

64544-7

64544-7

No. 645447

COURT OF APPEALS
DIVISION 1
OF THE STATE OF WASHINGTON

CAROL MAVIS
Appellant

v.

KING COUNTY PUBLIC HOSPITAL NO. 2
Respondent

APPELLANT'S OPENING BRIEF

Mario A. Bianchi
WSBA No. 31742
LASHER, HOLZAPFEL,
SPERRY & EBBERSON, PLLC
2600 Two Union Square
601 Union Street
Seattle, Washington 98101-4000
Phone: (206) 624-1230
Attorneys for Appellant

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A. Assignment of Error

1. The trial court erred in granting Evergreen's motion for summary judgment because Evergreen failed to strictly follow the procedures for identifying an agent to receive claims as required by RCW 4.96.020(2). Evergreen failed to properly record the name and address of its designated agent at the King County Recorder's Office as is expressly required by the statute.

2. The trial court erred in granting Evergreen Healthcare's motion for summary judgment because Carol Mavis waited the full sixty day waiting period required by RCW 4.96.020(4) after presenting her claim on January 31, 2009. The Washington State Legislature has clarified that "[a] claim is deemed presented when the claim form is delivered in person or is received by the agent by regular mail, registered mail, or certified mail, with return receipt requested, to the agent or other person designated to accept delivery at the agent's office." This amendment is curative and should be applied retroactively. *Washington Waste Systems, Inc. v. Clark County*, 115 Wn.2d 74, 78,794 P.2d 508 (1990) citing *State v. Jones*, 110 Wn.2d 74, 82, 750 P.2d 620 (1988).

3. The trial court erred in granting Evergreen Healthcare's motion for summary judgment because Carol Mavis waited the full sixty day waiting period required by RCW 4.96.020(4) after presenting her claim on January 31, 2009. The Washington State Legislature has clarified that "[a] claim is deemed presented when the claim form is delivered in person or is received by the agent by regular mail, registered mail, or certified mail, with return receipt requested, to the agent or other person designated to accept delivery at the agent's office." This amendment is strong evidence of the statute's original intent. *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 755, 953 P.2d 88 (1998.)
4. The trial court erred in granting Evergreen Healthcare's motion for summary judgment because Carol Mavis' claim for damages was constructively received on Saturday, January 31, 2009. Washington case law recognizes the constructive receipt of claims for damage when equity dictates. *Stevens v. City of Centralia*, 86 Wn. App. 145, 936 P.2d 1141(1997).
5. The trial court erred in denying Carol Mavis her attorney fees and costs incurred in defending Evergreen Healthcare's motion for summary judgment pursuant to CR 37(c), because Evergreen Healthcare improperly denied Carol Mavis' Requests for

Admission No. 21 and No. 22. “If a party fails to admit ...the truth of any matter as requested under rule 36, and if the party requesting the admissions thereafter proves...the truth of the matter, [s]he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees.” CR 37(c).

B. Introduction

This appeal concerns the interpretation of RCW 4.96.020(2), and whether appellant Carol Mavis lawsuit against King County Public Hospital No. 2 (herein referred to as “Evergreen Healthcare”) should be dismissed for failure to comply with the procedures of the statute. The primary issue is one of statutory interpretation and when a notice of claim for damages to a governmental entity is first deemed “presented” for purpose of starting the clock on the sixty calendar day waiting period required before commencement of a lawsuit. The Appellant, Carol Mavis sent her notice of claim for damages to Evergreen Healthcare by certified mail with return receipt requested, and respectfully submits that her notice was “presented” within the meaning of the statute on Saturday, January 31, 2009, when a representative of Evergreen Healthcare signed the green return receipt:

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> ■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits. 	A. Signature <input type="checkbox"/> Agent <input type="checkbox"/> Addressee <i>Emma I. Bach</i>	
1...Article Addressed to: <i>Mr. Steven E. Brown Chief Executive Officer Evergreen Healthcare 12040 NE 120th St. Kirkland, WA 98109</i>	B. Received by (Printed Name) <i>EMMA I-BACH</i>	C. Date of Delivery <i>01-31-09</i>
2. Article Number (Transfer from service label)	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
	3. Service Type <input type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	

RP 38. Despite the fact that a representative at Evergreen had signed the return receipt for Mrs. Mavis' claim for damages on Saturday, January 31, 2009, Evergreen successfully convinced the Superior Court that it should not be deemed "presented" within the meaning of the statute until the following Monday, February 2, 2009, the next 'business day.' The Superior Court dismissed Mrs. Mavis' lawsuit with prejudice because Ms. Mavis had therefore commenced her lawsuit against Evergreen on the sixtieth day (as opposed to waiting until the 61st day), one day too early.

RP 97-99.

