2-17-2016

# CNW, LLC v. New Sweden Irr. Dist. Respondent's Brief Dckt. 43005

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| CNW, LLC, a limited liability company,<br><br>Plaintiff/Appellant,<br><br>v.<br><br>CITY OF IDAHO FALLS, a municipal corporation and NEW SWEDEN IRRIGATION DISTRICT, an irrigation district, DOE DEFENDANTS 1 THROUGH 6,<br><br>Defendants/Respondents. | Supreme Court Docket No. 43005-2015<br><br>Bonneville County District Court No. 2013-6723 |

# RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE.
Honorable JOEL E. TINGEY, District Judge, Presiding.


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## III.

## STATEMENT OF CASE

Plaintiff owns a professional business complex located in Idaho Falls, Idaho, which is commonly referred to as Taylor's Crossing (the "Complex"). The complex sits on the west side of the Snake River. The Complex was initially constructed in the early 2000's. (R. 8). Directly to the east of the Complex is Porter Canal, which is operated by the New Sweden Irrigation District ("New Sweden"). (R. 8).

On June 12 or 13, 2012, Plaintiff identified cracking in the parking lot, which subsequently developed into a sinkhole. (R. 8). Over the next several months, numerous inspections were performed by Plaintiff and experts retained by the Plaintiff. During this inspection, it was revealed that an abandoned sewer pipe, owned by the City of Idaho Falls, had been breached filling with water from the Porter Canal, which runs adjacent to the complex. (R. 35-45). Due to the water in the abandoned sewer pipe, water infiltrated and eroded the soil under the parking lot. (R. 8).

Following the sinkhole's inspection, Plaintiff made telephone and letter contact with New Sweden's attorney, Jerry Rigby, regarding the sinkhole. As early as July 19, 2012, Plaintiff claimed that New Sweden had some responsibility for the sinkhole. (R. 59-60). On October 18, 2012, Plaintiff sent correspondence to Jerry Rigby, a private attorney who had performed water law work for New Sweden on an as-needed basis. (R. 57-58; Supp. R. 18-19). Mr. Rigby was never an employee of New Sweden and

maintained a private law practice in Rexburg, Idaho. (R. 57-58; Supp. R. 18-19). The October 18, 2012 letter was addressed to "New Sweden Irrigation District c/o Jerry Rigby." (R. 57-58; Supp. R. 18-19). The letter did not reference or ask the letter be delivered to New Sweden's secretary. Mr. Rigby was never authorized to accept a Notice of Tort Claim on behalf of New Sweden Irrigation. (R. 57-58; Supp. R. 18-19).

On October 23, 2012, Mr. Rigby forwarded the letter to various individuals at New Sweden, including the manager Kail Sheppard and Delillian Reed. (R. 94). Ms. Reed, as New Sweden's secretary, sent a letter to CNW requesting they file a tort claim with New Sweden if they believed they had a claim. (R. 94). The letter sent by Ms. Reed did inadvertently send an incorrect tort claim form. (R. 94-95). Despite the letter, CNW chose not to file anything on the form supplied by Ms. Reed or make any other attempts to serve a tort claim on New Sweden at that time.

On or about October 30, 2012, Plaintiff served a Notice of Tort Claim on the City of Idaho Falls only. This first tort claim made no mention of New Sweden at all and no notice was ever served on New Sweden at this time. (R. 49; R. 68-70). On January 25, 2013, Plaintiff served an Amended Notice of Tort Claim on New Sweden's secretary, DeLillian Reed. R. 68-70). This was the first notice of a tort claim received by New Sweden from Plaintiff. (R. 60, ¶ 4).

## IV.
## ARGUMENT

### A. The Idaho Tort Claims Act Applies To New Sweden Irrigation District.

The Idaho Tort Claims Act ("ITCA") applies to New Sweden Irrigation District. The ITCA, I.C. § 6-901, *et seq.*, governs tort claims against governmental entities. I.C. § 6-902(3) defines "governmental entity" to include the state and political subdivisions. "Political subdivision" is defined as follows:

> [A]ny county, city, municipal corporation, health district, school district, **irrigation district**, special improvement or taxing district, or any other political subdivision or public corporation. As used in this act, the terms "county" and "city" also mean state licensed hospitals and attached nursing homes established by counties pursuant to title 31, chapter 36, Idaho Code, or jointly by cities and counties pursuant to title 31, chapter 37, Idaho Code.

