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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 KENNETH LEE CRONK,

8 Plaintiff,

9 v.

10 CITY OF WEST RICHLAND, ET AL.,

11 Defendants.

No. 4:14-CV-5041-EFS

**ORDER GRANTING DEFENDANTS' MOTION  
FOR PARTIAL SUMMARY JUDGMENT**

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13 Before the Court, without oral argument, is Defendants' Motion  
14 for Partial Summary Judgment, ECF No. 23. Defendants seek dismissal  
15 with prejudice of all of Plaintiff's state law claims because  
16 Plaintiff failed to comply with the notice requirements of RCW  
17 4.96.020. Plaintiff opposes the motion. ECF No. 28. Having reviewed  
18 the pleadings and the file in this matter, the Court is fully informed  
19 and grants the motion for partial summary judgment.

20 **I. INTRODUCTION**

21 Plaintiff Kenneth Cronk sued the City of West Richland and  
22 several city officers and employees in both their official and  
23 personal capacities. Complaint, ECF No. 1. He asserts federal claims  
24 under 42 U.S.C. §§ 1983 and 1985 and pendent state law tort claims.  
25 *Id.* The issues currently before the Court in this motion for partial  
26 summary judgment pertain only to Plaintiff's state law claims. The

1 Court must determine the following: (1) Was Mr. Cronk required to  
2 comply with the notice requirements of RCW 4.96.020 in order to pursue  
3 his state law claims against Defendants? (2) If so, did Mr. Cronk  
4 comply with the notice requirement? (3) If not, did Defendants waive  
5 their lack-of-notice defense? The first issue is a legal one, the  
6 second is factual, and the third is a mixed question of law and fact.  
7 As explained further below, the Court will grant summary judgment if  
8 it resolves all legal issues in Defendants' favor and finds there is  
9 no genuine issue of material fact.

## 10 **II. LEGAL STANDARD**

11 Summary judgment is appropriate if the record establishes "no  
12 genuine dispute as to any material fact and the movant is entitled to  
13 judgment as a matter of law." Fed. R. Civ. P. 56(a). The party  
14 opposing summary judgment must point to specific facts establishing a  
15 genuine dispute of material fact for trial. *Celotex Corp. v. Catrett*,  
16 477 U.S. 317, 324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*  
17 *Corp.*, 475 U.S. 574, 586-87 (1986). If the non-moving party fails to  
18 make such a showing for any of the elements essential to its case for  
19 which it bears the burden of proof, the trial court should grant the  
20 summary-judgment motion. *Celotex Corp.*, 477 U.S. at 322.

21 When considering this motion, the Court (1) believed the  
22 undisputed facts<sup>1</sup> and the non-moving party's evidence, (2) drew all  
23 justifiable inferences therefrom in the non-moving party's favor, (3)  
24 did not weigh the evidence or assess credibility, and (4) did not

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25 <sup>1</sup> The parties failed to file a Joint Statement of Uncontroverted Facts no  
26 later than three days after service of the reply, as required by the Court's  
Scheduling Order, ECF No. 10, at 4, and are reminded of the requirement to do  
so with any future summary judgment motions.

1 accept assertions made by the non-moving party that were flatly  
2 contradicted by the record. See *Anderson v. Liberty Lobby, Inc.*, 477  
3 U.S. 242, 255 (1986); *Scott v. Harris*, 550 U.S. 372, 380 (2007).

### 4 **III. ANALYSIS**

#### 5 **A. Applicability of RCW 4.96.20's Notice Requirement**

6 RCW Chapter 4.96 governs actions under state law against local  
7 government entities, including cities. It provides that cities "shall  
8 be liable for damages arising out of their tortious conduct or the  
9 tortious conduct of their past or present officers, employees, or  
10 volunteers while performing or in good faith purporting to perform  
11 their official duties, to the same extent as if they were a private  
12 person or corporation." RCW 4.96.010. At least sixty days prior to  
13 filing a lawsuit asserting tort claims against a city or its  
14 employees, an individual must file a claim for damages with the city.  
15 RCW 4.96.020. Section 4.96.020 requires that all claims for damages  
16 be presented on the standard tort claim form and delivered to the  
17 city's appointed agent. By the plain language of RCW 4.96.20,  
18 Plaintiff's state law claims against the City of West Richland are  
19 subject to RCW 4.96.020's notice requirement. Plaintiff does not  
20 assert otherwise.

