Washington Supreme Court No. 95339-2

Washington State Court of Appeals, Div. III No. 345726

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WILLIAM RUMBURG and CAROL RUMBURG,

Respondents,

v.

FERRY COUNTY PUBLIC UTILITY DISTRICT NO. 1,

Petitioner.

REPLY TO RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

Defendant-Petitioner Ferry County Public Utility District No. 1 (hereinafter, "the PUD") herby replies to Plaintiffs-Respondents Rumburgs' Response to Petition for Review (hereinafter, "Response").

II. ARGUMENT

A. The Rumburgs Do Not Dispute that the Court of Appeals' Interpretation of RCW 4.96.020(4) is Contrary to the Plain Language of the Statute.

The Rumburgs argue that this Court should not accept review because "[t]he Court of Appeals ruling comports with Supreme Court decisions as well as the will of the legislature[.]" Response at 2. Yet the Rumburgs do not cite any cases of this Court or the Court of Appeals that are consistent with the result reached by the Court of Appeals in this case. The Rumburgs seemingly cannot dispute that the Court of Appeals did not apply the plain language of RCW 4.96.020(4). The Rumburgs do not address the PUD's argument as to how the Court of Appeals essentially rewrote RCW 4.96.020(4) by finding a distinction between the "waiting period" and "tolling period" when the statute makes no such distinction.

Rather than responding to the PUD's argument in support of review, Plaintiffs focus on RCW 4.96.020(5), a section that did not provide the basis for the Court of Appeals' decision. Plaintiffs argue that "RCW 4.96.020(5) is unambiguous." Response at 5. The PUD never

argued that RCW 4.96.020(5) was ambiguous, and accepts that substantial compliance with RCW 4.96.020 is satisfactory "with respect to the content of claims . . . and all procedural requirements." RCW 4.96.020(5).

But the issue in this case does not concern the "content of the claim," i.e., the information provided in the notice of claim itself such as the claimant's name and a description of the injury or damage. *See* RCW 4.96.020(3). Nor is the issue in this case one concerning strictly procedural requirements, i.e., government entity's duty to appoint an agent and claimant's duty to present notice of claim to agent, etc. In *Myles v. Clark County*, 170 Wn. App. 521, 530-33, 289 P.3d 650 (2012), cited by the Rumburgs, there was a question whether the claimant substantially complied with RCW 4.96.020 by presenting a notice of tort claim to a risk management division within a government entity, which responded by stating the claim was under investigation. In that case, unbeknownst to the claimant, the government entity's appointed agent was someone other than the risk management division. The court was left to determine whether the claimant in *Myles*, despite serving the (technically) incorrect agent, nevertheless substantially complied with the RCW 4.96.020.

In this case, unlike in *Myles*, neither the content of the Rumburgs' tort claim nor the tort claim statute's procedural requirements are in dispute. Instead, the Rumburgs appear to be arguing that their suit was

timely because they substantially complied with the statute of limitations (plus 60-days for tolling period, plus 5-day grace period). *See* Response at 3 ("Mr. Rumburg substantially complied with the statute[.]"). But this Court has repeatedly instructed that statutes of limitation require strict compliance, not substantial. *City of Seattle v. Pub. Employment Relations Comm'n*, 116 Wn.2d 923, 929, 809 P.2d 1377 (1991); *Forseth v. City of Tacoma*, 27 Wn.2d 284, 297, 178 P.2d 357 (1947), *overruled on other grounds by Shafer v. State*, 83 Wn.2d 618, 623, 521 P.2d 736 (1974). And the Court of Appeals' decision was not even based on RCW 4.96.020(5)'s substantial compliance mandate. Based on its erroneous interpretation of RCW 4.96.020(4), the Court of Appeals found that the Rumburgs *strictly* complied with the requirements of RCW 4.96.020. So it is unclear why the Rumburgs rely on RCW 4.96.020(5) as grounds to oppose discretionary review of this case.

In sum, discretionary review is warranted because the Court of Appeals rewrote RCW 4.96.020(4) according to its own preferences and, in so doing, improperly usurped the role of the legislature. Further, as now argued by the Rumburgs, the Court of Appeals' decision suggests that a plaintiff may substantially comply with a statute of limitations, which is contrary to holdings of this Court.

B. The Rumburgs' Arguments Concerning Legislative Intent are Unsupported and Misleading and Immaterial to the Issue Before the Court.

The Rumburgs dedicate briefing to the issue of legislative intent behind the 2009 amendments to RCW 4.96.020 (adding 5-day grace period to RCW 4.96.020(4) and Subsection (5)). Response at 4. The PUD did not cite to any legislative history in arguing that the Court of Appeals decision was contrary to the opinions of this Court or the Court of Appeals. RAP 13.4(b)(1). It is unclear how the Rumburgs' arguments concerning legislative history weigh against discretionary review.

To the extent these arguments are probative to the issue before the Court, the Rumburgs' characterization of the legislative history and purpose of the 2009 amendments to RCW 4.96.020 is unsupported and misleading. Nothing in the legislative record indicates "that the legislature intended to provide potential plaintiffs with **overwhelming opportunities** to not miss the filing deadline." Response at 4 (emphasis added). Nothing in the legislative record supports that the legislature "**doubl[ed] down** [in its protections afforded to potential plaintiffs] by adding an additional five court days to the tolling period." *Id.* (emphasis added). Additionally, the Rumburgs oversimplify the requirements of RCW 4.96.020, and without citation to any authority, blithely state that "[t]he legislature's concern is clearly that so long as the government entity receives notice of suit against

it, the plaintiff is to benefit from these provisions." *Id.* If providing notice of suit to a government entity was all that was necessary to sue it then most of RCW 4.96.020 would be superfluous.

