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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 JENNIFER DOLD, ET AL.,

9 Plaintiffs,

10 v.

11 SNOHOMISH COUNTY, ET AL.,

12 Defendants.

CASE NO. 2:20-cv-00383-JHC

ORDER

13
14 **I.**

15 **INTRODUCTION**

16 This matter comes before the Court on Defendants Bryson McGee and Cody McCoy's
17 "Motion for Clarification." Dkt. # 72. The Court construes this motion as a motion for summary
18 judgment and GRANTS it. The Court thus DISMISSES with prejudice Plaintiff Jennifer Dold's
19 state law claims against the individual Defendants, Mr. McGee and Mr. McCoy.

20 **II.**

21 **BACKGROUND**

22 On March 21, 2017, Alexander Dold died following a struggle with several Snohomish
23 County deputy sheriffs. Nearly three years later, Plaintiffs Jennifer Dold and Kathy Duncan sued
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1 Snohomish County and two individual deputies, Bryson McGee and Cody McCoy. *See*
2 *generally* Dkt. # 1 (complaint). Ms. Dold is suing as the personal representative of Mr. Dold’s
3 estate; Ms. Duncan is suing in her individual capacity. The complaint alleges that the deputies’
4 unlawful use of force resulted in Mr. Dold’s death. *Id.* The complaint asserts both federal
5 claims under 42 U.S.C. § 1983 and state law claims for wrongful death and negligent retention.
6 *Id.* at 13–14.

7 In December 2020, the County and Mr. McGee moved for partial summary judgment on
8 Plaintiffs’ state law claims. *See* Dkt. # 13. They argued that Plaintiffs failed to comply with
9 Washington law requiring that a potential plaintiff provide written notice to the governmental
10 entity before filing a tort suit against it. In October 2021, the Court granted that motion in part
11 and denied it in part. *See* Dkt. # 39. The Court concluded that Ms. Dold failed to provide pre-
12 suit notice as required by the Revised Code of Washington (RCW) 4.96.010. *See id.* at 4
13 (“Because Ms. Dold did not file a claim form, she has failed to meet RCW 4.96.010’s condition
14 precedent.”); *see also id.* at 3–7, 9. Thus, the Court held that Dold’s “state law claims against *the*
15 *County* are dismissed with prejudice.” *Id.* at 9 (emphasis added). Importantly, the Court stated
16 that it “expresses no opinion on . . . Ms. Dold’s wrongful death claim against the *individual*
17 *Defendants.*” *Id.* (emphasis added). The Court also concluded that unlike Ms. Dold, Ms.
18 Duncan satisfied the pre-suit notice requirements.¹ *Id.* at 8.

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¹ In that same order, the Court also dismissed Ms. Duncan’s wrongful death claim, *see* Dkt. # 39
at 7–9, because she lacks standing. *See Atchison v. Great W. Malting Co.*, 166 P.3d 662, 664 (Wash.
2007) (“Washington courts have consistently read this statute to mean that *only* a personal representative
may bring an action for wrongful death.”). This aspect of the Court’s order is unimportant for purposes of
the motion at issue.

1 In March 2022, the individual deputies filed the “Motion for Clarification” pending
2 before the Court. Dkt. # 72. In April 2022, this case was reassigned from the Honorable Richard
3 A. Jones to the undersigned judge. *See generally* Dkt.

4 III.

5 DISCUSSION

6 Washington state has waived sovereign immunity for claims against both the state and
7 the state’s political subdivisions. *See Silvernail v. Pierce Cty.*, 80 Wash.2d 173, 173–74, 492
8 P.2d 1024, 1024 (1972); *Daggs v. City of Seattle*, 110 Wash.2d 49, 52, 750 P.2d 626 (1988).
9 Under RCW 4.96.010, “[a]ll local governmental entities . . . shall be liable for damages arising
10 out of their tortious conduct . . . to the same extent as if they were a private person or
11 corporation.”

12 “However, prospective plaintiffs must [first] file a tort claim with the local government at
13 least 60 days prior to filing a lawsuit.” *Renner v. City of Marysville*, 168 Wash.2d 540, 545, 230
14 P.3d 569 (2010). Filing a “claim for damages” with the local government is a “condition
15 precedent” to any action under the statute. RCW 4.96.010(1); *see also* RCW 4.96.020 (listing
16 requirements for pre-suit claim filing). “The claim filing condition precedent serves the
17 important function of fostering inexpensive settlements of tort claims.” *Hintz v. Kitsap Cty.*, 92
18 Wash. App. 10, 13, 960 P.2d 946 (1998). The purpose of this requirement is “to allow
19 government entities time to investigate, evaluate, and settle claims’ before they are sued.”
20 *Renner*, 168 Wash.2d at 545 (quoting *Medina v. Pub. Util. Dist. No. 1*, 147 Wash.2d 303, 310,
21 53 P.3d 993 (2002)). “A court must dismiss any action commenced in violation of a statutorily
22 mandated claim filing condition precedent.” *Westway Const., Inc. v. Benton Cty.*, 136 Wash.
23 App. 859, 867, 151 P.3d 1005 (2006).

