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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 290735

COURT OF APPEALS STATE OF WASHINGTON
DIVISION III

KELLY JAMES PAULLUS and TRISTA SOPHIA PAULLUS,
individually and as a marital community, and GEOFFREY MICHAEL
MITCHELL, individually,

Appellants.

v.

COUNTY OF YAKIMA,

Respondent.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Appellants Geoffrey Michael Mitchell, Kelly James Paullus, and Trista Sophia Paullus (collectively “Mitchell”) offer this brief in reply to the brief of Respondent Yakima County (“the County”).

II. ARGUMENT

A. **The County’s Statement of Case contains improper argument and irrelevant information.**

The Rules of Appellate Procedure require a “fair statement of the case facts and procedure relevant to the issues presented for review, without argument.” RAP 10.3(a)(5). The County’s “counterstatement” not only is argumentative, but also contains irrelevant material regarding actions Mitchell did not take in the time between filing the claim form and the hearing on the County’s summary judgment motion (for example, the failure to respond to the County’s request for treatment records or to inquire when the County would answer the Complaint). Resp. Br. at 3; *id.* at 4. This appears to be an attempt to shift blame from the County, whose actions Mitchell argues constituted waiver, to Mitchell.

B. **This court may take judicial notice of the guardrail's ownership on appeal.**

The County’s argument that judicial notice cannot be taken for the first time on appeal is flatly incorrect. Under the Federal rule, which is identical to Washington’s, an appellate court plainly can take judicial

notice of a relevant fact for the first time. *Gustafson v. Cornelius Co.*, 724 F.2d 75, 79, (8th Cir. 1983); Fed. Rule. Ev. 201; Wash. ER 201.

There is also no bar to taking judicial notice of “the ownership of roadways and adjacent properties.” Resp. Br. at 3. The single case cited to the contrary by the County involved the narrow issue of whether judicial notice could be taken as part of a demurrer, not a generally applicable rule. *Martin v. Commonwealth*, 556 A.2d 969, 972 (Pa. 1989). As the *Martin* court noted, “[t]he principle of judicial notice must have a restricted application to demurrers, which challenge the *legal* sufficiency of a complaint, rather than the *factual* sufficiency.” *Id.* at 972 (citing *Dept. of Justice v. Knox*, 29 Pa. Commonwealth Ct. 302, 370 A.2d 1238 (1977)) (italics in original). The inapplicability of *Martin* to this case is obvious; it not only is from a different jurisdiction, but also dealt narrowly with application of judicial notice to the equivalent of a motion under CR 12(b)(6) rather than one for summary judgment.

C. The record supports Mitchell’s factual assertions .

The County asserts that the record does not support Mitchell’s factual assertions. The County is wrong. Mitchell will address the County’s various claims of assertions not supported by the record at the relevant points in this Reply Brief, *infra*.

D. The trial court erred in granting summary judgment.

1. The facts relevant to summary judgment are very much in dispute.

The County takes out of context Mitchell's statement that "the facts underlying this claim are undisputed." Resp. Br. at 9. That statement preceded two paragraphs relating the facts of the accident, the filing of the claim form, service of the parties, and dismissal of some defendants. CP 27. It is correct that **those** facts are not disputed. However, those facts were not at issue on summary judgment. The relevant issues for purposes of the summary judgment motion were (1) whether the claim form put the County on notice and thus substantially complied with the requirements of RCW 4.96.020¹; and (2) whether the County's actions constituted waiver of the affirmative defense. Those disputed factual issues were briefed and argued below, and now on appeal.

2. Because the facts are at issue, whether the claim form substantially complied or whether a waiver occurred are not questions of law, and entry of summary judgment was reversible error.

Summary judgment is appropriate only when there is no genuine issue of material fact, such that reasonable minds could reach but one conclusion, and the movant is entitled to judgment as a matter of law. CR 56(c); *Marincovich v. Tarabochia*, 114 Wn.2d, 271, 274, 787 P.2d 562

¹ As in Mitchell's opening brief, unless otherwise specified, all references to the claims statute, RCW 4.96.010 *et seq.* are to the version in effect in 2008.

(1990); *VersusLaw, Inc. v. Stoel Rives*, 127 Wn. App. 309, 319, 111 P.3d 866 (2005); *Island Air v. LaBar*, 18 Wn. App. 129, 136, 566 P.2d 972 (1977).