The Washington legislature has already resolved the ambiguity in the RCW 4.96.020, amending the statute in April of 2009, to add the following clarifying language:

A claim is deemed presented when the claim form is delivered in person or is received by the agent by regular mail, registered mail, or certified mail, with return receipt requested, to the agent or other person designated to accept delivery at the agent's office.

RCW 4.96.020(2). Prior to the 2009 amendment to the statute, no controlling authority existed to determine when a claim was deemed "presented" in compliance with RCW 4.96.020(2). The statute was silent and there was no case law decision on point.¹ Carol Mavis submits that the April, 2009, clarification to RCW 4.96.020 should therefore be applied retroactively, and that her claim for damages should be deemed timely. *Washington Waste Systems, Inc. v. Clark County*, 115 Wn.2d 74, 78,794 P.2d 508 (1990) ("Curative statutes, i.e., statutes which clarify ambiguities in older legislation without changing prior case law, presumably act retroactively.") Further, Ms. Mavis submits that even if the amendment to the statute is not applied retroactively, the amendment is strong evidence of the intent of the first statute and the court should interpret the statute such that Mrs. Mavis timely "presented" her claim when she sent it by certified mail with return receipt requested. *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 755, 953 P.2d 88 (1998.) (When a statute is amended to clarify an ambiguity, the amendment is strong evidence of

¹ As explained in the authorities section below, both sides have identified and argued case law from other jurisdictions which support their respective interpretations of the statute.

intent of the first statute.) Third, Mrs. Mavis submits that even if the statute is construed in favor of Evergreen, equity dictates that Evergreen constructively received the notice of claim for damages when a representative of Evergreen signed the return receipt on Saturday January 31, 2010. *Stevens v. City of Centralia*, 86 Wn. App. 145, 936 P.2d 1141(1997). Finally, Mrs. Mavis respectfully submits Evergreen should be denied the protection of RCW 4.96.020(2) because it failed to strictly follow the requirements of the statute when it appointed Ms. Beverly J. Barksdale its agent to receive claims for damages, but failed to record her agency authority with the King County Auditor's Office. This last issue is argued first below, for the sake of chronological consistency.

C. Statement of the Case

1. Background of Underlying Lawsuit

On February 7, 2006, while visiting Evergreen Healthcare, Mrs. Carol Mavis, fell over a 4" steel pipe protruding out of a 10" by 10" steel plated bolted to the hospital's garage floor as she was returning to her car. RP 4. The pipe was a support base of a yield sign, which had been removed. RP 4. The pipe and steel plate were painted grey, blending in with the concrete, and there was no warning of the danger of the protruding pipe. RP 4. When Ms. Mavis fell, she hit her head on the

The respondents also argued in-state authority, but it is not on point and not helpful to the

concrete and suffered permanent injuries including vertigo, as well as unsightly scars on her face and an indentation on her forehead. RP 4. Ms. Mavis filed this pending lawsuit against Evergreen Healthcare on April 3, 2009, seeking recovery for her permanent injuries on the basis of premises liability. RP 5-6.

2. Facts Salient To Appeal

A. Notice of Claim Sent by Certified Mail To Steven Brown

Before commencing her lawsuit against Evergreen Healthcare, on Friday, January 30, 2009, Carol Mavis, mailed Evergreen Healthcare a letter Claim Against King County Public Hospital District No. 2 (hereinafter the "Notice of Claim".) RP 33-36. The Notice of Claim was sent via U.S. certified mail, with return receipt requested and addressed to:

Mr. Steven E. Brown
Chief Executive Officer
Evergreen Healthcare
12040 NE 128th St.
Kirkland, WA 98109

RP 38. Mr. Brown had been identified as Evergreen Healthcare's designated agent to receive claims for damages in a December 14, 2001, Designation of Agent document on file at the King County Recorder's Office.

resolution of the issues in this lawsuit.

Mrs. Mavis' Notice of Claim to Mr. Steven Brown was received by Evergreen Healthcare on Saturday, January 31, 2009, and the green return receipt card was signed by a representative of Evergreen Healthcare on that date:

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> ■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits. 	A. Signature <input type="checkbox"/> Agent <input type="checkbox"/> Addressee <i>Emma L. Bach</i>	
1. Article Addressed to: <div style="text-align: center;"> <i>Mr. Steven E. Brown Chief Executive Officer Evergreen Healthcare 12040 NE 120th St. Kirkland, WA 98109</i> </div>	B. Received by (Printed Name) <i>EMMA L. BACH</i>	C. Date of Delivery <i>01-31-09</i>
2. Article Number (Transfer from service label)	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
PS Form 3811, February 2004	3. Service Type <input type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes

RP 38. The notice of claim was thereafter stamped "Received" by "Evergreen Healthcare Administration" on Monday, February 2, 2009, although Mrs. Mavis could not have known this at the time. RP 121. The notice of claim has a hand written notation identifying "Bev Barksdale" as the internal recipient of the document. *Id.*

The signed green return receipt showing that Evergreen Healthcare had received the Notice of Claim on January 31, 2009, was returned to Mrs. Mavis' counsel. RP 28. Noting that the Notice of Claim was signed

for by Evergreen Healthcare on January 31, 2009, Mrs. Mavis calculated that the sixty day waiting period required by RCW 4.96.020(4) would expire on April 1, 2009. *Id.* Mrs. Mavis waited the statutory sixty days, but heard nothing from the Evergreen Healthcare. *Id.* On April 3, 2009, Carol Mavis commenced this pending lawsuit for premises liability. RP 40.