I.C. § 6-902(2) (emphasis added). Thus, based upon the plain language of I.C. § 6-902(2), claims against New Sweden Irrigation District are governed by the ITCA. Because New Sweden is subject to the ITCA, it is entitled to timely notification of any claims being presented against it pursuant to I.C. § 6-906.

### B. CNW Failed To Timely Serve A Notice Of Tort Claim As Required By Idaho Code § 6-906.

This appeal centers on whether CNW timely served a Notice of Tort Claim on New Sweden Irrigation consistent with the unambiguous notice requirements of Idaho Code § 6-906. CNW's arguments, as will be addressed more fully below, seek to

overturn well-established legal precedent on what constitutes valid service of a Notice of Tort Claim on a political subdivision. Idaho Code § 6-906 provides as follows:

> All claims against a political subdivison [subdivision] arising under the provisions of this act and all claims against an employee of a political subdivision for any act or omission of the employee within the course or scope of his employment shall be presented to and **filed with the clerk or secretary of the political subdivision within one hundred eighty (180) days from the date the claim arose** or reasonably should have been discovered, whichever is later.

Idaho Code § 6-906 requires that all claims against a political subdivision must be "**filed with the clerk or secretary** of the political subdivision within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered." (Emphasis added). The failure to timely file a notice of tort claim with the political subdivision requires the dismissal of any tort actions. I.C. § 6-908. When a question regarding the validity of a notice arises, the plaintiff bears the burden of pleading and proving compliance with the notice requirements of the Act. *McLean v. City of Spirit Lake*, 91 Idaho 779, 782, 430 P.2d 670 (1967) ("Recognizing that the defendant city is correct in its contention that it was incumbent upon the plaintiff to plead and prove the filing of a claim against the city. . . ."); *Intermountain Construction, Inc. v. City of Ammon*, 122 Idaho 931, 933, 841 P.2d 1082 (1992) ("Appellant Intermountain initially failed to plead and prove compliance with the Tort Claims Act.").

Any claim or action that has not been properly presented to the political subdivision is barred pursuant to Idaho Code § 6-908:

> No claim or action shall be allowed against a governmental entity or its employee unless the claim has been presented and filed within the time limits prescribed by this act.

Under this section, compliance with the notice requirement is a "condition precedent" to filing suit. *McQuillen v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744(1987) ("Compliance with the Idaho Tort Claims Act's notice requirement is a mandatory condition precedent to bringing suit, the failure of which is fatal to a claim, no matter how legitimate."). *See also Overman v. Klein*, 103 Idaho 795, 654 P.2d 888 (1982); *Smith v. City of Preston*, 99 Idaho 618, 586 P.2d 1062 (1978). "The statutory period within which all claims against a political subdivision must be filed begins to run from the occurrence of the wrongful act, even though the full extent of damages may be unknown or unpredictable at that time." *Ralphs v. City of Spirit Lake*, 98 Idaho 225, 560 P.2d 1315 (1977).

The central dispute here is what constitutes compliance with the notice requirements as identified in the Act. In this case, the alleged wrongful act occurred on or about June 12 or 13, 2012. (R. 42, Int. No. 12). With the alleged wrongful act occurring on either June 12 or 13, 2012, Plaintiff would have been required to serve notice on New

Sweden within 180-days or December 12 or 13, 2012[1]. CNW has taken the position that an October 18, 2012 letter sent by counsel for CNW to Jerry Rigby constituted a Notice of Tort Claim and satisfied the content of Idaho Code § 6-906.

The argument regarding Jerry Rigby's role in satisfying the notice requirements of § 6-906 is unpersuasive. When CNW was advised by one of it's tenants of a crack in the parking lot, CNW performed an investigation and subsequently contacted Jerry Rigby, an unaffiliated water law attorney who had performed work on New Sweden's behalf. Later, on October 18, 2012, CNW sent a letter to Rigby at his law office in Rexburg, Idaho. This letter was simply addressed to "New Sweden Irrigation District c/o Jerry Rigby." (R. 57). It is CNW's assertion that this letter constituted a proper notice of tort claim and satisfied the requirements of Idaho Code § 6-906. This position is in error and contrary to the unambiguous language of the statute and the well-established case law confirming actual service by the claimant on clerk or secretary of the political subdivision.