In this case, reasonable minds readily could have concluded that the claim form filed by Mitchell accomplished its statutory purpose of placing the County on notice of the claim. In fact, the record below contains ample evidence that it **did** put the County on notice. Reasonable minds could also conclude that the County waived the claim form defense by its conduct. At a minimum, the evidence before the trial court was sufficient to raise an issue of material fact on both issues, and it was reversible error for the court to grant summary judgment.

E. The claim form's content substantially complied with RCW 4.96.020.

The courts have identified two classes of requirements in the claim statute: those that require strict compliance (for example, a claim form must be filed at least 60 days prior to the suit) and those for which substantial compliance is sufficient (*i.e.*, the content requirements). *Medina v. P.U.D. No. 1 of Benton County*, 147 Wn.2d 303, 316, 53 P.3d 993 (2002). Where strict compliance was required, the County does not dispute that it was met. As to the content requirements at issue here, the County admits that only substantial compliance is required. Resp. Br. at 11.

Mitchell stands by its analysis of substantial compliance. App. Br. at 14-16. The *Renner* case is dispositive of this appeal. *Renner v. City of Marysville*, 168 Wn.2d 540, 545, 230 P.2d 569 (2010) (citing *Medina*, 147 Wn.2d at 310). As set forth in Mitchell’s opening brief, the County had notice of the time, place, and manner of the injuries, and was able to investigate the accident. App. Br. at 17-18.

Such notice is the purpose of the claim statute. *Renner*, 168 Wn.2d at 545. Because Mitchell’s claim form provided that notice, there is no question that it met the statute’s “reasonable objectives.” This is the very definition of “substantial compliance.” *In re Habeas Corpus of Santore*, 28 Wn. App. 319, 623 P.2d 702 (1981).

Finally, the County’s attempt to compare this case to *Kirby v. City of Tacoma*, 124 Wn. App. 454, 470, 98 P.3d 827 (2004), fails. In *Kirby*, the claim form at issue identified only “constitutional tort claims.” *Id.* In contrast, Mitchell’s claim form specifically described a claim for personal injuries, based on an accident at a stated place and time, and described the instrumentality of the injuries. CP 44-45.

F. Contrary to the County’s assertion, the statute does not require an express allegation of “tortious conduct.”

The argument that RCW 4.96 requires an allegation or description of “tortious conduct” is at the heart of the County’s response regarding substantial compliance. Resp. Br. at 12. The County persists in arguing for

what is in effect a “strict compliance” standard on this point. It is incorrect. The substantial-compliance standard, as explained by *Renner*, does not require such specific language. *Renner*, 168 Wn.2d at 545.

Further, the County is incorrect as to what language the statute requires. Neither RCW 4.96.020 nor any authority cited by the County requires an express statement that the County engaged in “tortious conduct.” RCW 4.96.020 requires that a claim must describe the “conduct and circumstances leading to injury.” It does not require that the conduct be expressly described as “tortious.”²

The County cites *Harberd v. Kettle Falls* for the proposition that the “conduct” referred to in the statute is the “tortious conduct” of the government. Resp. Br. at 12.; *Harberd v. Kettle Falls*, 120 Wn. App. 498, 510-11, 84 P.3d 121 (2004). *Harberd* does not, however, require an express description of “tortious conduct.” The issue in *Harberd* was whether a claim form was required at all for non-tort claims; the content of the form or its description of the City’s conduct is never discussed in the opinion. *Id.* at 509. The decision notes (in the context of a historical review of the statutory scheme) that the claimant must set forth “specific facts outlined in the statute” but nowhere says that an express allegation of

² Despite this, the County (incorrectly) infers a “crucial statutory requirement” to describe “tortious conduct.” Resp. Br. at 13.

“tortious conduct” is required.

The County also misreads *Renner* for the proposition that “an ‘accurate and complete description’ of ‘the nature’ of the tortious conduct is required.” Resp. Br. at 12. *Renner* simply does not require that any conduct be described as “tortious”; in fact, the description of the alleged conduct was not at issue in that case (the claim was for wrongful termination). *Renner*, 168 Wn.2d at 543.

G. Under RCW 4.96.020, a claim form need not contain an express allegation of negligence or describe a defect.

The County also objects that the claim form did not contain an allegation that the county was negligent, did not identify any defect, and did not “claim or describe negligent or improper design, maintenance, operation, or management.” Resp. Br. at 13. However, RCW 4.96.020 requires none of these things.

