

**FILED**

**MAR 30 2012**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO 30054-4-III

Superior Court No. 11-2-00805-1

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

MARGE GANSER-HEIBEL, individually,

Appellant

v.

CHAVALLO COMPLEX LLC., a Washington  
Limited Liability Corporation,

Respondent

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APPELLANT'S OPENING BRIEF

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### **III. ASSIGNMENT OF ERROR**

1. The trial court erred by granting summary judgment dismissal of codefendant Chavallo because Ms. Ganser-Heibel's action was properly commenced on April 5, 2011, within the applicable statute of limitations as tolled by RCW 4.96.020(4).

#### **Issue Pertaining to Assignments of Error**

1. If an action in negligence is properly commenced within the statute of limitations as tolled by RCW 4.96.020(4) against a governmental codefendant, is the action also properly commenced with respect to other non-governmental codefendants named and joined in the same action?

### **IV. STATEMENT OF THE CASE**

#### **1. Facts**

On February 27, 2008, Ms. Ganser-Heibel attended an open house at the Rod Coler Center for Senior Health, which is owned and operated by the Kennewick Public Hospital District (hereinafter, KPH). CP 45. KPH currently leases the property from codefendant Chavallo. CP 45. Ms. Ganser-Heibel was seriously injured when she fell on an unmarked

concrete step just outside the door of the KPH facility and fractured her hip. CP 46.

After the injury, KPH received a notice of claim filing on February 3, 2011, commencing the 60-day waiting period and tolling the applicable statute of limitations per RCW 4.96.040(2) & (4). CP 46. The 60-day waiting period ended on April 4, 2011, with no action taken by KPH. On April 5, 2011, the summons and complaint were filed in Benton County Superior Court, naming Chavallo and KPH as codefendants. CP 8. Chavallo and KPH were properly served with the summons and complaint on April 5, 2011. CP 8-9.

## **2. Procedural Posture**

Chavallo moved for summary judgment on May 4, 2011, arguing that Ms. Ganser-Heibel failed to timely commence her action against Chavallo. CP 16, 22. Specifically, Chavallo argued that the 60 day tolling provision in RCW 4.96.020 did not apply to them as a non-governmental codefendant. CP 25.

At a hearing on June 10, 2011, Judge Vic L. VanderSchoor heard oral argument and granted Chavallo's motion for summary judgment and dismissed Chavallo from this action. CP 85. Ms. Ganser-Heibel filed a

timely Notice of Appeal to the Court of Appeals, Division 3 from the trial court's June 10, 2011, order.

## V. ARGUMENT

### 1. Standard of appellate review.

When reviewing a grant of summary judgment, the appellate court engages in the same inquiry as the trial court. Summary judgment is appropriate when, considering evidence and the reasonable inferences flowing from it in the light most favorable to the non-moving party, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990); *Island Air v. LaBar*, 18 Wn. App. 129, 136, 566 P.2d 972 (1977). Appellate review of summary judgment as a matter of law and interpretation of a tolling statute is de novo. *Rivas v. Overlake Hosp. Medical Center*, 164 Wash2d 261, 266, 189 P.3d 753 (2008). The statute of limitations is an affirmative defense and the defendant has the burden of proof. *Id.* If however, the plaintiff asserts that the applicable statute of limitations has been tolled, the plaintiff bears the burden of proof. *Id.*

**2. The trial court misinterpreted the clear meaning of RCW**

**4.96.020(4) that tolls the “applicable statute of limitations within which an action must be commenced.”**

RCW 4.96.020(4) states the following:

(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.

The language of the statute with respect to the tolling of the statute of limitations is not limited to the governmental defendant. The statute relates the tolling of the statute of limitation to the “action” itself without reference to any particular class of defendants – governmental or non-governmental. The tolling provision does not apply a particular defendant, but rather, to the action itself. The *action* is the main focus of this portion of the statute. *Black's Law Dictionary* defines “action” as a “civil or criminal judicial proceeding,” *Black's Law Dictionary*, pg. 32 (9th ed.2009). The meaning of the word action in this statute clearly tolls the

statute of limitations with respect to all defendants, governmental and non-governmental. Hence, if the statute of limitations is tolled with respect to one governmental defendant by RCW 4.96.020(4) it is tolled with respect to all other defendants joined in the same action to the plaintiff.

**3. Even if RCW 4.96.020(4) is ambiguous, the clear meaning of the term “action” as used elsewhere in RCW Title 4 confirms that the statute of limitations was tolled with respect to all defendants joined in this action.**

Statutory construction begins by reading the text of the statute or statutes involved. If the language is unambiguous, a reviewing court is to rely solely on the statutory language. *State v. Avery*, 103 Wash.App. 527, 532, 13 P.3d 226 (2000). Where statutory language is amenable to more than one reasonable interpretation, it is deemed to be ambiguous. *State v. Keller*, 143 Wash.2d 267, 276, 19 P.3d 1030 (2001). A statute is only ambiguous if it remains subject to multiple interpretations after analyzing the plain language. *HomeStreet, Inc. v. State, Dept. of Revenue*, 210 P.3d 297, 301 (Wash. 2009). Legislative history, principles of statutory construction, and relevant case law may provide guidance in construing

the meaning of an ambiguous statute. *State v. Roggenkamp*, 106 P.3d 196, 199 (Wash. 2005).

