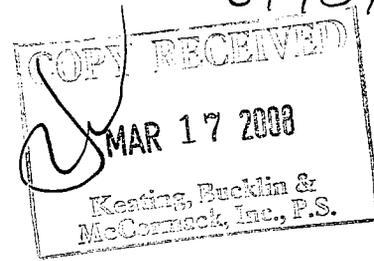


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NO. 60509-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARC STEPHEN RENNER, Appellant,

v.

CITY OF MARYSVILLE, Respondent.

REPLY BRIEF OF APPELLANT

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I. ISSUES

Appellant/plaintiff Renner believes the issues have boiled down to three:

1. Whether he sufficiently complied with the claims statute content requirement that he state his address for the six months prior to accrual of his claim where his alleged failure to do so was instigated and perpetuated by the city's misleading affirmative conduct, where the address he stated was his address for two of those months, where all city executives personally knew his addresses for five years preceding accrual of his claim, where he responded in good faith to all inquiries on the city's claim form and thereafter to all address-related inquiries the city chose to make in two sets of interrogatories, where he made no effort to deceive, and where the applicable 1967 statute requires that both the claim content and the related "law" be liberally construed so that substantial compliance will be deemed sufficient.

2. Whether the city's conduct in creating the alleged claim form content deficiency issue and fostering it thereafter should result in it being estopped or deemed to have waived the claim deficiency defense.

3. Whether the claim statute requirement that he state the amount of damages he seeks forces him out of court for failure to state a number when he provides accurate information that the damages are on-

going and impossible to calculate, and does declare their nature and elements, and where the city is better able to calculate the wage and benefit loss elements than he because that loss is what it was paying him together with its subsequently developing history of wage increases, benefits and related factors since his termination.

II. REPLY ARGUMENT

Appellant will offer his reply to respondent's responses in the order offered by respondent.

A. Whether Waiver of the Legislature's Claim Filing Requirements is an Issue.

In one sense it is not. The first and third issues as characterized herein above both relate to application of the two mandates of RCW 4.96.010 that:

- (1) "The laws [emphasis added] specifying content" of governmental tort claims "shall be liberally construed"
- (2) "so that substantial compliance therewith will be deemed satisfactory."

This statute was enacted in 1967, presumably to help alleviate the harshness, hairsplitting and apparent inconsistencies demonstrated by preceding case law decided under other forms of enactment which do not

appear to have made a distinction in construction between the procedural claim requirements and requirements involving content.

The 1967 statute literally states that the law applicable to claim content shall be liberally interpreted. Earlier case law seems to have also confused liberal interpretation of the law with liberal construction of the content of a claimant's claim, affording the former but withholding the latter, and imposing a strict interpretation of the law leading to unconscionably harsh results which denied honest claimants substantial justice at the service of no comparative benefit.

The overriding intent of the 1967 claim statutes was to render government liable for its torts to the same extent as private parties. RCW 4.96.010 (1), not to unnecessarily obstruct this purpose by serving formal traps to the detriment of substantial justice.

The second issue, as we have characterized it in this reply, does directly involve waiver in a way which sharply contrasts to respondent's assertions based on now out-moded law.

The respondent city's affirmatively misleading acts, by which the claim deficiency issue was born and fostered, amount to waiver under Lybbert v. Grant County, 141 Wn. 2d 29 (222) or estoppel under this Division's holding in Dyson v. King County, 15 Wn. App. 243 (1991). Lybbert may compromise the Dyson result to the extent that Dyson relies

on the estoppel theory, but Lybbert does not mention Dyson which is discussed further at section II. E., at pages 16-17 and throughout F. at page 17 herein because of the way respondent structured its brief.

As with Dyson, the facts of Mr. Renner's case closely fit those in Lybbert in which our Supreme Court held that multiple affirmative misleading acts by the county, by which it masked and withheld expression of its insufficiency of process defense until after the statute of limitations had run, amounted to waiver. The reasons it gives are consistent with the reasons given in Dyson and urged herein for the same result, though at page 35 Lybbert does hold that where both parties can determine the law and have knowledge of the facts, estoppel does not apply.

The reasons waiver does apply to Mr. Renner's case are set forth in Lybbert, Id. at 39-41 thusly:

We believe the doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote "the just, speedy, and inexpensive determination of every action." CR 1 (1). If litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind the procedural rules may be compromised. We note, also, that the common law doctrine of waiver enjoys a healthy existence in courts throughout the country, with

numerous federal and state courts having embraced it.