B. Evergreen Healthcare's Denial of Request For Admissions No. 21 and No. 22

In Answer to Mrs. Mavis' lawsuit, Evergreen Healthcare generally denied that Mrs. Mavis had complied with the requirements of RCW 4.96.020. RP 127. Since Mrs. Mavis believed she had complied with the with the Statute, in compliance with CR 36, Mrs. Mavis sent Evergreen Healthcare two Request for Admissions that are relevant to this pending appeal. Requests for Admission No. 21 and No. 22 were posed by Mrs. Mavis, and answered by Evergreen Healthcare as follows:

REQUEST FOR ADMISSION NO. 21. Admit Evergreen Healthcare Facilities received the attached document titled ***Claims Against King County Public Hospital District No. 2*** on January 31, 2009.

ADMIT ___ DENY X

REQUEST FOR ADMISSION NO. 22. Admit that the attached document titled ***Claims Against King County Public Hospital District No. 2*** complies with the requirements of RCW 4.96.020.

ADMIT _____ DENY X

RP 45. Evergreen Healthcare made these specific denials despite having been provided a courtesy copy of the signed green return receipt showing that a representative of Evergreen Healthcare had signed for the Notice of Claim addressed to Mr. Steven Brown on January 31, 2009. RP 48-49.

C. Evergreen Healthcare's Motion For Summary Judgment

On September 18, 2009, Evergreen Healthcare filed *Defendant Evergreen Healthcare's Motion for Summary Judgment* and asked the Superior Court to dismiss Mrs. Mavis' lawsuit with prejudice for failing to wait a full sixty days required by RCW 4.96.020(4) before commencing her lawsuit. RP 106-111. The original basis of the motion focused on the date of *mailing* by Mrs. Mavis. Specifically, Evergreen Healthcare initially argued that CR 5(b)(2)(A) required that Mrs. Mavis wait three days after placing her notice in the mail on Friday, January 30, 2009, before starting to count the sixty days required by the statute. RP 109. In its Reply memorandum Evergreen Healthcare's legal basis subtly changed to focus on the date of *receipt* of the Notice of Claim. Evergreen Healthcare argued in Reply that although the green return receipt was signed for on Saturday, January 31, it did not physically reach its intended recipient until the following business day, Monday, February 2, 2009. Either way, counting sixty days from Monday, February 2, 2009,

Evergreen Healthcare calculated that when Mrs. Mavis commenced her lawsuit on April 3, 2009, she did so on the sixtieth day, instead of waiting a full sixty days.

In response to the motion for summary judgment, Mrs. Mavis argued that her claim should be deemed “presented” within the meaning of the statute, when the representative of Evergreen Healthcare signed the return receipt which acknowledged that the Notice of Claim addressed to Mr. Brown had been received on Saturday, January 31, 2009. RP 10-25. Mrs. Mavis could not have known any another date as it would have no reason to believe that a representative of Evergreen Healthcare would sign for the Notice of Claim on one day and then wait to deliver it to its intended recipient until the next day. Mrs. Mavis also asked the Superior Court to find that Evergreen Healthcare’s denial of Requests for Admission No. 21 and 22 were improper and to award her attorney fees and costs pursuant to CR 37(c).

D. CEO Steven Brown was *not* the designated Agent of Evergreen Healthcare.

In its briefing to the Superior Court, Evergreen Healthcare alleged that CEO Steven E. Brown, was its designated agent for purposes of RCW 4.96.020. However, during the pendency of Evergreen Healthcare’s Motion for Summary Judgment it was discovered that on August 19, 2008,

Evergreen Healthcare's Board of Commissioners had adopted and approved King County Public Hospital District No. 2 King County, Washington, Resolution No. 818-08, which document appointed a new designated agent (Beverly Barksdale), and expressly repealed all prior resolutions inconsistent therewith. RP 133-136. Resolution No. 818-08 provides in relevant part:

RESOLUTION

NOW, THEREFORE, BE IT RESOLVED by the Board of Commissioners of King County Public Hospital District No. 2 as follows, to wit:

1. In accordance with RCW 4.96.020, the Board hereby appoints the *Administrative Assistant to the Superintendent of the District (presently Beverly J. Barksdale)* to act as agent (the "**Agent**") to receive a claim.