1. RCW 4.96.020 does not require an express allegation of negligence.

RCW 4.96.020 does not require an express allegation of negligence, indeed the word “negligent” appears nowhere in the statute. What is required, and what Mitchell provided, is that the claim form describe the “conduct and circumstances” that led to the injury. RCW 4.96.020. The County cites no authority for the notion that RCW 4.96.020 requires an express allegation of negligence.

2. RCW 4.96.020 does not require that a claim identify the specific defect leading to the injury.

The County relies on *Caron v. Grays Harbor County*, 18 Wn.2d 397, 139 P.2d 626 (1943) for the proposition that a claim which does not identify the defect leading to the injury is deficient. *Caron* was inapposite when it the County cited it to the trial court, and it is inapposite now. Unlike RCW 4.96.020, the claim form statute applied in *Caron* explicitly required that a claim “**must locate and describe the defect** which caused the injury.” Rem. Rev. Stat. § 4077 (emphasis added). Whether a claim that did not describe the defect “substantially complied” under that statute is irrelevant to whether it would substantially comply with RCW 4.96.020.

a. The authority that the County cites from other jurisdictions is distinguishable.

In addition to *Caron*, the County cites numerous cases from other jurisdictions in support of this point. Resp. Br. at 19-22. However, in nearly all of those cases the controlling statute required much greater specificity than does RCW 4.96.020, and in some cases the claims were defective in other ways as well. In *Ross v. New London*, 222 A.2d 816, 817 (Conn. 1966), the statute required a “general description of the [injury] and **of the cause thereof.**” *Id.* at 817 (emphasis added). In *Collins v. City of Meridian*, 580 A.2d 549, 550 (Conn. 1990), the claim

form failed to provide “**the cause of the injury** and the place of its occurrence” and was also filed outside the statute of limitations.

The claim form in *DiMenna v. Long Island Lighting*, 209 A.D. 2d 373, 374-75, 618 NYS 2d 425, 427 (1994), was held deficient because plaintiffs provided **no information whatsoever** about what caused plaintiff to be struck by a car, making it “impossible” for the town to investigate. This is in stark contrast to the details provided in Mitchell’s claim form, which clearly **did** allow the County to investigate.

Finally, *City of Louisville v. O’Neill*, 440 S.W.2d 265, 266 (Ky. App. 1969) is readily distinguishable. The court in that case noted that strict compliance with the applicable Kentucky statute was required (“[t]he statute dealing with notices to cities must be strictly complied with”). *Id.* Because it dealt with strict compliance, rather than the substantial compliance required by RCW 4.96.020, *City of Louisville* simply has no bearing on the case before this court.

3. A claim need not specifically allege improper design, maintenance, operation, or management.

The County also objects that the claim “fails to even claim or describe negligent or improper design, maintenance, operation, or management.” Resp. Br. at 13. The County’s objection is premature. This is exactly the type of information that would be revealed through discovery (which was not available before suit was filed). Mitchell was

not in possession of the evidence (the guardrail) needed to determine what caused its failure (*i.e.*, defective design, maintenance, management, etc.) and could not have provided this information. This is also the type of information to which the *Renner* court referred when it observed that “the [claim] requirement is not equivalent to a final request for relief.” *Renner*, 168 Wn.2d at 547 (plaintiff did not possess information needed for a complete calculation of damages when claim filed).

Finally, the County’s argument as to whether an equipment failure raises an inference of tortious conduct is a red herring. Resp. Br. at 25. The claim form is not required to raise an inference of tortious conduct; it is merely required to put the governmental agency on notice so that the claim can be investigated.³ *Renner*, 168 Wn.2d at 545. Whether a claim has merit is to be addressed through investigation and perhaps discovery, not on the basis of the claim form alone.

³ As Mitchell’s opening brief noted, however, the information in the claim form did strongly suggest negligence. App. Br. at 19-20. By analogy to *Curtis v. Lein*, 239 P.3d 1078, 2010 Wash. Lexis 809 (2010), it is clear that a guardrail (like a wooden dock) should not fail absent some defect or breach of duty, so that the failure raised an inference of negligence. *Curtis* was not cited to the trial court for the simple reason that it had not been decided at the time this case was argued. The County’s discussion of *Curtis* also misstates the burden on a claimant. Mitchell’s claim form did not need to show that there had been negligence, but needed only to put the County on notice of the nature of the claim being made. *Renner*, 168 Wn.2d at 545.