Id. at 39

****Our holding today merely underscores the importance of preventing the litigation process from being inhibited by inconsistent or dilatory conduct on the part of litigants.

We are satisfied, in short, that the doctrine of waiver complements our current notion of procedural fairness and believe its application, in appropriate circumstances will serve to reduce the likelihood that the “trial by ambush” style of advocacy, which has little place in our present-day adversarial system, will be employed. Apropos to the present circumstances of this case, one court has acknowledged that [a] defendant cannot justly be allowed to lie in wait, masking by misnomer its contention that service of process has been insufficient, and then obtain a dismissal on that ground only after the statute of limitations has run, thereby depriving the plaintiff of the opportunity to cure the service defect. [Citations omitted. Emphasis added.]

Mr. Renner literally presents a “masking by misnomer” case.

B. Mr. Renner Provided Information Regarding his Address for the Six Months Prior to Accrual of his Claim, the City Knew His Addresses for the Five Years It Employed Him Prior to the Accrual of His Claim.

On his claim form, Mr. Renner stated “6811 54th Pl. N.E.,

Marysville, WA 98270,” thus stating his then current address and stating

the address of his residence for two of the six months prior to the date on which his claim accrued. All city executives personally and necessarily had all of Mr. Renner's addresses for the entire five years he worked for the city before his cause of action accrued. His claim was filed with the City Clerk who personally knew him and all of his addresses for the five years before his claim accrued. The City Manager, Financial Director and Human Resources Director called and wrote to him on multiple occasions over the six months prior to the accrual of the action. Brief of Appellant, p. 12, CP 74 (Claim form), 25-26 § 2 (Renner declaration) and CP 29 at lines 2.5 - 3.5.

Mr. Renner literally and practically thus provided a statement of both the requisite addresses but for the one he had for the first four of the six months before his claim accrued, and the city knew that to be true. To say otherwise would be to deny him liberal interpretation of both the content of his claim and of liberal application of the law to the contextual fact pattern.

Liberal construction of the claim's content and liberal application of the law to that content should result in a holding that Mr. Renner substantially served the purpose of the claim statute, especially where the reality is that the city knew all of his addresses and both the Mayor and the City Manager provided references for him to the landlord, aiding him to

be able to secure the address at which he resided for the first four months of the six months prior to accrual of the claim. CP 26, 1.3 and 29, 1. 2.5-3.5.

In Duschaine v. City of Everett, 5 Wn. 2d 181 (1940) the claim statute, Rem. Rev. Stat § 9480, provided that compliance with all requirements was “mandatory.” The requirement in issue was that claimant give her addresses at the time of presenting and filing the claim and for six months prior to its accrual “by street and number.” She stated the initial address by street and number and then simply stated “and prior thereto resided at route number 1, Marysville, Washington.” She also failed to state that she had no other addresses during the six months. The city claimed her statement was deficient and our court said it was close enough. Id. at 181-183. In so doing it set forth these principles derived from the then prior case law:

The rule consistently followed by this court is that literal compliance with legislative and charter provisions respecting the presentation of claims for tort against a municipality is not demanded; only substantial compliance is required. [Citations omitted. Emphasis by the court.]

The theory upon which this court has proceeded in adopting the rule of substantial compliance is aptly stated in Wagner v. Seattle, 84 Wash. 275, 146 P. 621, 622, Ann.Cas.1916E, 720, as follows: ‘The

obvious purpose of these charter and statutory provisions is to insure such notice to the city as to enable it to investigate the cause and character of the injury; and, where there is a bona fide attempt to comply with the law, and the notice filed actually accomplishes its purpose of notice, it is sufficient, though defective in some particulars. [Citing authorities.]' [sic.]

Id. at 184-185.

We submit that these principles are particularly applicable to Mr. Renner's case in the context of the present 1967 statute, in the context of this respondent's initiation and perpetuation of, or significant complicity in, the defect it seeks to use to deny Mr. Renner his day in court, and in the context of its high level official pre-existing knowledge of Mr. Renner's addresses.

Respondent complains that Mr. Renner seeks to misuse the Duschaine case, and wishes to use it against him because, at page 187, the court comments on facts not before it in stating dicta that if Ms. Duschaine provided no information at all in her claim form about her address for the six months before accrual of her claim, it would have been insufficient even if, in truth, that address had been the same as her address at the time of filing.

Under the statute and context presented by Mr. Renner's case, he did state the address that the city knew to be his address for two of the six

months prior to accrual of his claim. It had helped him acquire the lease at his preceding address. It had no need of further information, did not ask for it in its official claim form or in two substantial subsequent sets of discovery requests.