2. The *Director for Governance and Community Services (presently Laurene H. Burton)* or the *In-House Counsel for the District (presently Aimee D. Brice)* are hereby appointed to act as deputy agents ("**Deputy Agents**") to serve in the place of the Agent if the Agent is unavailable to receive a claim.

3. In the event that the foregoing persons are unavailable [to] receive a Claim, the *Administrative Assistants to a Senior Vice President or Vice President of the District* (which Administrative Assistants shall be identified in the Claim Filing Process Notice pursuant to Section 4(a) hereinbelow) are hereby appointed to act as alternative Deputy Agents to receive a claim.

4. In accordance with RCW 4.96.020, the Board hereby adopts the following procedures for presenting a Claim to the District:

- a. Recording Information with Auditor. *The identify of the Agent and Deputy Agents and the address where they may be reached during the normal business hours of the District shall be recorded by the District with the King County Auditor (the "Auditor") in the "Claim Filing Process Notice."*

[b. – e. omitted.]

5. *All prior Resolutions are hereby repealed insofar as the same may be inconsistent with this Resolution No. 818-08.*

RP 133-134. (Emphasis in *italics* added.) Mrs. Barksdale acknowledges in her declaration testimony that she was in fact the designated agent to receive claims at the time period in question.

Contrary to the Evergreen Hospital's representations to the Superior Court, after August 19, 2008, CEO Steven Brown was not an agent designated by Evergreen Healthcare's Board of Commissioners to receive notice of claims filed in accordance with RCW 4.96.020. Instead, the agents designated by Evergreen Hospital's Board of Commissioners to receive claims included the *Administrative Assistant to the Superintendent of the District*. RP 133. Any previous resolution appointing CEO Steven Brown had been expressly repealed. (There is no evidence in the record of Evergreen Healthcare ever appointing Steven Brown as its designated agent to receive claims for damages.)

Despite the adoption and approval of Resolution No. 818-08, Evergreen Healthcare failed to record the identity of its new designated agent and deputy agents and the address where they could be reached during normal business hours with the King County Auditor RP 54-61. Consequently, the only notice on file at the King County Recorder's office was the outdated Designation of Agent recorded by Evergreen Healthcare Administration on December 14, 2001, which wrongfully identified Steven Brown as the agent to receive claims under RCW 4.92.010-020.

E. Superior Court's Decision.

On November 12, 2009, the Superior Court granted Evergreen Healthcare's motion for summary judgment. RP 97-99. In her order, Superior Court Judge Mary Yu, articulated the basis of her decision as follows:

1. That Defendant Evergreen Healthcare's Motion for Summary Judgment is **GRANTED** and all of Plaintiff's claims against Defendant Evergreen Healthcare are dismissed with prejudice *on the basis that there is no evidence in the record for the Ct. to find that the switchboard operator was the authorized agent to receive the claim or that she had authority to accept the claim. The first business day after receipt by the operator was Monday, February 2, 2009, which is the day of presentation for purposes of complying with the statute.*

2. *The Ct. denies the request for fees & admissions but does not strike the request.*

3. *The Ct. denies the request to apply the amendments to 4.96 retroactively.*

RP 99. (*italics hand-written.*) On the face of the Superior Court's Order, it is apparent that the Superior Court wrongfully shifted the burden of proof onto the non-moving party (Mrs. Mavis), requiring that she prove that the switchboard operator lacked authority to receive the claim for damages on behalf of designated agent. However, as Mrs. Mavis pointed out to the Superior Court, there is nothing in the record that "Emma Bach" (who signed the return receipt) was even a switchboard operator, let alone any evidence by Evergreen that Ms. Bach lacked the authority to sign for the document which she signed.

This appeal timely followed.

D. Standard of Review

The standard of review for an order of summary judgment is de novo, and this appellant court must perform the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). "Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to

judgment as a matter of law.” *Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005) *see also* CR 56(c). A party is entitled to summary judgment as a matter of law “when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.” *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997).

The appellant court may consider all materials that were brought to the attention of the trial court, whether or not the trial court relied on those materials. *Riojas v. Grant County PUD*, 117 Wn. App. 694, 696 n.1, 72 P.3d 1093 (2003). In addition, this appellant court is entitled to consult the law in its review of the case, whether or not a party has cited that law. *Ellis v. City of Seattle*, 142 Wn.2d 450, 460 n.3, 13 P.3d 1065 (2000)

● **E. Argument**

For relevant background, RCW 4.96 *et. seq.* concerns actions against political subdivisions, municipalities, and quasi-municipal corporations. RCW 4.96.020 creates a notice requirement for standard tort claims made against such entities. The statute provides in relevant part:

All claims for damages against a local governmental entity, or against any local governmental entity’s officers, employees, or volunteers, acting in such capacity, shall be

presented to the agent within the applicable period of limitations within which an action must be commenced.