H. Contrary to the County's assertion, Mitchell did raise to the trial court the inability to produce more detailed information.

The County's assertion that Mitchell did not raise the inability to examine the guardrail and to obtain further information about how the injury occurred to the trial court, Resp. Br. at 26, is simply incorrect. Mitchell's request that the County make the damaged guardrail and any photos of the scene available for examination, and the County's denial of the request, is part of the record below. CP 55. A May 29, 2008 letter from the County Prosecutor's Office addressing this was part of the evidence offered at summary judgment. *Id.* This issue was also discussed at oral argument, as Mr. Watson noted that interrogatories and depositions (the logical means for further investigation of what the County did or did not do) were not available until the claim had been rejected. RP 4:25.

The County also misconstrues Mitchell's statement that further information could not have been provided as an admission that the claim form was deficient. Resp. Br. at 26, n. 5. Under *Renner*, failure to provide information that is unknown to the claimant does not render a claim form deficient. *Renner*, 168 Wn.2d at 546. The assertion that more complete information could not have been provided is in no way inconsistent with Mitchell's position (which has been, and remains, that the claim form substantially complied with the statute).

I. Information beyond the four corners of the claim is fully relevant to determining whether the claim accomplished its purpose.

The County misapprehends Mitchell's argument that information beyond the claim form can be considered in evaluating whether the form accomplished its purpose of providing notice with an argument that communications beyond the claim form can be **part** of the required notice. Resp. Br. at 27. Mitchell has never argued that communications beyond the claim form were part of providing notice, or that these communications cured any defect in the claim form. Mitchell does, however, argue that information (including the County's **reaction** to the claim form by investigating the accident) can be used to demonstrate that the claim form **did** put the County on notice. If the claim form had not substantially complied, the County would not have had the information it needed to investigate. The fact that the County could and did investigate demonstrates that it was on notice.

Lewis v. City of Mercer Island, 63 Wn. App. 29, 817 P.2d 408 (1991) is inapposite for two reasons. First, the *Lewis* court rejected that plaintiff's argument that the City's familiarity with the issue in general excused his failure to **file a claim**. *Id.* at 35. Mitchell makes no such argument; rather, he contends that the information **provided in the claim form** was sufficient to place the County on notice. Any evidence of what

the County did after receiving the notice is merely relevant to show that the claim form accomplished its purpose..

Second, the issue in *Lewis* was not the content of a claim notice, but whether a claim needed to be provided at all (it does). *Id.* at 30. The statute's filing requirements, as opposed to the content requirements relevant here, must be strictly complied with. *Id.* at 33. Any discussion of *Lewis* in the context of substantial compliance is irrelevant.

Burnett v. Tacoma City Light, Pirtle v. Spokane Pub. Sch. Dist., and *Kleyer v. Harborview* are also irrelevant, as these cases too dealt with requirements for strict compliance. *Burnett v. Tacoma City Light*, 124 Wn. App. 550, 558, 104 P.3d 677 (2004) (filing requirements not met); *Pirtle v. Spokane Pub. Sch. Dist. No. 81*, 83 Wn. App. 304, 309, 921 P.2d 1084 (1996) (60 day waiting period not observed); *Kleyer v. Harborview Med. Ctr.*, 76 Wn. App. 542, 549, 887 P.2d 468 (1995) (claim filed with wrong office).

J. The County's actions were wholly consistent with defending the suit on its merits.

The County first notes that a County official does not have the power to waive the substantial compliance requirements of the statute." Resp. Br. at 29. This too is a red herring, as Mitchell does not contend that any County official waived any of the requirements for substantial

compliance. Mitchell's position is that the claim form substantially complied, so that no such waiver would have been needed.

The County is correct in stating that that mere inaction does not constitute a waiver. *Mercer v. State*, 48 Wn. App. 496, 497, 739 P.3d 703 (1987). But mere inaction is not the issue here. In contrast to *Mercer*, rather than remaining passive, the County here did exactly what any practitioner would do in preparing a defense. It acknowledged receipt of the claim. CP 54. It requested medical records. CP 55-56. It investigated whether the guardrail had been saved. CP 55. It associated outside counsel. CP 57-8. And the County's attorneys discussed the matter, including possible depositions, with Mitchell's counsel. CP 25. These actions were wholly consistent with an intent to defend the case on the merits.