The Rumburgs' characterization of the legislative history behind RCW 4.96.020 is unsupported and misleading and is simply not relevant to the issue before the Court, i.e., whether the Court of Appeals' *Rumburg* decision is contrary to the holdings of this Court or the Court of Appeals. RAP 13.4(b)(1).[1]

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[1] The legislative history is relevant for ascertaining legislative intent and the plain meaning of RCW 4.96.020(4). As the PUD argued before the trial court and the Court of Appeals, a number of pre-2009 cases illustrate the problems with RCW 4.96.020 that precipitated the 2009 amendments. *E.g.*, *Troxell v. Rainer Public School District No. 307*, 154 Wn.2d 345, 111 P.3d 1173 (2005); *Medina v. PUD No. 1. of Benton County*, 147 Wn.2d 303, 53 P.3d 993 (2002); *Sievers v. City of Mountlake Terrace*, 97 Wn. App. 181, 983 P.2d 1127 (1999) These cases make clear that one of the biggest problems with the tort filing statute prior to 2009 was the situation that arose when a tort claimant waited until the last day or two of the applicable statute of limitations to file a notice of tort claim. In that situation, the 60-day tolling period began, but after the tolling period ended, the claimant was possibly left with a "single magic date" on which to file his or her complaint in court. *Medina*, 147 Wn.2d at 327-28 (Chambers, J., dissenting). This issue appears to have been the catalyst for the 2009 amendments, particularly the addition of the 5-day grace period, which eliminates the "one magic date" dilemma.

In this case, the Rumburgs filed their notice of tort claim soon after the alleged injury and had over two years to file a complaint. This is not a case where the Rumburgs had a "single magic date" on which to file their complaint. This is not the type of case the legislature was concerned about in enacting the 2009 amendments.

C. The Rumburgs Cannot Show that the Court of Appeals' Decision Does Not Affect the Public Interest.

The Rumburgs do not dispute that the Court of Appeals' published decision will have a profound effect on government entities across the state. Instead, the Rumburgs argue that the Court of Appeals' decision advances the public interest because it is consistent with legislative intent and any other result would be absurd. Response at 5-6. These arguments go to the merits of the parties arguments, but do not address the issue before the Court, i.e., whether the Court of Appeals' *Rumburg* decision, "immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture." *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake,* 150 Wn.2d 791, 803, 83 P.3d 419 (2004); *see also* RAP 13.4(b)(4). To the extent the Rumburgs' arguments are relevant to the issue before the Court, the Court of Appeals' decision is contrary to legislative intent as illustrated in the Court's pre-2009 case law. *See* Note 2, *supra.*

Further, applying the plain language of the statute would not lead to an absurd result, as argued by the Rumburgs. The plain language of the statute provides that the 5-day grace period applies immediately after the 60 calendar day period that begins upon a claimant's presentment of a notice of tort claim. RCW 4.96.020(4). The 5-day grace period will

operate in cases where the tort claimant files his or her notice of tort claim one to five days before the running of the statute of limitations. The 5-day grace period will not apply in cases, such as this case, where the tort claimant files his or her notice of tort claim well before the expiration of the statute of limitations. In such a case, the tort claimant has *more* than 5 days to file his or her notice of tort claim after the 60-day calendar period elapses. In such a situation, the tort claimant does not need the benefit of the 5-day grace period. This is not an absurd result. This is mandate of the plain language of RCW 4.96.020(4).

Finally, the Rumburgs argue that applying the plain language of RCW 4.96.020(4) (which the Court of Appeals did not do) "would encourage claimants to wait until the last moment to file notices of claim because only then would they be able to claim the protections of RCW 4.96.020(4)." Response at 6. No prudent person (or lawyer) would think it sound strategy to wait until the last minute to file a notice of tort claim simply so they would have five extra days to file a complaint in court. Moreover, that a claimant might delay until the last minute to file a notice of tort claim to "claim the protections of RCW 4.96.020(4)," Response at 6, is not necessarily "injurious to government entities," *Id.* Government entities do not control when a claimant files a notice of tort claim. Government entities are protected through RCW 4.96.020(4), which

allows entities 60-days to investigate claims made against them before claimants can file suit, as well as by other defenses, such as those based on statutes of limitations. It is to the peril of plaintiffs like the Rumburgs to wait until the last minute to put government entities on notice, not only because of the potential running of the statute of limitations, but for other obvious reasons such as the possibility that evidence will turn stale, witnesses become harder to locate, etc.

In sum, the Rumburgs are unable to show that review of the Court of Appeals' decision will not advance the public interest. The Rumburgs' arguments against discretionary review go to the issues of legislative intent and statutory interpretation, and, if anything, further reveal the need for this Court to accept review of this case.

III. CONCLUSION

For the foregoing reasons, Ferry County Public Utility District No. 1 respectfully requests that the Court grant its Petition for Review.

RESPECTFULLY SUBMITTED this 6TH day of February, 2018.

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By: _____

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that a true and accurate copy of the document to which this declaration is affixed was sent via email and regular mail, postage prepaid, on this day, to:

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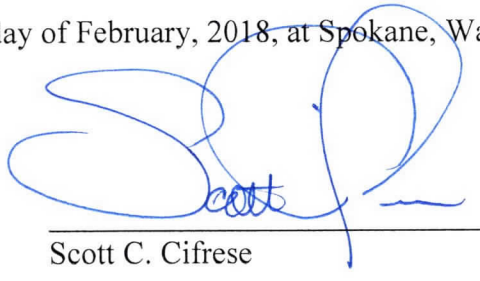
Dated this 6th day of February, 2018, at Spokane, Washington.



Scott C. Cifrese

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