RCW 4.96.020(2) (Emphasis added.) The statute then creates a waiting period for the filing of a lawsuit after presentation of a Notice of Claims for damages, as follows:

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 tortuous 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 first 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 days period has elapsed is deemed to have been presented on the first day after the sixty calendar day period has elapsed.

RCW 4.96.020(4). The purpose of this sixty day waiting period is to establish a period of time for government defendants to investigate claim and settle those claims where possible. See *Medina v. Public Utility District No. 1 of Benton County*, 147 Wn.2d 303, 317, 53 P.3d 993 (2002).

1. The trial court erred in granting Evergreen Healthcare's motion for summary judgment because Evergreen Healthcare failed to follow the procedures for designating an agent as required by RCW 4.96.020(2).

As an initial inquiry, this Court must first determine whether Evergreen Healthcare complied with the statutory requirements of RCW

4.96.020(2), such that it is entitled to claim a defense under the statute. If Evergreen Healthcare failed to follow the requirements of the statute, then it is precluded from raising the defense.

A. Legal Authority.

The requirements of RCW 4.96.020 on governmental entities is as follows:

(2) The governing body of each local governmental entity shall appoint an agent to receive any claim for damages made under this chapter. The identity of the agent and the address where he or she may be reached during normal business hours of the local governmental entity are public records and shall be recorded with the auditor of the county in which the entity is located....The failure of a local governmental entity to comply with the requirements of this section precludes that local governmental entity from raising a defense under this chapter.

RCW 4.96.020 (emphasis added.) The statute has two straight-forward requirements:

(1) The governing body of the government entity must appoint an agent to receive any claim for damages;

(2) The identity of that agent and the address where he or she may be reached must be recorded with the auditor of the county in which the entity is located.

B. Application of Facts to Law

Evergreen Healthcare did not comply with the requirements of RCW 4.96.020(2) in its designation of either Steven E. Brown or Beverly Barksdale as agent to receive claims for damages.

With respect to Mr. Steven E. Brown, his identity and the address where he could be reached were recorded at King County Recorder's on December 14, 2001. However, there is nothing in the record to show that the Evergreen Healthcare's governing body (the Board of Commissioners) ever appointed him to act as that agent. Even assuming (without factual support) that Mr. Brown had been properly appointed to act as agent to receive any claim for damages, his appointment was expressly repealed on August 19, 2008, with the adoption of Board Resolution No. 818-08 which appointed Ms. Beverly Barksdale as the designated agent to receive claims made in compliance with RCW 4.96.020:

5. All prior Resolutions are hereby repealed insofar as the same may be inconsistent with this Resolution No. 818-08.

RP 135. Contrary to Evergreen Hospital's representations to the Superior Court, after August 19, 2008, CEO Steven Brown was not an agent designated by Evergreen Healthcare's Board of Commissioners to receive notice of claims filed in accordance with RCW 4.96.020.

With respect to Mrs. Beverly Barksdale, on August 19, 2008, Evergreen Healthcare's Board of Commissioner properly designated Ms. Barksdale as its agent to receive claims:

RESOLUTION

NOW, THEREFORE, BE IT RESOLVED by the Board of Commissioners of King County Public Hospital District No. 2 as follows, to wit:

1. In accordance with RCW 4.96.020, the Board hereby appoints the *Administrative Assistant to the Superintendent of the District (presently Beverly J. Barksdale)* to act as agent (the "Agent") to receive a claim.

RP 135. Furthermore, the Board of Commissioner's properly instructed that Ms. Barksdale's identity as the designated agent be recorded with the King County Auditor:

4. In accordance with RCW 4.96.020, the Board hereby adopts the following procedures for presenting a Claim to the District:

- a. Recording Information with Auditor. *The identify of the Agent and Deputy Agents and the address where they may be reached during the normal business hours of the District shall be recorded by the District with the King County Auditor (the "Auditor") in the "Claim Filing Process Notice."*

RP 134. (Emphasis in *italics* added.) However, Evergreen Healthcare failed to follow through on its Board of Commissioner's directive and failed to record the identity of Ms. Barksdale and the address where she

could be reached during normal business hours with the King County Auditor. RP 54-61. Strictly construing the statute, Evergreen Healthcare failed to comply with the requirements of the statute and is precluded from raising a defense thereunder.

Evergreen Healthcare's failure to properly identify Beverly Barksdale as its agent with the King County Recorder's Office is relevant in this case. Mrs. Mavis sent her notice of claim to Steven Brown based on the mis-information stated at the King County Auditor's Office. Even if Mrs. Mavis had delivered her notice of claim in-hand to Mr. Brown, there was no guarantee that the notice would have actually reached the appropriate individual designated on that day to properly commence the ten-day clock as is contemplated by the statute. Consequently Evergreen should not be heard to complain about the timeliness of the notice of claim, when timely delivery still would not have reached the person responsible for handling the claim (Ms. Barksdale.)