21 However, Plaintiff argues that his claims against the individual  
22 Defendants, who are employees or officers of the City of West  
23 Richland, are not governed by RCW 4.96.020 because the individual  
24 Defendants acted with personal malice, which places their actions  
25 outside the scope of their employment. ECF No. 28, at 3. Plaintiff  
26 relies on *Kephart v. Genuity, Inc.*, 136 Cal. App. 4th 280 (Cal. Ct.

1 App. 2006). In that case, the California Court of Appeals, in  
2 analyzing whether an employer was vicariously liable for an employee's  
3 torts, stated that an employer "may be, but will not necessarily be,  
4 held vicariously liable for an employee's torts that are willful,  
5 malicious, or criminal." *Id.* at 292. However, the present case is  
6 not governed by the decision of a California appellate court.

7 In Washington, "[a]n employee's conduct will be outside the  
8 scope of employment if it is different in kind from that authorized,  
9 far beyond the authorized time or space limits, or too little actuated  
10 by a purpose to serve the master." *Robel v. Roundup Corp.*, 148 Wn.2d  
11 35, 53 (2002) (quoting Restatement 2d of Agency § 228(2) (1958))  
12 (internal quotation marks omitted). "An employer can defeat a claim  
13 of vicarious liability by showing that the employee's conduct was (1)  
14 intentional or criminal and (2) outside the scope of employment." *Id.*  
15 (internal quotation marks and emphasis omitted). However, intentional  
16 or criminal conduct is not per se outside the scope of employment.  
17 *Id.*

18 Here, Plaintiff failed to demonstrate that there is a genuine  
19 dispute of material fact as to whether the individual Defendants acted  
20 outside the scope of their functions as officers or employees of the  
21 city when committing the alleged wrongs against him. Plaintiff does  
22 not explain why or how he believes the individual Defendants' actions  
23 fall outside the scope of their employment. Plaintiff also has not  
24 fulfilled Federal Rule of Civil Procedure 56(c)(1)'s requirement that  
25 he cite to "particular parts of materials in the record." Fed. R.  
26 Civ. P. 56(c)(1); see also *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404,

1 1409 (9th Cir. 1991) ("the opposing party may not rely on denials in  
2 the pleadings but must produce specific evidence, through affidavits  
3 or admissible discovery material, to show that the dispute exists.").

4       Instead, Plaintiff states that the deposition of the Chief of  
5 Police "will contradict specific facts that are attested to in the  
6 attached Declaration of Plaintiff," and that the same deposition  
7 "directly contradicts Defendants response to a specific Interrogatory  
8 Response and facts therein." ECF No. 28, at 3. Plaintiff provided no  
9 explanation of the subject of the deposition testimony, and he  
10 declined to attach the deposition transcript to his response because  
11 the Police Chief had not yet signed and approved it. *Id.* It is not  
12 clear why Plaintiff was unable to obtain approval of the deposition  
13 transcript and provide it to the Court within the time provided for  
14 his response, or, failing that, seek an extension of time to provide  
15 the transcript. More importantly, it is not clear what the deposition  
16 transcript says or how it supports, or even relates to, Plaintiff's  
17 arguments on the issue of RCW 4.96.020 notice. The mere fact that  
18 additional evidence exists does not, without more, create a genuine  
19 issue of material fact, and the Court declines to find that a genuine  
20 dispute exists on the sole basis of Plaintiff's vague and confusing  
21 references to a deposition transcript that has not been provided to  
22 the Court. Accordingly, the Court finds that RCW 4.92.020's notice  
23 requirement applies to Plaintiff's state law claims against the City  
24 of West Richland and the individual Defendants.