CNW relies on *Huff v. Uhl*, 103 Idaho 274, 277, 647 P.2d 730, 733 (1982) to support its contention that service of a notice of tort claim on Jerry Rigby, a non-

[1] Plaintiff did not serve a Notice of Tort Claim on New Sweden until January 25, 2013. (R. 49, R. 60-65). Initially, Plaintiff served a Notice of Tort Claim on the City of Idaho Falls only on October 30, 2012. (R. 51-52). This Notice of Tort Claim made no reference to New Sweden nor was it served on New Sweden. Rather, the first and only Notice was the Amended Notice of Tort Claim served on New Sweden Secretary DeLillian Reed. Service of the Amended Notice of Tort Claim was first made 227 days after discovery of the alleged wrongful act.

employee attorney in private practice in Rexburg, Idaho satisfies the Act. CNW's argument is unavailing and unsupported by recent case law abrogating that decision. In *Huff*, the claimant actually went to the office of the governmental entity and presented a written repair estimate to the receptionist. The receptionist then took the statements to the secretary and discussed them with her. Copies of the estimates were made and the originals were returned to the claimant. The claimant then returned to the governmental entity and actually spoke with the secretary regarding the claim, wherein the secretary advised the claimant that the insurance carrier would take care of the matter. The claimant then followed up with the governmental entity by making at least two telephone calls to inquire about the status of the claim. At issue in *Huff* was whether the claimant had properly served the notice of tort claim on the governmental entity. Given that the **claimant** personally provided the information necessary to comply with a notice of tort claim to the receptionist who actually discussed the estimate with the **secretary in the claimant's presence**, the logical conclusion was that compliance with the requirements of § 6-906 occurred. Contrary to CNW's assertions, *Huff* does not suggest that an agent or employee of the entity can satisfy the notice acceptance requirements. In *Huff*, the claimant was personally present to deliver the estimates and then personally visited and had a follow-up conversation at the office with the secretary and followed up with at least two additional phone calls.

By contrast, the Plaintiff's assertion that an employee may accept notice and send it to the secretary was considered in *Turner v. City of Lapwai*, 157 Idaho 659, 339 P.3d 544 (2014). The *Turner* case specifically reviewed the existing state of the law in Idaho with respect to proper service of a notice of tort claim on a secretary or clerk of a political subdivision. In *Turner*, the claimant failed to communicate with the city's clerk. There the claimant corresponded with three individuals associated with the city about the claim: an independent auditing firm to analyze the claim, the mayor, and a single member of the city council. The Court went on to explain that the claimant failed to ever communicate her claim with the city's clerk: "Turner argues that her three attempts to communicate with the City collectively satisfied the requirements of the ITCA. Turner is incorrect. Even setting aside deficiencies in the content of those communications, none were filed **by Turner** with the city clerk's office." *Id.* at 662, 339 P.3d at 547 (emphasis added). This Court repeatedly focused on the claimant's failure to file proper notice with the clerk: "**Turner failed to file** her claim with the city clerk as required," "none were filed **by Turner** with the city clerk's office." *Id.* (emphasis added). The focus of this Court was the claimant's complete failure to file the claim with the city's clerk, confirming that "none of Turner's communications were filed with the clerk's office."

The plain language of Idaho Code § 6-906 combined with the definitive authority of how to properly serve notice, requires a finding that CNW failed to timely and properly serve notice on New Sweden. CNW attempts to suggest Mr. Rigby, a private

attorney from Rexburg, who had handled discrete water law issues for New Sweden, can be deemed an agent to serve a notice on behalf of CNW. Mr. Rigby did not have an ongoing attorney-client relationship with CNW. The role Mr. Rigby played is akin to the role of an insurance company, who may undertake and investigation or advise on liability issues. This Court has routinely confirmed that service of a notice of tort claim on an insurer of the governmental entity is insufficient to satisfy the notice requirements of § 6-906. *See Avila v. Wahlquist*, 126 Idaho 745, 890 P.2d 331 (1995); *Independent School District of Boise City v. Callister*, 97 Idaho 59, 539 P.2d 987 (1975); *Blass v. County of Twin Falls*, 132 Idaho 451, 453, 974 P.2d 503, 505 (1999).