2. The trial court erred in granting Evergreen Healthcare's motion for summary judgment because Carol Mavis waited the full sixty day waiting period required by RCW 4.96.020(4) after presenting her claim on January 31, 2009, and then commencing her lawsuit against Evergreen Healthcare on April 3, 2009. The Washington State Legislature has so stated in its July, 2009, amendment to the statute which should be applied retroactively.

A. Legal Authority.

The notice requirement of RCW 4.96.020(2) provides that claims for damages must be “presented” to the agent within the applicable period of limitations:

All claims for damages against a local governmental entity, or against any local governmental entity’s officers, employees, or volunteers, acting in such capacity, shall be presented to the agent within the applicable period of limitations within which an action must be commenced.

RCW 4.96.020 (emphasis added.) At the time when Mrs. Mavis mailed her claim to Evergreen Healthcare, no controlling authority existed to resolve the ambiguity of how and when a claim was deemed “presented” in compliance with RCW 4.96.020(2). The statute was silent and there was no case law decision dictating when a claim is deemed “presented.”²

In April of 2009, the Washington Legislature amended RCW 4.96.020(4) to add the following clarifying sentence:

A claim is deemed presented when the claim form is delivered in person or is received by the agent by regular mail, registered mail, or certified mail, with return receipt requested, to the agent or other person designated to accept delivery at the agent’s office.

RCW 4.96.020(2) (Emphasis added.) This clarifying sentence is applied retroactive because it is curative and a clarification of the legislature’s

² Before making a final decision, the Superior Court asked for supplemental briefs by both parties for authorities which may be on point from other jurisdictions. Both parties located additional out-of-state authorities to support their respective positions on the interpretation of presentment. Appellant’s out-of-state authority was the Missouri case of *Powers v. Kansas City*, 224 Mo.App. 70, 18 S.W.2d 545 (1929). RP 78 – 82.

intent. *Tomlinson v. Clark*, 188 Wn.2d 495, 510, 825 P.2d 706 (1992). See also *Washington Waste Systems, Inc. v. Clark County*, 115 Wn.2d 74, 78,794 P.2d 508 (1990) citing *State v. Jones*, 110 Wn.2d 74, 82, 750 P.2d 620 (1988) (“Curative statutes, i.e., statutes which clarify ambiguities in older legislation without changing prior case law, presumably act retroactively.”).

B. Application

Carol Mavis complied with RCW 4.96.020(2) when she presented her Notice of Claims to defendant Evergreen Healthcare. Specifically, in compliance with RCW 4.96.020(2), on January 30, 2009, Carol Mavis mailed her Notice of Claim to Evergreen Healthcare by U.S. Certified Mail – Return Receipt Requested. RP 38. Evergreen Healthcare received the letter on January 31, 2009, and signed the return receipt which was promptly delivered back to Mrs. Mavis’ counsel. *Id.* By the express language of the statute, Mrs. Mavis’ claim was deemed presented on January 31, 2009, the date it was received and signed for by Evergreen Healthcare. Mrs. Mavis’ Notice of Claim is deemed presented on January 31, 2009, the sixty day waiting period required by RCW 4.96.020(4) commenced the following day on February 1, 2009 and ended sixty days later on April 1, 2009. See *Troxell v. Rainier Public School District No. 307*, 154 Wn.2d 345, 11 P.3d 1173(2005). (clarifying how the sixty day

waiting period should be calculated.) Mrs. Mavis' counsel was cognizant of this authority and therefore waited until this sixty day period had elapsed, and then filed her lawsuit on April 3, 2009. RP 28. Pursuant to RCW 4.96.020(4) the statute of limitations on the plaintiff's claims was tolled during the sixty day waiting period and by complying with the requirements of the statute the plaintiff filed her claim within the applicable statute of limitations.

Mrs. Mavis approach of mailing the notice of claim by certified mail with return receipt requested comports with basic common sense. When the addressee signed for the notice of claim, Mrs. Mavis would receive a written receipt evidencing the date to being counting the clock on the sixty day time period required by the statute. In this case, Mrs. Mavis' notice of claim was received in hand and signed for by Evergreen Healthcare on January 31, 2009.

3. The trial court erred in granting Evergreen Healthcare's motion for summary judgment because Carol Mavis waited the full sixty day waiting period required by RCW 4.96.020(4) after presenting her claim on January 31, 2009, and then commencing her lawsuit against Evergreen Healthcare on April 3, 2009. The legislatures amendment to the statute is strong evidence of the statutes original intent.

