

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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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.

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RESPONDENT'S BRIEF

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## I.

### REFUTATION OF ASSIGNMENT OF ERROR

**A. The trial court did not err in granting defendants' motion for summary judgment to dismiss plaintiff's Amended Complaint for a claimed failure to substantially comply with the requirements regarding presentment and filing under RCW 4.96.020.**

1. RCW 4.96.020 requires substantial compliance with regard to the presentment of a claim and the filing of a lawsuit against a governmental entity.

2. Plaintiff did not substantially comply with the requirements of RCW 4.96.020.

## II.

### STATEMENT OF THE CASE

**A. Factual Background.**

This case arises out of a slip and fall accident occurring on June 28, 2009 when Christine Lee, visiting family and friends in Tacoma, caught her toe on a raised portion of a concrete slab floor inside a picnic shelter at Point Defiance Owen Beach, owned by Metro Parks Tacoma, tripped and injured herself. CP 21-22.

**B. Procedural History.**

Metro Parks Tacoma agrees with the recitation of Ms. Lee's Procedural History contained in Appellant's Brief.

**III.**

**ARGUMENT**

**A. There was no substantial compliance with the statutory timing requirement.**

The trial court properly determined whether Ms. Lee had substantially complied with the requirements of RCW 4.96.020 in ruling in favor of the defendants. The substantial compliance requirements of RCW 4.96.020(4) and (5) were properly before the court. Those requirements 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 first presented her claim to Metro Parks Tacoma on June 8, 2012. CP 23. She was required to wait 60 calendar days before commencing her lawsuit. Instead she waited only 14 days to amend her 2-day old complaint against the private, non-profit corporation Greater Metro Parks Foundation by adding the local government entity, Metro Parks Tacoma. CP 5-8. She did not substantially comply nor did she actually comply with the 60 day waiting period.

Why Ms. Lee chose to only wait 14 days instead of the 60 required days to file her lawsuit is unknown. There would appear to be no reason for her to have aborted the 60 day waiting period. If she was concerned about the statute of limitations (she had presented her tort claim within 20 days of the running of the three year statute of limitations), the law is clear that the three year personal injury statute of limitations is *extended* by 60 days to allow the local governmental entity an opportunity to investigate

and accept or reject the claim *and* to allow the plaintiff the benefit of a prolonged statute of limitations by 60 days. In *Castro v. Stanwood School District*, 151 Wn.2d 221, 86 P.3d 1166 (2004), the Washington Supreme Court held that the tolling provision of RCW 4.96.020(4) effectively added 60 days to the end of the applicable statute of limitations.

The purposes of the 60-day waiting period are to enable the local governmental entity to investigate claims without incurring litigation expenses and to foster inexpensive settlement. *Johnston v. City of Seattle*, 95 Wn. App. 770, 976 P.2d 1269 (1999). In *Johnston*, the plaintiff filed a tort claim for damages with the City of Seattle and filed a personal injury action against the City one day before the statute of limitations was set to expire. The City moved for summary judgment dismissal of the personal injury action, contending that Johnston failed to wait 60 days after filing his claim before he commenced his action as required by RCW 4.96.020 and by the Seattle Municipal Code. The trial court granted the City's motion for summary judgment and a

Washington appellate court affirmed the dismissal, stating that the matter was properly dismissed because plaintiff had failed to observe the RCW 4.96.020 60-day waiting period following notice of the claim. Plaintiff's complaint was barred by the statute of limitations.

There have been numerous decisions in Washington that have resulted in the dismissal of plaintiffs' lawsuits for failing to strictly comply with statutory notice claim provisions except as to the content of the claim. See *Medina v. Public Utility District No. 1 of Benton County*, 147 Wn.2d 303, 53 P.3d 993 (2002), citing *Sievers v. City of Mountlake Terrace*, 97 Wn. App. 181, 983 P.2d 1127 (1999); *Pirtle v. Spokane Pub. Sch. Dist. No. 81*, 83 Wn. App. 304, 921 P.2d 1084 (1996); *Levy v. State*, 91 Wn. App. 934, 942, 957 P.2d 1272 (1998) (plaintiff failed to strictly comply with filing requirements of RCW 4.92.110 so dismissal was proper); *Kleyer v. Harborview Med. Ctr.*, 76 Wn. App. 542, 547-49, 887 P.2d 468 (1995) (filing claim with university rather than state risk management office is not compliance and requires dismissal);

*Lewis v. City of Mercer Island*, 63 Wn. App. 29, 817 P.2d 408 (1991) (filing requirements of RCW 4.96.010 are conditions precedent to commencing suit and must be strictly complied with); *Andrews v. State*, 65 Wn. App. 734, 738-39, 829 P.2d 250 (1992) (requirement of RCW 4.92.010 that claim be filed with state risk management office before commencement of suit is a mandatory condition precedent and will be strictly construed).