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1 **B. Whether Notice Was Filed**

2 The City of West Richland appointed the City Clerk as the agent  
3 to receive notice of tort claims provided pursuant to RCW 4.96.020.  
4 Decl. of Julie Richardson, ECF No. 26, at ¶ 4; Resolution No. 20-07,  
5 ECF No. 26-1. The City Clerk has never received a notice of tort  
6 claim form from Mr. Cronk or from anyone else on his behalf. *Id.* at  
7 ¶¶ 8-11. Plaintiff's response brief does not assert that he filed the  
8 required notice, nor does it provide any evidence to contradict  
9 Defendants' evidence that no notice was received. The Court finds  
10 that there is no genuine dispute that Plaintiff failed to provide the  
11 required notice.

12 **C. Waiver<sup>2</sup> and Estoppel**

13 Plaintiff seems to argue that Defendants are estopped from  
14 asserting his lack of compliance with RCW 4.96.020 as a defense  
15 because city officials never told him that he needed to file a notice  
16 of tort claim, even though he expressed his complaints at multiple  
17 city council meetings and informed the mayor that he would be  
18 compelled to seek judicial intervention. ECF No. 28, at 4. Plaintiff  
19 does not assert that Defendants in any way misled him into believing  
20 he need not comply with the notice requirement; he simply argues that  
21 they did not inform him of it. *Id.* However, Defendants were not  
22 required to inform Plaintiff about the requirement that he file a  
23 notice of tort claim form before commencing suit. See RCW 4.96.020

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25 <sup>2</sup> Defendants asserted a defense based on RCW 4.96.020 in their Answer,  
26 stating "plaintiff has failed to comply with RCW 4.96 et seq. which is a  
necessary condition precedent to commencing and maintaining this action,"  
Answer, ECF No. 6, at 7, so Plaintiff cannot argue Defendants failed to  
comply with Federal Rule of Civil Procedure 8(c).

1 (containing no requirement of notice to potential claimants); see also  
2 *Woods v. Bailet*, 116 Wash. App. 658, 667-68 (Wash. Ct. App. 2003)  
3 (holding that a plaintiff who exercised due diligence would have  
4 discovered that Chapter 4.96 applied to a quasi-municipal corporation,  
5 even though it was not apparent from the corporation's name that it  
6 was a government entity). Defendants are not estopped from asserting  
7 RCW 4.96.020's notice requirement as a defense to Plaintiff's state  
8 law claims.

9 Plaintiff also appears to argue that Defendants should not be  
10 permitted to assert the lack of notice against him because they had  
11 provided him with a Notice of Trespass prohibiting him from accessing  
12 City Hall. ECF No. 28, at 5. The Court has reviewed the Notices of  
13 Trespass provided by Plaintiff. ECF Nos. 32-4 & 32-5. The first  
14 Notice of Trespass, dated June 19, 2012, prohibits Plaintiff from  
15 entering the "City of West Richland City Hall, Business Offices and  
16 City Council Chambers." ECF No. 32-4. However, the Notice dated  
17 August 19, 2012, states, in addition to the above prohibitive  
18 language, "If you need to conduct any city business, please contact  
19 West Richland Police Chief Brian McElroy at 967-3425 and he will  
20 assist you." ECF No. 32-5. Therefore, as of August 19, 2012,  
21 Plaintiff was on notice that he could arrange to conduct city business  
22 through Police Chief McElroy, and the Complaint in this case was not  
23 filed until March 27, 2014, more than sixty days after August 19,  
24 2012. Plaintiff had adequate time to contact Police Chief McElroy and  
25 arrange to file a notice of tort claim prior to filing the instant  
26 lawsuit.





1         **DATED** this 26<sup>th</sup> day of February 2015.

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3                                 s/Edward F. Shea

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5                                 EDWARD F. SHEA  
6                                 Senior United States District Judge  
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