In *Avila*, the claimant met with an insurance adjuster hired by the governmental agency to investigate the claim. After about nine months the claimant served notice on the State of Idaho. The State eventually sought dismissal of the claim because the claimant had not complied with the plain language of the Tort Claims Act. The district court granted the motion and dismissed the claim. On appeal, this Court rejected the argument that "notice of a potential insurance claim constitutes notice of a potential tort claim sufficient to satisfy I.C. § 6-906." *Id.* at 748, 890 P.2d at 334 (citing *Stevens v. Fleming*, 116 Idaho 523, 530–31, 777 P.2d 1196, 1203–04 (1989)). This Court went on to note that "[a]n insurance company's awareness of an accident or medical expenses **does not relieve a claimant of the burden to file a timely notice of tort claim with the appropriate governmental entity**. *Id.* (emphasis added). Repeatedly this Court has

declared that compliance with the notice requirements of Idaho Tort Claim Act is a burden of the **claimant** alone. Reliance on another party to send notice to the governmental agency is insufficient to satisfy the notice burden.

A similar argument was advanced by a claimant in *Independent School District of Boise City v. Callister*, 97 Idaho 59, 539 P.2d 987 (1975).[2] In *Callister*, this Court rejected the claim that there was "substantial compliance," although there was notice to the school district's insurance carrier. Interestingly, in addition to notice to the insurance carrier in *Callister*, the school district itself had actual knowledge of the injury including information submitted at the school district's own request. This information came from the insurance company and not from the claimant through an actual Tort Claim. This Court rejected a substantial compliance argument and confirmed that the claimant had failed to timely file notice and dismissed the tort claims.

In *Blass v. County of Twin Falls*, 132 Idaho 451, 453, 974 P.2d 503, 505 (1999), this Court again rejected an argument that a claimant had substantially complied with the notice requirements of the ITCA when he submitted written communication of his damages to the Hospital's insurance adjuster who forwarded the communication to the Hospital and the Hospital conducted its own investigation. In that case, this Court

[2] Westlaw indicates that *Callister* was disapproved by *Larson v. Emmett Joint School District No. 221*, 99 Idaho 120, 577 P.2d 1168 (1978) and *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986). However, *Larson* and *Doe* dealt with issues different than the issue presented in this case and are not dispositive. Thus, the portion of the *Callister* decision applicable to this matter has not been disturbed by subsequent appeals.

confirmed that the lack of notice to the governmental entity by the claimant was fatal and dismissed the action for failure to comply with the notice requirements of the Tort Claims Act.

In sum, Idaho has repeatedly recognized that the **claimant** has the burden of providing proper service on the government entity. Nowhere in the Idaho Tort Claims Act is the phrase "substantial compliance" or "actual notice" used. Serving a letter on a non-employee, unrelated third-party to provide notice is insufficient to satisfy the notice requirements of the Act. In this case, Mr. Rigby was not an agent of New Sweden authorized to accept a notice of tort claim. Whether New Sweden had actual notice of the tort claim is irrelevant to the proper service of the tort claim on the governmental entity. It is undisputed that the October 18, 2012 letter to Rigby was sent to Mr. Rigby's law office in Rexburg, Idaho and that the letter was not addressed to DeLillian Reed or even New Sweden's Secretary or Clerk. The letter was addressed generally to "New Sweden Irrigation District c/o Jerry Rigby." CNW failed to properly serve notice on New Sweden and the lower court's grant of summary judgment was appropriate.