Effective July 26, 2009, the Washington State Legislature added a fifth section to RCW 4.96.020 which added language that both the content of claims and the procedural requirements of those claims be liberally construed so that substantial compliance shall be deemed satisfactory. Prior to July 26, 2009, the content of the claims filed was liberally construed but the procedural requirements of the statute were strictly construed, allowing for the dismissal of many claims due to the failure by many plaintiffs to strictly adhere to the filing requirements of the statute.

The amendment was addressed by a Washington appellate court in *Myles v. Clark County*, 170 Wn. App. 521, 289

P.3d 650 (2012). In *Myles*, the estate of a motorist killed in an accident caused by an intoxicated driver sought damages for wrongful death from Clark County but the trial court entered a summary judgment in favor of the County on the basis that the plaintiff failed to strictly comply with the statutory procedural pre-suit claim filing requirements. In *Myles*, the plaintiff filed her claim with the Risk Management Division of Clark County and not with the Clerk of the Clark County Board of County Commissioners, Louise Richards, who was appointed to be the agent to receive claims for damages. Clark County asserted that it was improperly notified of the impending litigation and that as a result of the wrong Clark County employee being notified, it was entitled to have the case dismissed. The Washington Appellate Court, interpreting the 2009 amendment to RCW 4.96.020, reversed the trial court's dismissal of the case and remanded the matter to determine whether the plaintiff had substantially complied with the statute.

Ms. Lee properly asserts that the amendments to RCW

4.96.020 now allow substantial compliance to be deemed satisfactory with respect to the content of claims and all procedural requirements, as opposed to the former provision which required strict compliance for all procedural or presentment requirements. However, Metro Parks Tacoma nonetheless asserts that the amendments still require *substantial compliance*. Ms. Lee's decision to name Metro Parks Tacoma as a defendant in a lawsuit in Pierce County a mere 14 days after the filing of her tort claim in a first amended complaint did not substantially comply with the Washington statute requiring that *no action* subject to the claim filing requirements be commenced against any local governmental entity *until sixty calendar days have elapsed* after the claim has first been presented to the agent of the governing body thereof.

When a statute requires that one wait 60 days, it is not substantial compliance to only wait 14 days. When a statute requires that no action be commenced against any local governmental entity until 60 calendar days have elapsed, it is not

substantial compliance to file an action 46 calendar days earlier. Ms. Lee waited less than one quarter of the necessary time prescribed by the statute before she ignored the statute and filed her action against Metro Parks Tacoma anyway.

The issue of substantial compliance was addressed by the Washington Supreme Court in *Medina v. Public Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303, 53 P.3d 993 (2002). The specific issue of filing a complaint against a governmental entity 56 days after the filing of the tort claim was thoroughly reviewed and analyzed in the context of substantial versus strict compliance. In that case, the plaintiff argued that the Washington Supreme Court should apply the substantial compliance standard in analyzing whether his early filing fulfilled the requirements of RCW 4.96.020. He argued that substantial compliance was well established in Washington and should be applied when determining whether a party has met the statutory requirements of RCW 4.96.020(4). He believed that filing a lawsuit 56 days after the filing of the tort claim was in substantial compliance

with the 60-day waiting period. The Washington Supreme Court rejected that argument and specifically stated that “where time requirements are concerned, this court has held that ‘failure to comply with a statutory set time limitation cannot be considered substantial compliance’ with the statute. *City of Seattle v. Public Employment Relations Commission*, 116 Wn.2d 923, 929, 809 P.2d 1377 (1991).” *Medina*, supra at 317.

The Washington Supreme Court in *Forseth v. City of Tacoma*, 27 Wn.2d 284, 178 P.2d 357 (1947), previously had held that “there can be no ‘substantial compliance’ with the provision concerning the time within which a claim must be filed, except by filing it within that time.” *Medina*, supra at 317.