Duschaine stands for proposition that prejudice to the city, or lack of it, is an issue and that a city has a duty to investigate and is charged with what it knows or should know through its diligent investigation. Duschaine holds that a bona fide effort by a claimant making no effort to mislead which in fact, by virtue of facts extrinsic to the claim form determinable by reasonable government investigation, which leads to fulfillment of the purposes of the statute will suffice. Id. at 185.

This appellant submits that the Duschaine case itself, but particularly all of the pre-1967 cases cited by respondent, illustrate the probable motivation for enactment of RCW 4.96.010 and the decision by this Division I court in Dyson v. King County, 61 Wn. App. 243 (1991), rev. den. 117 Wn. 2d 1020 (1991) and our Supreme Court's subsequent decision in Lybbert v. Grant County, 141 Wn. 2d 29 (2000). That is, to rid our jurisprudence of wasteful unreasonably complex mixed-result hairsplitting which so often has allowed governmental entities to defeat the bigger purpose of the claims acts to make government liable to the extent that non-governmental entities would be for the same conduct, and

not to arm them with minefields by which to preclude justice on the merits.

Our present statute mandates that claims law as well as a claim's contents be liberally construed to do substantial justice.

C. The Requirement to State the Amount of Damages Claimed Before the Damages Case Has Ripened.

Mr. Renner stands on his stated positions of impossibility, the need for honesty under oath, his substantial compliance by listing of his then known damage elements coupled with the city's superior knowledge of changes in its wages and benefits over time, and its intimate knowledge of Mr. Renner's compensation rate and benefits at the time it terminated him.

At page 16 of its brief, respondent acknowledges that most tort claimants are unable to specify an amount that has any realistic meaning when they file their claims. In practice, when a specific figure is given, it is either pure posturing or it is an amount which exceeds a reasonable demand by a generous margin sufficient to avoid preclusion of unforeseeable developments, or both.

The law is not liberally construed if it requires fiction under oath, guestimating, or posturing.

D. The Claim Statute Defense Was Not Clearly and Properly Asserted Until the Statute of Limitations Had Run.

The city set its trap and baited it:

1. It drafted its defective official claim form, and seeks a grand prize for doing so by gloating that plaintiff followed it, thereby making the exact same mistake of law (assuming it to be a mistake) for which he alone should bear the burden -- the death penalty of sanctions.

2. It filed an Answer which was not just ambiguously lacking in CR 9 (c) specificity and particularity, it falsely globally denied compliance with “RCW 4.96” when it knew, and ultimately admitted, that all procedural requirements had been met and all content requirements but two had likewise been met. Plaintiff exercised the respect and sought the confidence implied by the extra effort involved in obtaining and using the city’s official claim form. The Answer violated both the CR 9 (c) mandate that a denial of conditions precedent “shall be made specifically and with particularity” and the related CR 8 (b) mandate that

Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder.
[Emphasis added]

The affirmative defense allegation suffers from the same problems in stating “That plaintiff has failed to comply with the requirements of RCW 4.96.” CP 72 at its Ex.3., CP 81 § 1 and 83 § 4.

Plaintiff had alleged compliance in its Complaint to proactively flush out technical complaints.

3. Plaintiff persisted by way of discovery requests to secure the admissions to which he reasonably felt entitled in order to put this matter to rest, seeking to put the burden on the defense, as the rules do, to specify any sincere claims of technical defects. It is common for defendants to deny just about everything, and as illustrated in the opening brief, this defendant made many of the usual absurd denials. The city made no effort whatever to respond, stating nothing in its initial response but inapplicable objections. CP 31, § C and its Ex. 1 at CP 33-38.

4. Thereafter, the city provided another document with the same title and footers as the preceding one declaring it too to be nothing more than “Objections.” While the city claims that it took clear, proper and unambiguous steps to make its position clear, this document was not only misleadingly – wrongly – labeled, it again wholly dodged responding to No. 57 which is the first of two interrogatories which asked for the specifics of its denials and of its affirmative defenses. The only response it offered to No. 57 was the nonsensical sentence: “See documents provided in response to plaintiff’s public disclosure request.” Buried in the middle of the second paragraph of its response to related No. 59 was the city’s only statement that it was complaining about the lack of a

damages figure and of residence addresses for six months prior to accrual of the claim.

Incredibly, this hidden response to but the last of the two critical requests is what the city claims to be a clear and proper assertion. Instead, it is literally “masking by misnomer.” See Lybbert, *supra*, at 40.