### C. The Idaho Supreme Court Has Previously Rejected CNW's Substantial Compliance Argument.

Consistent in Appellant's Brief is the idea that Idaho has accepted "substantial compliance" to satisfy the notice requirements of Idaho Code § 6-906. As noted, the statute does not contain language to suggest that "substantial compliance" is the

minimum requirement. Rather, the service requirement is unambiguous—it must be served on the secretary or clerk of the governmental entity. Any argument that only "substantial compliance" is necessary has been repeatedly answered by this Court in the negative. In fact, this Court has rejected any actual notice argument in lieu of strict compliance, "in actions against governmental entities, plaintiffs are not exempt from the notice of claim requirements because of substantial actual notice having been given." *McQuillen v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744 (1987). Strict compliance with the service of a notice of tort claim has repeatedly been held as the only acceptable standard.

In *Friel v. Boise City Housing Authority*, 126 Idaho 484, 887 P.2d 29 (1994), this Court rejected the idea that only "substantial compliance" is needed to satisfy the notice requirements of Idaho's Tort Claims Act. This Court then reaffirmed its position in *Avila v. Wahlquist*, 126 Idaho 745, 748, 890 P.2d 331, 334 (1995). The recent *Turner* decision also confirms that strict compliance with the Act is required. The lower court's rationale rejecting a "substantial compliance" argument is sound: requiring "strict compliance with § 6-906" is necessary "so as to avoid a case by case analysis and arguments of 'substantial compliance.'" (R. 190).

Any reading of *Turner* suggesting substantial compliance is acceptable ignores the plain language of *Friel* and *Avila*. Likewise, attempts to distinguish *Turner* from *Huff* are unpersuasive because *Huff* did not address substantial compliance given **the claimant**

had actually made several attempts to **personally serve** and follow-up with the secretary of the governmental entity. Idaho does not accept the proposition that service of the notice of tort claim is substantial compliance with Section 6-906 if the clerk or secretary has actual notice of a tort claim that comes from a source that is not the claimant. Indeed, reliance on Mr. Rigby to serve notice would be no different than reliance on an independent auditing firm, insurance company, mayor, or city council member to deliver notice. Thus, CNW's argument suggesting it substantially complied with the notice requirement where New Sweden's secretary received a copy of, what is arguably a tort claim, from a third party that is not an agent of CNW is contrary to established precedent. This Court should find, as the lower court did, that CNW did not comply with the service requirements and the grant of summary judgment was appropriate.

### D. The Rules Of Professional Conduct Do Not Absolve An Attorney From Compliance With Idaho Code § 6-906.

CNW advances for the first time on appeal that somehow the Idaho Rules of Professional Conduct foreclosed CNW from serving a Notice of Tort Claim on New Sweden. This argument is raised for the first time on appeal and should be ignored by the Court. *Bank of Commerce v. Jefferson Enters., LLC*, 154 Idaho 824, 828, 303 P.3d 183, 187 (2013). Even so, the argument is illogical and without merit. CNW suggests when Lou Thiel asked counsel for CNW to communicate about the sinkhole with Mr. Rigby that it was alleviated from filing a timely notice of tort claim. Rule 4.2, Idaho Rules of

Professional Conduct, states that counsel may not communicate with a represented party regarding the facts of the matter.

In this case, it is senseless to suggest that CNW was prevented from sending a claim to New Sweden. Notice on numerous governmental entities that have statutorily elected attorneys occurs throughout the State frequently. For example, when a county is sued for tortious conduct, service must always be served on the county clerk. I.C. § 6-906. Yet, pursuant to statute, each Idaho county has an elected prosecuting attorney who represents the county on all legal matters. I.C. § 31-2001, § 31-2604(1). Likewise, when the State of Idaho is sued for tortious conduct, the requirement for service on the Secretary of State (Idaho Code § 6-905), despite the State always being represented by the Attorney General. Idaho Const., Art. IV, Sec. 1. Despite these governmental entities being represented by elected attorney representatives, nothing in the Idaho Tort Claims Act alleviates a claimant from properly serving the notice of tort claim on a governmental entity that is represented by an attorney pursuant to statute or the Constitution. To suggest that the Idaho Rules of Professional Conduct create such an exception is illogical.