Consequently, in order to substantially comply with a provision concerning a statutory set time limitation, one must actually comply with it. In the case of *RCW 4.96.020(4)*, the Washington state legislature adopted a 60-day period of time for government defendants to investigate claims and settle those claims where possible. As the *Medina* court ruled, “compliance with a waiting period can be achieved only through meeting the

time requirements of the statute.” *Medina*, supra at 303. In *Medina*, the plaintiff categorically failed to comply. Waiting 56 days instead of 60 days was not considered to be substantial compliance. The *Medina* court invoked the Washington Supreme Court decision in *Hall v. Niemer*, 979 Wn.2d 574, 649 P.2d 98 (1982) which held that there is a “rational relationship between the purpose of the statute, which is to encourage negotiation and settlement, and the provision enforcing a uniform waiting period for all claims.” *Daggs v. City of Seattle*, 110 Wn.2d 49, 55, 750 P.2d 626 (1988). The *Medina* court held that that holding was constitutionally sound and continued to adhere to it.

The plaintiff then argued in *Medina* that because the purposes of the waiting period had been met once the County denied his claim, substantial compliance should be found. The *Medina* court disagreed. In fact, the court stated that to hold as the plaintiff suggested

would call into question all statutory and court rule time requirements because often the underlying purpose of the statute or rule may be achieved

without regard to time requirements. All time requirements necessarily involve a judgment by the legislature or a court as to the amount of time necessary to achieve the legislative or judicial purpose. Here, the legislature adopted a 60-day waiting period, and [the plaintiff in the *Medina* case] simply failed to comply.

*Medina*, supra, at 317-318.

The doctrine of substantial compliance has been the subject of numerous court rulings. As a Washington appellate court held in *San Juan Fidalgo Holding Co. v. Skagit County*, 87 Wn. App. 703, 943 P.2d 341 (1997):

In order for the doctrine for 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. [citations omitted.] (Non-compliance with a statutory mandate is not substantial compliance.)

The *San Juan Fidalgo* court quoted *City of Seattle v. Public Employment Relations Commission (PERC)*, 116 Wn.2d 923, 8090 P.2d 1377 (1991), which ruled that the doctrine of substantial compliance does not apply to statutorily-established time limits for accomplishing acts:

It is impossible to substantially comply with a statutory time limit.... It is either complied with or it is not. Service after the time limit cannot be considered to have been actual service within the time limit. *We therefore hold that failure to comply with a statutorily set time limitation cannot be considered substantial compliance with that statute.*

*PERC*, 116 Wn.2d at 928-29. (Emphasis in the original.)

What is the point of having a statute with a time requirement when it is willfully disregarded without any claim of inadvertence?

This is far different from the case that Ms. Lee relies upon, *Myles v. Clark County*, *supra*. In our case, we are not faced with the situation of *who* received notice of the claim on behalf of defendant Metro Parks Tacoma, but *when* Metro Parks Tacoma received that notice and *when* plaintiff chose to file her lawsuit against Metro Parks Tacoma. This is not a “gotcha” technicality; it is a well-reasoned statutory right to which Metro Parks Tacoma, as a municipal entity, is entitled. It is ironic that Ms. Lee, too, received an entitlement under RCW 4.96.020 – namely an extension of the three year statute of limitations by an

additional 60 days according to the Washington Supreme Court in *Castro*, supra.

By giving Metro Parks Tacoma only 14 days instead of the statutorily-required 60 days notice before she filed her lawsuit, Ms. Lee did not strictly comply with the statute nor did she substantially comply with the statute. She simply did not comply with the presentment and timing requirements of the statute at all.

**B. Prejudice is not the issue.**

Ms. Lee argues that Metro Parks Tacoma would not be prejudiced by a reversal of the trial court's decision. That argument, in this context with regard to plaintiff's failure to wait the statutorily-required 60 days before filing her lawsuit, has been previously rejected by the Washington Supreme Court.

In *Nelson v. Dunkin & Whatcom County*, 69 Wn.2d 726, 419 P.2d 984 (1966), the Washington Supreme Court was faced with a plaintiff's failure to substantially comply with the tort claim statute pertaining to a statement of residency. The plaintiff argued that his failure to meet that particular statutory

requirement did not prejudice the defendant Whatcom County.