A. Authority.

Even when an amendment is not otherwise applied retroactively, the legislative intent of a former statute may be ascertained from the

content of subsequent amendments thereto. *Matter of Marriage of Blickenstaff*, 71 Wn. App. 489, 494, 859 P.2d 646 (1993). It is well settled law that when a statute is amended to clarify an ambiguity, the amendment is strong evidence of intent of the first statute. *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 755, 953 P.2d 88 (1998.) In the case of *Ravsten v. Department of Labor and Industries*, 108 Wn.2d 143, 736 P.2d 265 (1987) the Supreme Court explains:

The function of judicial interpretation of statutory enactments is to effectuate the object and intent of the legislature. Legislative intent is to be ascertained from the statute as a whole, and the sequence of all statutes relating to the same subject matter should be considered. An original act and an amendment should be read and construed as one law passed at the same time. [Citations omitted.]...Where the statute has not been interpreted to mean something different and where the original enactment was ambiguous to the point that it generated dispute as to what the Legislature intended a subsequent amendment can enlighten court as to a statute's original meaning. [Citation omitted.]

Id., at 150-51. In fact, where the legislature has amended a statute to clarify or interpret a phrase of doubtful or vague meaning in a former statute, the Courts are not at liberty to speculate further on legislative intent. *Miller v. St. Regis Paper Co.*, 366 P.2d 214, 216 (1962) *citing* *Cowiche Growers v. Bates*, 10 Wn.2d 585, 117 P.2d 624 (1941) and *Carpenter v. Butler*, 32 Wn.2d 371, 201 P.2d 704 (1949).

B. Application of Law to Facts.

Prior to July 26, 2009, the phrase “presented” had doubtful or vague meaning, which despite exhaustive research performed by both parties remained unresolved. No binding case law authority was on point. Effective July 26, 2009, the Washington Legislature amended RCW 4.96.020(2) to clarify that a claim is deemed “presented” within the meaning of the statute upon receipt by “the agent *or other person designated to accept delivery at the agent’s office.*” RCW 4.96.020(2). The legislature’s clarification is strong evidence of what the legislature meant in the original statute, and the plaintiff respectfully requests that this Court read the former RCW 4.96.020(2) consistent the recent amendments thereto.

In this case, there was no legal basis for the Superior Court to find that the notice was not “presented” when it was signed for at Evergreen Healthcare. The Superior Court’s decision appears to be premised on the Supreme Court’s subjective reading as to the meaning of the word “presented,” without regard for the consequences of such an interpretation. If followed, the Superior Court’s interpretation of the meaning of the statute that a notice of claim can only be presented by personal delivery to the designated agent within normal business hours could lead to absurd results, especially under the new statute. If the Superior Court’s interpretation prevails then notice can only be ‘received’ by physical

possession by the actual agent or another person authorized to receive claims. Consequently, every public entity could effectively thwart the presentation of all claims against it by simply having all of its mail signed for at central location and by a clerical employee. No plaintiff would ever get his or her day in Court.

The basis of the legislature's amendment to the statute in 2009 was to remedy the problem that public agencies were using the notice of claims statute as a sword and not a shield. Instead of using the opportunity to investigate and resolve claims, the public agencies were simply using the statute as a mechanism to throw-out otherwise cognizable claims. This is exactly what has happened in this case. Evergreen Healthcare successfully convinced the Superior Court to throw out an otherwise cognizable lawsuit on a strained interpretation of the procedural requirements of the statute. Mrs. Mavis respectfully submits that the Court not read the statute in a way that would allow the public agencies to further abuse the intent of the statute.

4. The trial court erred in granting Evergreen Healthcare's motion for summary judgment because Carol Mavis' claim for damages was constructively received on Saturday, January 31, 2009. Washington case law recognizes the constructive receipt of claims for damage when equity dictates. *Stevens v. City of Centralia*, 86 Wn. App. 145, 936 P.2d 1141(1997).

A. Authority.

Washington case law recognizes the constructive receipt of notices of claims when equity dictates. *Stevens v. City of Centralia*, 86 Wn. App. 145, 936 P.2d 1141 (1997). In the case of *Stevens v. City of Centralia*, the plaintiff Gary Stevens attempted to file a notice of claim with the City of Centralia, but the clerk told him he could not file it because it was not presented on a pre-printed form provided by the city. *Id.*, at 149-50. In a motion for summary judgment the City moved to dismiss the plaintiff's case on the basis that the notice of claim was not timely received, which was granted by the trial court. *Id.* On appeal, the Court of Appeals found that Mr. Stevens had properly tendered the claim and under the circumstances the City had waived any lack of formality in the tender by refusing to accept the claim. *Id.*, at 152. The Court held "that under the facts of this case, Stevens' claim was "constructively accepted" at the point he first "tendered" or presented it to the correct City office clerk. To allow the clerk to refuse to accept what is otherwise a proper complaint would lead to an inequitable result." *Id.*