Rather, CNW had the opportunity to send a notice without involving their attorney, which is exactly what CNW did when it filed an Amended Notice of Tort Claim on New Sweden on January 25, 2013. (R. 49). The Rules of Professional Conduct do not prevent a client from communicating directly with the adverse party; it simply prevents

an attorney from communicating with a represented party. Moreover, filing a notice of tort claim on behalf of a client is not "communicat[ion] about the subject of the representation" (Idaho Rule of Professional Conduct 4.2) but is a necessary document that is a condition precedent to filing suit on behalf of a claimant. *Magnuson Properties P'ship v. City of Coeur D'Alene*, 138 Idaho 166, 170, 59 P.3d 971, 975 (2002). Ultimately, the Idaho Rules of Professional Conduct do not serve as a viable exception to the timely filing of a Notice of Tort Claim.

**E. The Estoppel Theories Advanced By CNW Fail.**

CNW's argument centers on the suggestion that the New Sweden Board of Director, Lou Thiel, informed CNW's counsel that Mr. Rigby was their attorney and to contact him regarding the sinkhole. Alternatively, CNW argues that New Sweden changed its position about work allegedly performed in the Porter Canal. As will be explained more fully below, the elements for equitable estoppel, promissory estoppel and quasi-estoppel cannot be met in this case. CNW's failure to identify a material representation is fatal to each estoppel claim. New Sweden never suggested that Mr. Rigby was permitted to accept a Notice of Tort Claim on behalf of New Sweden. As such, each claim fails.

**1. The Elements For Equitable Estoppel Cannot Be Satisfied By CNW.**

A claim of equitable estoppel requires satisfaction of four elements: (1) a false representation or concealment of a material fact with actual or constructive knowledge of

the truth; (2) that the party asserting estoppel did not know or could not discover the truth; (3) that the false representation or concealment was made with the intent that it be relied upon; and (4) that the person to whom the representation was made, or from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice. *Williams v. Blakley*, 114 Idaho 323, 325, 757 P.2d 186, 188 (1987); *Twin Falls Clinic & Hosp. Bldg. v. Hamill*, 103 Idaho 19, 22, 644 P.2d 341, 344 (1982). CNW cannot point to any evidence to satisfy each of the four elements required for application of equitable estoppel.

In this case, Plaintiff cannot establish any false representations or concealment of material fact by New Sweden. CNW suggests that the statement by Lou Thiel to "contact Jerry Rigby regarding the sinkhole problem and NSID's potential involvement" is a false representation. (R. 152, ¶ 2). Mr. Thiel's statement was not false and Mr. Thiel made no statement that Mr. Rigby was permitted to accept the service of a Notice of Tort Claim on behalf of New Sweden. Mr. Thiel did not believe that New Sweden had any involvement and was directing future communications to Mr. Rigby wherein he could confirm that lack of involvement by New Sweden. His simple statement to communicate with Mr. Rigby cannot reasonably be construed to suggest Mr. Rigby was authorized to accept a Notice of Tort Claim.

Likewise, the claimed change of position regarding work in the canal had no bearing on CNW's belief that New Sweden may have been involved in the matter. If, as

suggested by CNW, the letter to Mr. Rigby were a proper tort claim, there would be no reason to send a second amended tort claim. As early as October 18, 2012, CNW believed that New Sweden was potentially responsible for the sinkhole. Accordingly, there is no legitimate argument that they were estopped from complying with the Notice requirements of Idaho Code § 6-906. Thus, reliance by CNW on *Twin Falls Clinic & Hospital Bldg. Corp. v. Hamill*, 103 Idaho 19, 21-22, 644 P.2d 341, 343 (1982), to support an equitable estoppel claim is misplaced. Mr. Thiel never made any representations that the Notice of Tort Claim could be filed with Mr. Rigby or that Mr. Rigby's involvement would circumvent CNW's compliance with the Idaho Tort Claims Act. In fact, New Sweden's Secretary, Delillian Reed, sent a letter to CNW's counsel informing him of the need to submit a tort claim if they believed that New Sweden was potentially liable for the sinkhole. (R. 94). New Sweden never made any statement suggesting compliance with § 6-906 was unnecessary. Likewise, the claim that New Sweden did perform some work in the Porter canal, which was more than a mile downstream of the sinkhole, does not alter the fact that CNW always claimed New Sweden had some involvement in causing the sinkhole. This had been CNW's position since it first communicated with Mr. Rigby. (R. 59-60). Accordingly, the holding in *Twin Falls Clinic* has no bearing on the facts of this matter and is irrelevant.