Titles, or captions, are matters of importance in the paper-laden world of litigation. For good reason, CR 10 (a) provides that “every pleading shall contain an identification as to the nature of the pleading or other paper.” CR 10 (e) (3) recommends “proper footers with the name of the document.”

As with its faulty claim form, the city bears the entire responsibility for initiating and affirmatively perpetuating these problems of obfuscation, but seeks to place the entire burden on the innocent – certainly the comparatively far more innocent – claimant. It is not really relevant in any meaningful sense for it to argue that plaintiff had a “full year” (ten months) to cure when his attorney was led to overlook the one and only meaningful statement of the city’s intentions which it alone had buried after plaintiff’s several good faith efforts to flush it out.

In all senses meaningful, plaintiff did cure by responding to the city’s two generous sets of discovery requests to which he drew no relevant criticism. The city obtained everything it asked for about all of

Mr. Renner's addresses and everything he was able to provide about his complex and still growing damages issues which were further complicated by his need to join the Army to get work, and its complex system of benefits and special category pay.

Plaintiff's counsel does not know why, beyond the obvious, that he missed one critical sentence on a subject which should have been clearly addressed on each of the five prior occasions which he provoked in efforts to elicit it.

Plaintiff counts those five occasions as:

1. Non-specific denial in the Answer of Plaintiff's affirmative allegation of compliance,
2. Non-specific allegation of affirmative defense of non-compliance,
3. Defense "Objections" to plaintiff's related discovery request No. 57,
4. Defense "Objections" to plaintiff's related discovery request No. 59,
5. Defense avoidance of any meaningful response to request No. 57 in the defendant's mislabeled second set of "Objections."

Counsel does not know which of the last two obfuscations proximately caused his oversight because, as previously stated in his response to the motion for summary judgment (CP 62 at 64-65 and CP 31 at 31 §§ A and B, and his supporting declaration verifying his factual assertions), he has no recall of seeing the critical buried sentence until finding it, to his surprise, during preparation of his response to the motion. He finds it particularly interesting that the defense did not use it in its motion, considering how “clear” and supporting it now claims it to be. It became the mainstay of the city’s position. It appears that it was also hidden to the defense attorney. Plaintiff’s attorney brought it, and his surprise over it, to light in plaintiff’s response to the motion, CP 62 at 64-65. This case is Dyson, and it is Lybbert and the burden should be on the defense if these cases are to be reasonably distinguished.

Plaintiff urges that all five of the defense obfuscations, its failures to specify and particularize, cumulatively, in conjunction with its faulty preparation of its official claim form, contributed to the oversight. Counsel surely would have acted on the address issue had it come to his attention.

E. Whether Substantial Litigation Occurred Before the City Brought its Motion is of No Consequence in Light of Dyson.

This Court held that it was “misleading affirmative action” that mattered, not whether substantial litigation procedures had occurred. Dyson v. King County, 61 Wn. App. 243 (1991), rev. den., 117 Wn. 2d 1020 (1991).

It is, however, of significance in this case that plaintiff did address and cure the city’s claims of insufficient claim form information by responding, without any material complaints, to the city’s two sets of interrogatories in which it asked for all the information it wanted.

The city is clearly not prejudiced. All of the post running of the statute of limitations effort relates not to what the city knew or was told or asked and had answered or cared about knowing at all, but to its simple desire to use its mistakes to throw plaintiff out of court. As discussed, whether the city is prejudiced is an issue which is coupled to whether it knows enough to exercise its duty to reasonably investigate the claim information it got and thus satisfy the purposes of the claims statute. Duschaine v. City of Everett, 5 Wn. 2d 181 at 184-185 (1940) discussed herein at pages 7 through 10.

The twenty-six months of litigation in Mr. Renner’s case compares favorably to the nine in Lybbert, supra at 35.

The city asserts Dyson’s, supra, inapplicability first because the defense in that case did not assert a defective claim defense until after the

statute of limitations had run, but that is exactly what effectively happened here as well, and this defendant's misleading affirmative actions were not singular but multiple—not the Dyson act of mere silence, but multiple affirmatively misleading acts such as those which occurred in Lybbert, supra.

Dyson is said to be inapplicable because the defense claims plaintiff allegedly cannot explain his failure to cure, but he has so explained and for all meaningful purposes he did cure. Further, the subject information was known to the city long before plaintiff filed his claim.

The city has chosen not to notice Lybbert, supra.