B. Application of Law to Facts.

In the event that the Court finds the legislature's definition of "presented" unpersuasive, Mrs. Mavis respectfully submits that this Court should find that her notice of claim was constructively "presented" to Evergreen Healthcare on January 31, 2009, the date the notice of claim

was signed for as being delivered. In this case, Evergreen Healthcare materially interfered with delivery of Mrs. Mavis' Notice of Claim to its intended addressee. Specifically, Emma Bach signed for the registered mail on behalf of Mr. Steven Brown and thereby prevented him from getting it in the first instance. If Ms. Bach had not signed for the letter, it would have been delivered directly to Mr. Brown during normal business hours the following Monday, February 2, 2009. If Evergreen had not otherwise interfered with the presentment of the claim, it would have been signed for by its intended addressee and the green return receipt would have correctly identified the date of delivery. Mrs. Mavis would have begun counting the 60 day waiting period beginning on that later date and waited an additional day before filing her lawsuit. Mrs. Mavis respectfully submits that this Court should find that Evergreen Healthcare waived the formality of 'presentment' when it signed for the notice of claim outside of normal business hours, and under the circumstances find that Mrs. Mavis' notice of claim was constructively 'presented' (if not formally 'presented') as of the date the letter was signed for as received by Mr. Brown: January 31, 2009.

5. The trial court erred in denying Carol Mavis her attorney fees and costs incurred in defending Evergreen Healthcare's motion for summary judgment pursuant to CR 37(c). Evergreen Healthcare denied Carol Mavis Request for Admission asking Evergreen Healthcare to admit that it "received the attached document title

*Claims Against King County Public Hospital District No.2 on
January 31, 2009.*

A. Authority.

CR 37(c) provides:

Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to CR 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe the fact was not true or the document was not genuine, or (4) there was other good reason for the failure to admit.

CR 37(c) makes an award of fees and costs mandatory unless the Court finds good reason for the denial.

B. Application to the Facts.

On August 27, 2009, plaintiff provided Evergreen Healthcare with a courtesy copy of the return receipt showing that Evergreen Healthcare received plaintiff's Notice of Claim on January 31, 2009. RP 48-49. By the same enclosure letter, Mrs. Mavis also served Plaintiff's First Requests For Admission To Defendant, in which Mrs. Mavis propounded the following Requests for Admission No. 21 and No. 22:

REQUEST FOR ADMISSION NO. 21. Admit Evergreen Healthcare Facilities received the attached document titled *Claims Against King County Public Hospital District No. 2* on January 31, 2009.

REQUEST FOR ADMISSION NO. 22. Admit that the attached document titled *Claims Against King County Public Hospital District No. 2* complies with the requirements of RCW 4.96.020.

Id. Despite the fact that defendant Evergreen Healthcare possessed a copy the return receipt for Mrs. Mavis' Notice of Claim, defendant denied plaintiff's Requests for Admission No. 21 and No. 22. RP 45-46.

Evergreen's denial on the requests for admission is not predicated on a dispute of fact that the notice of claim was signed for as being "received" on January 31, 2009, as that cannot reasonably be contested. Rather, the denial of the requests for admission are predicated on the legal theory that Mrs. Mavis' notice of claim should not be deemed "presented" within the meaning of RCW 4.96.020(2) until the following Monday February 2, 2009.

Since the denial made by Evergreen is made not on the facts but upon the application of law to the facts, Mrs. Mavis respectfully submits that should she prevail in this appeal, Mrs. Mavis will have successfully controverted Evergreens' denials and successfully proved that "Evergreen Healthcare Facilities received the attached document titled *Claims Against King County Public Hospital District No. 2* on January 31, 2009." If such

is the case, Mrs. Mavis respectfully submits she should be awarded her reasonable expenses, including attorney fees and costs, incurred defending Evergreen's motion for summary judgment before the Superior Court and on appeal.

Attorneys Fees on Appeal

As explained in subsection 5 above, Mrs. Mavis respectfully requests her attorney fees and costs incurred on Appeal pursuant to CR 37(c).

Conclusion

Mrs. Mavis complied with the procedural requirements of RCW 4.96.020 in good faith and through a common sense process. Mrs. Mavis has cognizable tort claims against Evergreen Healthcare and those claims should not be thrown out based on a strained interpretation of the statute which is inconsistent with the intuitions of the Washington State Legislature, which has already amended the statute to rectify the ambiguity Mrs. Mavis respectfully requests that on de novo review this court find that Mrs. Mavis' lawsuit was timely filed and remand for further proceedings. Mrs. Mavis respectfully requests reimbursement of her fees on appeal.

DATED: 18th day of March, 2010.

LASHER HOLZAPFEL
SPERRY & EBBERSON P.L.L.C.



Mario A. Bianchi, WSBA No. 31742
Attorneys for Appellant