Moreover, Plaintiff cannot argue that it did not know or could not discover the identity of New Sweden's clerk or secretary. As noted, the District has never attempted to

conceal who its secretary was. As noted, Ms. Reed actually sent a letter to CNW's attorney advising him that he needed to file a notice of tort claim before New Sweden could consider a liability claim: "Since nothing can be addressed until your client files a claim with this office, I am enclosing said claim." (R. 94). Enclosed with the letter was a form to notify New Sweden of the claim. (R. 95). CNW never attempt to serve notice on the District's secretary or clerk within 180-days of discovering the sinkhole. There is no evidence that the District was attempting to conceal any facts relative to Mr. Rigby's relationship with New Sweden. Given the letter by Ms. Reed, where she implicitly identified herself as the "Secretary," no concealment can reasonably be argued. (R. 94).

Finally, CNW's reliance on an Indiana Supreme Court decision is irrelevant here. First, Idaho has specific guidance on what is required to timely and properly serve a Notice of Tort Claim on a governmental entity. Moreover, *Schoettmer v. Wright*, 992 N.E.2d 702 (Indiana 2013) is factually dissimilar rendering it irrelevant. In *Schoettmer* the Court found that the Plaintiff did not know and could not reasonably determine that the governmental entity was subject to Indiana's tort claims act. There were no indications by the governmental entity or its insurer that it was subject to the tort claims act. There were alleged representations made by the insurance company that would suggest that compliance with Indiana's tort claims act was unnecessary. In this case, CNW was well aware of New Sweden's legal status as a governmental entity (*see* Idaho Code § 6-902(2)) and no representations were made to suggest that it was not subject to

the Tort Claims Act. Reliance on an insurance company as to how to proceed would likewise run contrary to the established case law that notice of an insurance company can serve as notice on a governmental entity. *See Avila v. Wahlquist*, 126 Idaho 745, 890 P.2d 331 (1995); *Independent School District of Boise City v. Callister*, 97 Idaho 59, 539 P.2d 987 (1975); *Blass v. County of Twin Falls*, 132 Idaho 451, 453, 974 P.2d 503, 505 (1999). Ultimately, CNW is unable to establish the necessary elements for an equitable estoppel claim under the facts of this matter.

**2. The Elements of Promissory Estoppel Cannot Be Satisfied By CNW.**

CNW suggests that Louis Thiel made a direct and implicit promise that New Sweden was represented by counsel in the matter. There was no direct or implicit promise made by Mr. Thiel with respect to Mr. Rigby. Mr. Rigby was never authorized to accept service and somehow waive the service requirements of Idaho Code § 6-906. Even assuming *arguendo* that Mr. Rigby was working on this matter, his service as the attorney would not satisfy the plain requirements of Section 6-906.

Promissory estoppel, generally speaking, means that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Smith v. Boise Kenworth Sales, Inc.*, 102 Idaho 63, 67–68, 625 P.2d 417, 421–22 (1981) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1973)).

In this case, no promise was made. As stated by Mr. Thiel's affidavit, "I never informed Mr. Hahn that he was permitted to serve a Notice of Tort Claim on Mr. Rigby rather than serve a Notice of Tort Claim on the District's secretary. Mr. Rigby was not the attorney retained by the District or our insurance company, ICRMP, to defend us in this matter. Mr. Rigby did not handle these types of cases." (Supp. R. 18-19). The District never promised anything with respect to the notice on the District's secretary. (Supp. R. 18-19). Mr. Hahn confirmed that Lou Thiel made no promises regarding acceptance of notice. At best, Mr. Thiel requested Mr. Hahn to speak with Mr. Rigby regarding any claimed involvement with the sinkhole. "Promissory estoppel is simply a substitute for consideration, not a substitute for an agreement between parties." *Lettunich v. Key Bank Nat. Ass'n*, 141 Idaho 362, 366, 109 P.3d 1104, 1108 (2005). This matter is more akin to the conclusions reached by this Court in *Mitchell v. Mitchell*, 130 Idaho420, 425, 942 P.2d 544, 549 (1997), wherein no promises were made by New Sweden and therefore promissory estoppel is inapplicable.

