8, 2012. CP 2. Ms. Lee filed her initial Complaint against Greater Metro Parks Foundation on June 20. CP 1-4. She filed her First Amended Complaint, adding Metro Parks Tacoma, a municipal agency, on June 22. CP 5-8. Defendants filed their Notice of Appearance on June 25. CP 9-10. Defendants did not file their Answer until October 19, almost four months later. CP 11-14. They did not raise the statute of limitations as an affirmative defense until that date, almost 60 days after the running of the statute of limitations. Clearly, the defendants “hid in the bushes” until after the statute of limitations ran so they could use RCW 4.96.020 as a “gotcha” statute.

With respect to “gotcha” statutes such as that at issue in this case, the Court of Appeals in *Myles v. Clark County* said:

Although Clark County may have come to expect it could avoid litigation through operation of the “tricky” provisions of the pre-trial notification “gotcha” statutes, this expectation falls well short of being a vested right. As our Supreme Court explained in *Godfrey v. State*, 84 Wn.2d 959, 963, 530 P.2d 630 (1975),

A vested right, entitled to protection from legislation, must be something more than a *mere expectation* based upon an anticipated continuance of the existing law; *it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.*

By failing to apply the standard in effect at the time it made its determination of Myles’s compliance with the notice of claim statute, the trial court incorrectly granted summary judgment to Clark County. Accordingly, we reverse and remand for further proceedings.

*Myles v. Clark County*, 170 Wn. App. at 533 (emphasis in original, fn omitted).

When the legislature amended RCW 4.96.020 in 2009, it obviously did so for a reason. Whereas there is limited legislative history, the language added to the statute is indicative of a legislative intent. That is, the legislature intended that the pre-filing claim requirement should be “liberally construed so that substantial compliance will be deemed satisfactory.” RCW 4.96.020(5). As stated by the Court of Appeals in *Myles v. Clark County*, the legislature, by adopting a “liberally construed” rule for the

application of RCW 4.96.020, did not want it to be used as a “gotcha” statute.

Strict compliance with legislatively mandated procedures is not always required. Washington courts have long upheld actions taken in substantial compliance with statutory requirements, albeit with procedural imperfections. Substantial compliance requires “actual compliance in respect to the substance essential to every reasonable objection to [the] statute.” **We apply the doctrine of substantial compliance where appropriate because the distinct preference of modern procedural rules is to allow cases to proceed to a hearing on the merits in the absence of serious prejudice to other parties.**

*Kim v. Lee*, 102 Wn. App. 586, 591, 9 P.3d 245 (2000) (fn omitted) (emphasis added).<sup>2</sup>

#### **4. Plaintiff substantially complied.**

The question therefore is: did the plaintiff substantially comply with the requirements of RCW 4.96.020?

“Substantial compliance has been found where there has been compliance with the statute albeit with procedural imperfections.” *Continental Sports Corp. v. Department of Labor & Indus.*, 128 Wn.2d 602, 910 P.2d 1284, 1288 (1996). Thus, an essential aspect of substantial compliance is some level of *actual* compliance with the substance essential to the statute, although a procedural fault rendered the compliance imperfect.

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<sup>2</sup> Reversed on other grounds, *Huyn Kim v. Lee*, 145 Wn.2d 79, 31 P.3d 665, 43 P.3d 1222 (2001). An issue in that case was equitable subrogation. As stated by the Supreme Court, subrogation is liberally allowed in the interests of justice and equity. 145 Wn.2d at 688.

*Clymer v. Employment Security*, 82 Wn. App. 25, 28-29, 917 P.2d 1091 (1996) (italics in original).

There was no failure to comply in this case; there was no inaction, inadvertence or failure to fulfill the objection of the statute. *Id.* Ms. Lee's only fault was amending her complaint and naming Metro Parks Tacoma, a municipal entity, before running of the sixty day statutory notice.

In their Reply to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, the defendants cited *San Juan Fidalgo v. Skagit County*, 87 Wn. App. 703, 943 P.2d 341 (1997). This case was decided before the amendment to RCW 4.96.020. Nevertheless, the discussion of "substantial compliance" in that case supports the plaintiff in this case.

In order for the doctrine of substantial compliance to apply, there must have been some *actual* compliance with the relevant statute, because substantial compliance is "actual compliance" with the "substance" of a statutory requirement.

*San Juan Fidalgo v. Skagit County*, 87 Wn. App. at 711 (italics in original).

In this case, Ms. Lee complied with the relevant statute. She sent notice of her claim to Metro Parks Tacoma on June 5. In this regard, she actually complied with the requirements of the statute. Her only failure was in not waiting 60 days before filing her

Amended Complaint. A “liberal” interpretation and application of RCW 4.96.020 shows that the plaintiff “substantially” complied with the requirements of that statute. “Substantial compliance” is actual compliance in respect to the substance essential to every reasonable objective of a statute. *In re Santore*, 28 Wn. App. 319, 327, 623 P.2d 702 (1981). “In the cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty.” *City of Seattle v. Public Employment Relations Commission (PERC)*, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991).

As stated by the court in *San Juan Fidalgo v. Skagit County*, “In order for the doctrine of substantial compliance to apply, there must have been some *actual* compliance with the relevant statute.” 87 Wn. App. at 711. In all respects, other than waiting for 60 days, the plaintiff “actually” complied with the requirements of RCW 4.96.020.