In other statutory provisions within RCW Title 4 the term “action” is used without relationship to the classification of the defendants. The sections within RCW Chapter 4.16 define the statutes of limitations for actions based not upon the classification of the defendant(s), but upon the type of conduct that forms the basis for the action. (E.g., RCW 4.16.080 actions for personal injury limited to three years; RCW 4.16.040 actions based upon contract or written agreement limited to six years; RCW 4.16.100 actions for assault, libel, slander limited to two years.)

Elsewhere, RCW Section 4.16.170 – 4.16.260 discusses various circumstances that toll the statute of limitations during which an action must be commenced by a plaintiff. (E.g., RCW 4.16.200 – tolling the statute of limitations due to the death of the plaintiff; RCW 4.16.190 – tolling the statute of limitations due to incompetency or disability of the plaintiff; or RCW 4.16.170 – tolling the statute of limitations after a single defendant is served within 90 days after filing the complaint with respect to all other, unserved defendants.) In each of these instances, the term action is used and given the same meaning as in other statutes within RCW Title 4.

In the case at bar, Ms. Ganser-Heibel sought to commence an action in negligence against two codefendants – KPH and Chavallo. To properly commence her action against KPH, she was required to file a tort claim form and wait 60 days prior to filing her complaint in Superior Court. RCW 4.96.020(2). The statute requiring the tort claim form filing also provided a tolling of the statute of limitations for Ms. Ganser-Heibel's action to allow the mandatory 60 day time period to expire. RCW 4.96.020(4). Because Ms. Ganser-Heibel's action was burdened by the requirement to file a tort claim form and wait 60 days, the action was benefitted by the 60 day tolling provision. After the expiration of the 60-day time period and prior to the expiration of the period of limitations for Ms. Ganser-Heibel's action, she properly commenced her civil action by filing her complaint and serving all named defendants on the same day. Because of her status as a plaintiff alleging personal injury due to the negligence of a governmental entity – she qualified for the tolling of the statute of limitations for the commencement of her action under RCW 4.96.020(4). The statute of limitations for her action was tolled and her action was properly commenced by timely filing of the complaint and service upon all named defendants on April 5, 2011.

**4. Washington courts have consistently held in favor of tolling the statute of limitations for plaintiffs with respect to actions that concern multiple defendants joined by a common factual issue.**

The applicable statute of limitations for an action is tolled as to all defendants once an action against one defendant is timely filed and/or served provided that all defendants are joined by a common factual issue. *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 327, 815 P.2d 781 (1991). In *Sidis*, two separate actions were consolidated on appeal. One of the actions involved a wrongful death where the State of Washington and an individual were the only two named defendants. The State was served on the 90<sup>th</sup> day after the filing of the complaint. The individual defendant was not served until over a week after the 90-day period had elapsed. The court found that the plaintiff's filing of the complaint and proper service upon the State within the 90 days required, tolled the statute of limitation beyond the 90-days with respect to the individual defendant.

Following the *Sidis* decision, the Court of Appeals for Division 1 in *Wakeman v. Lommers*, extended the *Sidis* rule to toll the statute of limitations with respect to codefendants who were not even concurrent tortfeasors, but successive tortfeasors and where the only common factual issue was the apportionment of damages. *Wakeman*, 67 Wn. App. 819, 823, 840 P.2d 232, 234 (1992). Where the *Sidis* decision involved a single

cause of action against multiple defendants, the *Wakeman* facts involved two causes of action against two defendants that were “wholly unrelated in time and causation, but allegedly one indivisible harm was produced. *Id.*, at 233. In *Wakeman*, the court noted that “the language in *Sidis* is very broad” and applies to all actions involving multiple defendants “joined by a common factual issue.” *Id.*, at 823.

## VI. CONCLUSION

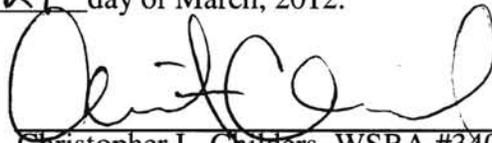
The trial court erred as a matter of law when it ordered the summary judgment dismissal of Chavallo from this action. The trial court erroneously determined that the statute of limitations had expired. The plain meaning of RCW 4.96.020(4) requires tolling of the statute of limitations for up to 60 days when plaintiff is required to file a tort claim form. Ms. Ganser-Heibel properly complied with the requirements of RCW 4.96.020(2) and the applicable statute of limitations during which she could commence her action was tolled by RCW 4.96.020(4) until April 5, 2011, when she filed her complaint and served all named defendants in this action.

Ms. Ganser-Heibel respectfully requests reversal of the trial court’s June 10, 2011, order granting summary judgment dismissal of Chavallo from this action.

**1. Motion for Costs on Appeal**

Ms. Ganser-Heibel respectfully moves this court for an award of costs as allowed under RAP 18.1 and RCW 4.84.010.

Respectfully submitted this 29<sup>th</sup> day of March, 2012.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29<sup>th</sup> day of March, 2012, I sent for delivery a true and correct copy of the foregoing Appellant's Opening Brief by the method indicated below, and addressed to the following:

**U.S. Mail – Two (2) Copies**

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