**3. Quasi-Estoppel Does Not Apply Here.**

The doctrine of quasi-estoppel does not apply here. "[T]he doctrine of quasi-estoppel requires that the **offending party must have gained some advantage or caused a disadvantage to the party seeking estoppel**; induced the party seeking estoppel to change its position to its detriment; and, it must be **unconscionable** to allow the offending party to maintain a position which is inconsistent from a position from

which it has **already derived a benefit**." *City of Sandpoint v. Sandpoint Independent Highway Dist.*, 126 Idaho 145, 151, 879 P.2d 1078, 1084 (1994) (citing *Tommerup v. Albertson's, Inc.*, 101 Idaho 1, 6, 607 P.2d 1055, 1060 (1980) (emphasis added)). This Court has described the doctrine of quasi-estoppel as "essentially a last-gasp theory under which a defendant who can point to no specific detrimental reliance due to plaintiffs' conduct may still assert that plaintiffs are estopped from asserting allegedly contrary positions where it would be unconscionable for them to do so." *Schoonover v. Bonner County*, 113 Idaho 916, 919, 750 P.2d 95, 99 (1988). "The doctrine classified as quasi-estoppel has its basis in election, ratification, affirmance, acquiescence, or acceptance of benefits; and the principle precludes a party from asserting to another's disadvantage, a right inconsistent with a position previously taken by him." *Id.* Application of a quasi-estoppel theory applies to governmental agencies in only exceptional circumstances. *Naranjo v. Idaho Dep't of Correction*, 151 Idaho 916, 919.

In this case, CNW has not been induced to perform any action or inaction by the District. The law of how to properly serve a governmental entity with a Notice of Tort claim is clear. Idaho Code clearly requires that a notice of tort claim be "**filed with the clerk or secretary of the political subdivision within one hundred eighty (180) days from the date the claim arose** or reasonably should have been discovered, whichever is later." I.C. § 6-906 (emphasis added). Idaho case law further confirms that the claimant has the burden of complying with Section 6-906. There is no exception for an attorney to

accept service of a notice. Service of a document on an attorney who is not an employee of the District and whose only contact with the District is a prior representation on water rights issues is ineffective service of the notice on the District itself. It cannot be disputed that prior to the January 25, 2013 Notice, CNW, as a claimant, did not actually present a claim to the District.

## V.
## ATTORNEY FEES ON APPEAL

Pursuant to Idaho Appellate Rule 41, New Sweden seeks an award of attorney fees in accordance with Idaho Code § 6-918A and/or 12-117. Section 6-918A and Section 12-117 provide a basis for a municipal entity to recover attorney fees when the party against whom the judgment is rendered acted in "bad faith" or "without a reasonable basis in fact or law." Under the statutes, the City is entitled to an award of attorney fees on appeal inasmuch the appeal has been brought frivolously, in bad faith, and without foundation.

Case law has held that an appeal is deemed frivolous when a party fails to make a legitimate showing that the trial court misapplied the law. *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 973 P.2d 142 (1999). In this case, there is no evidence that the district court misapplied the law. In fact, every single claimed error by CNW runs directly contrary to the plain language of Idaho Code § 6-906 and Idaho case law that is directly on point with how service of a Notice of Tort Claim must be served on a governmental

entity. The instant appeal is improper, pursued in bad faith and frivolous mandating an award of costs and attorneys' fees on appeal to New Sweden.

## VI.
## CONCLUSION

Based on the foregoing, the district court correctly analyzed the issues, properly concluded that service by CNW was never made on New Sweden's secretary as required by Idaho Code § 6-906. The district court's findings and conclusions were consistent with the statute and applicable case law. The district court's findings of fact and conclusions of law were supported by the law and evidence and this Court should uphold those findings.

DATED this 10 day of February, 2016.

BLAKE G. HALL

## CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 10 day of February, 2016, by the method indicated below:

| | |
|---|---|
| Frederick Hahn, Esq.<br>Aaron Crary, Esq.<br>RACINE OLSON<br>PO Box 50698<br>Idaho Falls, ID 83405 | [X] Mailing<br>[ ] Email<br>[ ] Hand-Delivery<br>[ ] Facsimile |
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