**5. Defendants not prejudiced.**

As stated by the court in *Kim v. Lee*, “We apply the doctrine of substantial compliance where appropriate because the distinct preference of modern procedural rules is to allow cases to proceed

to a hearing on the merits in the absence of serious prejudice to other parties.” *Kim v. Lee*, 102 Wn. App. at 591.

Although it dealt with an appeal to the Board of Industrial Insurance Appeals and failure to file a Notice of Appeal within thirty days as required by RCW 51.52.110, the case of *Graves v. Vaagen Brothers Lumber*, 55 Wn. App. 908, 781 P.2d 895 (1989) is on-point with regard to the issue of prejudice. In that case, Graves appealed from a June 6, 1988 adverse decision of the Board of Industrial Insurance Appeals. On June 16, Graves mailed a Notice of Appeal to his employer, the Board, the Director of the Department of Labor, and the Ferry County Superior Court. 55 Wn. App. at 909. The original Notice of Appeal was never received by the superior court. Upon discovery of this fact, a second Notice was mailed. *Id.* The second Notice of Appeal was filed with the superior court on July 28, more than thirty days after the decision of the Board. RCW 51.52.110 requires that appeals be filed within 30 days of the decision. The employer, Vaagen Brothers Lumber, moved to dismiss the appeal as not timely filed. *Id.*

In *Graves v. Vaagen Brothers Lumber*, the sole issue was “whether the trial court erred in dismissing the case because the Notice of Appeal, though mailed to the correct county court clerk’s

office well within the 30 days set for filing an appeal, was not filed with the court within 30 days.” *Id.* The trial court granted the motion and dismissed. On appeal, the Court of Appeals reversed.

[O]ur holding here is a very narrow one, limited to invocation of appellate jurisdiction and confined to the facts in this case: the notice of appeal was mailed well within the 30-day limitation, it was addressed to the correct county, and all parties received the notice within that 30 days. Under this set of facts, there is no prejudice. Given the current trend in this state to interpret statutory jurisdictional requirements for invoking appellate jurisdiction liberally so as to promote justice, we hold that Mr. Graves’s filing was in substantial compliance with the first step and in compliance with the second step requirements of the statute.

*Graves v. Vaagen Brothers Lumber*, 55 Wn. App. at 913-914.

In this case, the defendants have not been prejudiced by the filing of the Amended Complaint before expiration of the 60-day waiting period. The public policy underlying RCW 4.96.020 is to allow governmental entities adequate time to investigate a claim and reach a settlement before incurring the expense of litigation. In this case, the defendants deny liability. Had the Amended Complaint not been filed until after the 60-day waiting period, the statuses of the parties would be as it is currently. That is, a lawsuit would have been filed and the issue would be tried to verdict. No “serious prejudice” has occurred to the defendants. On the

contrary, the motion for summary judgment having been granted and the case dismissed, very "serious prejudice" has occurred to Ms. Lee.

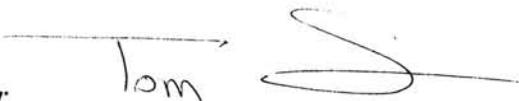
### CONCLUSION

Christine Lee substantially complied with the requirements of RCW 4.96.020. She properly filed a claim for damages with Metro Parks Tacoma before she filed her Amended Complaint and added Metro Parks Tacoma as a named defendant. Metro Parks Tacoma retained an attorney and denied the claim in its entirety. But for waiting 60 days, this case would have been presented to and decided by an arbitrator. Ms. Lee substantially complied with the procedural requirements of the procedural statute, which statute, per express legislative intent, should be "liberally construed."

This Court should reverse the trial court and remand this case for further proceedings.

DATED this 11 day of July, 2013.

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8 **IN THE COURT OF APPEALS**  
9 **FOR THE STATE OF WASHINGTON**  
10 **DIVISION II**

11 CHRISTINE M. LEE,

12 Appellant,

13 v.

14 METRO PARKS TACOMA, a municipal  
15 agency, and GREATER METRO PARKS  
16 FOUNDATION, a Washington nonprofit  
17 corporation,  
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19 Respondents.  
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NO. 44705-3-II

CERTIFICATE OF SERVICE

3Y  
DEPUTY

STATE OF WASHINGTON

2013 JUL 15 PM 12:00

COURT OF APPEALS  
EVIDENCE

21 JUDY LIMBURG declares under penalty of perjury under the laws of the State of  
22 Washington that the following is true and correct:

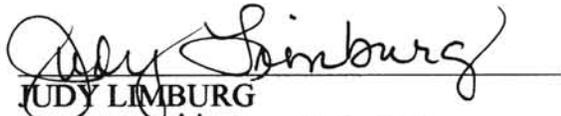
23 1. That I am a citizen of the United States, over the age of 18 years, and not a  
24 party to this action;

25 2. That on July 11, 2013, a true a correct copy of **APPELLANT'S BRIEF** was  
26 served by the method indicated below, and addressed to the following:  
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JUDY LIMBURG  
Signed this 11 day of July 2013  
at Walla Walla, Walla Walla County, Washington