F. The Effect of the City's Defective Official Claim Form.

In Mr. Renner's case, the defective claim form was not the only act by the city that was affirmatively misleading. It was the initiating factor and became one of six which cumulatively contributed to positioning the city for its post limitations period motion in which its first clean unobscured statement of the actual nature of the defense was stated – a Lybbert – Dyson, type “Ah ha, got ‘cha.”

The defense relies on Schoonover v. State, 116 Wn. App. 171 (2003) for the proposition that use of an official governmental claim form does not excuse the failure to include content which the form does not ask

for. Mr. Renner's case involves more than that one defect, Schoonover involved a critical procedural defect rather than one of content requiring substantial compliance only, and Dyson was not raised in Schoonover.

Lybbert was cited in Schoonover at its page 182, but for only one of its two holdings. That is that collateral estoppel is inapplicable where both parties have equal access to the law and facts because the estoppel element of justifiable reliance is missing where there is a clear statutory mandate such as that to serve a county one must serve its auditor. This appellant submits the inapplicability of this holding in his case where the statutory mandate permits substantial compliance, since specification of the claimed defect is critical where the clarity of the mandate is subject to liberal legal and factual interpretation and the address stated is the correct address for the last two of the six months before the claim arose.

Schoonover overlooked Lybbert's second discussion and holding at 141 Wn. 2d 38-45 that waiver is applicable to all defenses that are masked prior to expiration of the period within which to commence an action. This aspect of Lybbert was unnecessary to Schoonover because the latter case did not present facts involving obfuscation.

Mr. Renner respectfully submits that on the facts he presents, Lybbert and Dyson trump Schoonover. Further:

1. The form provided by the state in Schoonover was not misleading and involved no omissions. The state engaged in no misleading acts.

2. In Schoonover, the claimant did not verify his claim. His attorney did in violation of a basic procedural claim requirement. Consistent with the earlier discussion of RCW 4.96.010, Division II made the critical distinction at page 178:

With respect to the content of such claims this section shall be liberally construed so that substantial compliance will be deemed satisfactory.

[I]n contrast to the contents of the claim, which we liberally construe for substantial compliance, we strictly construe the statutory filing requirements. [Citation omitted.]

3. Lybbert and Dyson were not raised in Schoonover and are inapplicable in the absence of any misleading acts.

Lybbert and Dyson do fit Mr. Renner's facts. What is more unconscionable than to have a rule that says governmental attorneys can make mistakes or perhaps intentionally make legal omissions from their official claims forms respecting information they profess to want, thus trapping claimants and their attorneys whose only failure is to have

innocently made the very same omission the government attorneys initiated, but the government lawyers are rewarded and the claimants and their attorney are punished with the death penalty of sanctions—to be thrown out of court on the technicality, wholly frustrating the legislative purpose of making government responsible for its wrongs to the same extent that other defendants are?

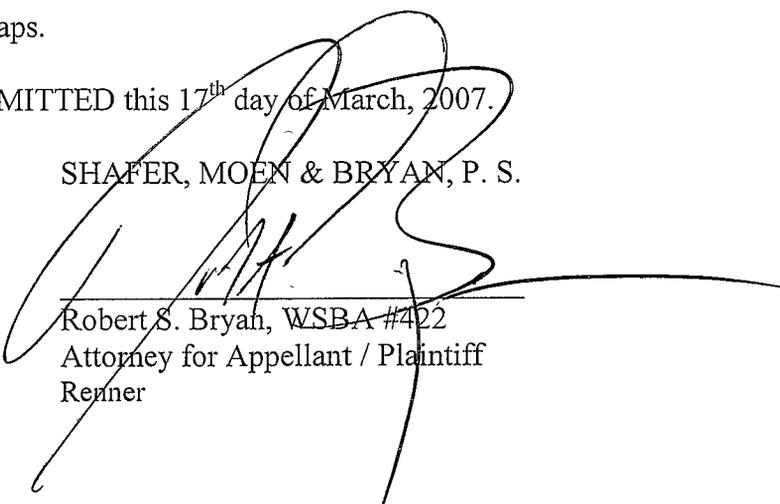
III. Conclusion

The city should not be rewarded with a dismissal for its several affirmative misleading acts where it is clear that the oversight alleged against its claimant was certainly no greater than its own and comparatively innocent. The problems addressed in this matter were wholly initiated and fostered by the city.

The trial court's harsh judgment should be reversed. The legislative intent of the governmental tort claim system would be honored, as would the Lybbert and Dyson courts, by another step toward the elimination of unconscionable traps.

RESPECTFULLY SUBMITTED this 17th day of March, 2007.

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