The court rejected the “lack of prejudice” argument, holding that:

It was not for the courts to decide whether a claimant’s failure to comply with the statutory requirement relative to his claim is prejudiced to the county in any particular case. The legislature has required certain information. If this requirement is no longer meaningful, it is for the legislature and not for this court to take it out of the statute.

*Nelson*, 69 Wn.2d at 732. Any issue of prejudice was held

“immaterial.” *Nelson*, supra at 732 as quoted in *Pirtle v. Spokane Public School District*, 83 Wash.App. 304, 921 P.2d 1084 (1996).

Ms. Lee’s reliance on *Graves v. Vaagen Brothers Lumber*, 55 Wn. App. 908, 781 P.2d 895 (1989) does not serve as precedent in this matter. The *Graves* court, in concluding that a plaintiff in a workers’ compensation claim seeking review by the Board of Industrial Insurance Appeals substantially complied with notice requirements, specifically stated that its holding was “a very narrow one, limited to invocation of appellate jurisdiction and confined to the facts in [that] case.” In *Graves*, a notice of appeal was mailed within the 30 day limitation, was addressed to the

correct county clerk's office and all parties received the notice within 30 days even though the appeal was not filed with the court within 30 days. Clearly, the plaintiff in *Graves* had substantially complied with the time requirement by serving all parties with notice well within the 30-day time requirement. In our case, there was no such compliance with the time requirement; in fact, there was a flagrant non-compliance.

Although prejudice is immaterial in this matter, Metro Parks Tacoma disagrees with Ms. Lee's claim that it has not been prejudiced. By filing her lawsuit long before the 60 days had expired and cutting off its opportunity to investigate, evaluate and negotiate the claim a mere 14 days after its presentment, Metro Parks Tacoma has had to defend a lawsuit, incurring attorney's fees and costs, that could have been avoided had Ms. Lee given Metro Parks Tacoma a full and fair opportunity to investigate and evaluate her claim. By receiving her claim on June 8, 2012 and needing to defend her lawsuit 14 days later, Metro Parks Tacoma had no such opportunity to fulfill the expressed legislative intent.

#### IV.

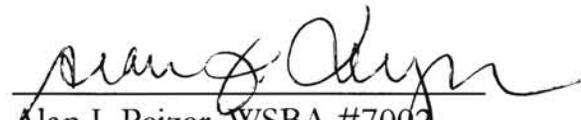
#### CONCLUSION

Ms. Lee willfully ignored RCW 4.96.020 and did not provide Metro Parks Tacoma the 60 day waiting period that the Washington State Legislature requires and the Washington Supreme Court has time and again upheld. Ms. Lee did not substantially comply with the timing requirement; she did not comply at all with the timing requirement. In ignoring the statute and failing to provide Metro Parks Tacoma with the full extent of the statutory waiting period, Ms. Lee prevented Metro Parks Tacoma from the legislative intent of being able to conduct a proper investigation, evaluation and settlement of the claim.

This court should affirm the trial court.

DATED this 17<sup>th</sup> day of September, 2013.

PEIZER & ZIONTZ, P.S.

  
Alan J. Peizer, WSBA #7002  
Of Attorneys for Respondents

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NO. 44705-3-II

DECLARATION OF SERVICE

19  
20  
21 I declare under penalty of perjury under the laws of the State of Washington that  
22 the following is true and correct:

23  
24 I am employed by the law firm of Peizer & Ziontz, P.S. and am a resident of the  
25 State of Washington over the age of 18 years old. I sent, via U.S. Mail, postage prepaid  
26 to:  
27  
28

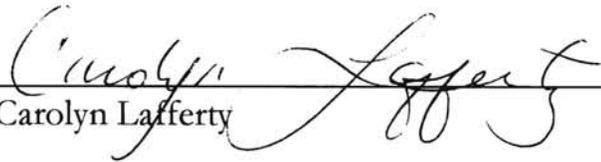
1 Mr. Tom Scribner  
2 Minnick Hayner  
3 P.O. Box 1757  
4 Walla Walla, WA 99362

5 a copy of the following documents:

- 6 1. Respondent's Brief; and  
7  
8 2. Declaration of Service

9 on the date indicated below.

10  
11 Date: 9-17-13  
12 Seattle, Washington

13   
14 Carolyn Lafferty