In contrast, nothing in *Mercer* indicates that the State did anything at all to defend against that suit other than filing its answer. *Mercer*, 48 Wn. App. at 496. Most importantly, in *Mercer*, the State actually told the plaintiff in its answer that she was not in compliance with the then-effective claim statute. *Id.* at 502 (waiver not found where defendant State raised issue in answer). This is in stark contrast to the instant case, where the County did not raise the issue of a deficient claim until moving for summary judgment.

The County cites *Meade v. Thomas*, 152 Wn. App. 490, 492-95, 217 P.3d 785 (2009) for the proposition that a relatively low level of activity (issuance of a single set of interrogatories and correspondence between counsel) was not sufficient activity to waive a defense of insufficient service of process. However, the *Meade* court also cited other factors, including “most importantly” that the defendant did file an answer asserting the defense before the statute of limitations ran. *Id.* at 495.

The defendant’s conduct in *Pirtle*, 83 Wn App. at 306, was similar. There, an answer asserting the defense of failure to observe the required 60 day waiting period was filed less than four months after the suit was served on the defendant school district. *Id.* at 306. In that case, the court also noted that the plaintiff had notice of RCW 4.96.020’s requirements, so that she would have known of her non-compliance with the 60 day period independently of anything the defendant did or did not do. *Id.* at 311. Here, in contrast, Mitchell would have had no way to know that the County considered the claim form deficient until the defense was raised (and indeed no such indication was ever given in any of the County’s communications until moving for summary judgment). The length of time elapsed before the County asserted the defense was also much greater than in *Pirtle* (22 months vs. less than four months in *Pirtle*). *Id.*

Finally, *Oltman v. Holland America Line*, 163 Wn.2d 236, 178 P.3d 981 (2008) is distinguishable. Contrary to the County's assertion, *Oltman* does not hold that as a strict rule there can be no waiver if the defect could not have been cured before the answer was required. Rather, the *Oltman* court applied the "dilatory conduct" prong of the waiver doctrine, as explained in *Lybbert v. Grant County*, 141 Wn.2d 29, 1 P.3d 1124 (2000) and found that the plaintiffs were not prejudiced by an answer, served 11 days late, that asserted the affirmative defense too late for any cure. *Oltman*, 163 Wn.2d at 246. The court did not consider the other prong of the waiver doctrine, that is, whether the defendant's previous conduct was inconsistent with asserting the defense. *Id.*

That second prong is the one that applies here, where (unlike in *Oltman*) the issue was not raised until 22 months after the claim was filed and 18 months after suit was filed. The County's conduct during that time was wholly consistent with defending the suit, and inconsistent with assertion of the defense. *Oltman* does not control this case, and does not bar a finding of waiver.

III. CONCLUSION

The decision of the trial court should be reversed. Mitchell's claim form needed only to substantially comply with RCW 4.96.020. The test for substantial compliance is simple: did the claim accomplish the

statute's purpose of putting the County on notice, so that the claim could be investigated? Despite the County's efforts to graft additional requirements onto the test, the answer to that question remains an unequivocal "yes."

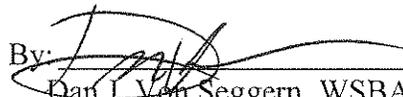
The County simply cannot overcome the undisputed fact that they **were** able to investigate Mitchell's claim based on the content of the claim form, demonstrating substantial compliance. Their assertion that an express allegation of negligence is required is not supported by the plain language of the statute or by any relevant case law. The *Caron* decision is irrelevant to a case governed by RCW 4.96.020, and the County's reliance on it for the proposition that the claim form must "identify the defect" is therefore misplaced. When viewed through the lens of the most recent *Renner* decision, this case becomes crystal clear: the claim form substantially complied, and the trial court erred when it granted summary judgment.

Moreover, because the County's conduct was consistent with defending the case and inconsistent with asserting a defect in the claim form, the defense was waived. *Oltman* does not bar a finding of waiver under these circumstances. It was error for the trial court to have found that there was no waiver and granted summary judgment on that issue as well.

For these reasons, this court should reverse the trial court's decision.

Respectfully submitted this 1 day of March, 2011.

LEE SMART, P.S., INC.

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CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on March 1, 2011, I caused service of the foregoing on each and every attorney of record herein:

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