1 The Court previously held that Ms. Dold did not file a claim form, and that Ms. Duncan's
2 claim form could not excuse Ms. Dold's failure to file. The Court stated:

3 Though there are two plaintiffs, only one, Ms. Duncan, filed a claim form under
4 RCW 4.96.010. Dkt. # 15 ¶¶ 4-5, Ex. A. *Ms. Dold, and hence the Estate, did not*
5 *file a claim form. Id.* ¶ 4. Because Ms. Dold did not file a claim form, she has
6 failed to meet RCW 4.96.010's condition precedent.

7 Dkt. # 39 at 4 (emphasis added).² The Court therefore concluded that "Ms. Dold failed to file a
8 claim form under RCW 4.96.010, and her state law claims against the County are dismissed with
9 prejudice." *Id.* at 9. But the Court "express[ed] no opinion on . . . Ms. Dold's wrongful death
10 claim against the *individual Defendants.*" *Id.* (emphasis added).

11 The individual Defendants now present a "Motion for Clarification." Dkt. # 72. The
12 motion recognizes that "[t]he Court expressed no opinion as to the remaining state law claims
13 asserted against the Deputies in their individual capacities" and requests "clarification on that
14 matter." *Id.* at 1. The individual Defendants argue that the pre-suit notice statute expressly
15 applies not only to claims brought against governmental units (like the County), but also to
16 claims brought against individual agents of the government (like the individual deputies).
17 Therefore, they ask the Court to "dismiss all state law claims against Defendant Deputies as a
18 matter of law, based on the Court's ruling in Docket 39." *Id.* at 2.

19 Plaintiffs respond that the motion is procedurally improper. Dkt. # 91. First, they assert
20 that the motion is no "motion for clarification" at all: There was no ambiguity in Judge Jones's
21 prior order, which clearly dismissed Ms. Dold's state law claims against the County but
22 expressed "no opinion" as to any state law claims against the individual deputies. *Id.* at 5-6.
23 Second, Plaintiffs assert that the motion functions as an untimely motion for reconsideration. *Id.*

24 ² For purposes of this motion, the Court does not re-evaluate this conclusion reached by Judge
Jones. The Court takes as given that Ms. Dold failed to file a claim form and failed to otherwise satisfy
the pre-suit filing requirements of RCW 4.96.010 and RCW 4.96.020.

1 Third, Plaintiffs argue that even if the Court considers the merits of the motion, the individual
2 deputies have waived any affirmative defense based on the pre-suit filing provision through their
3 dilatory conduct in litigation. *Id.* at 6–11. They do not, however, meaningfully contest that
4 Washington’s pre-suit filing requirements do, in fact, apply to claims brought against individual
5 governmental defendants.

6 A. Proper Characterization of the Motion and Legal Standard

7 The Court first considers the proper characterization of the motion. Though captioned as
8 a “motion for clarification,” the Court agrees with Plaintiffs that it is no such motion. The
9 Court’s previous order was as clear as day: The Court dismissed Ms. Dold’s state law claims
10 against the County, but “express[ed] no opinion on . . . Ms. Dold’s wrongful death claim against
11 the *individual Defendants*.” *Id.* at 9 (emphasis added). Defendants cannot reasonably believe
12 that this language requires “clarification.”

13 But the Court disagrees with Plaintiffs that this motion serves as a motion for
14 reconsideration. The prior order “express[ed] no opinion on” any state law claims against the
15 individual Defendants. *See id.* at 9. The Court interprets Judge Jones’s prior order as simply
16 deferring consideration of that question. The current motion asks the Court to decide that
17 deferred question; it does not ask the Court to reconsider a decision already made.

18 The Court construes the motion as a motion for partial summary judgment. *Cf. Credit*
19 *Suisse First Bos. Corp. v. Grunwald*, 400 F.3d 1119 (9th Cir. 2005) (in a different context,
20 looking to the substance of a motion, not its caption); *W. Sec. Bank v. Schneider Ltd. P’ship*, 816
21 F.3d 587 (9th Cir. 2016) (same). Defendants appear to agree. They state that the motion “would
22 be most appropriately construed as a motion for summary judgment, seeking application of the
23 Court’s holding to the Deputies, as a matter of law. To that end, it was timely filed, and the
24 issues are ripe to be decided in favor to the Deputies.” Dkt. # 104 at 2. The motion asks the

1 Court to answer a pure question of law that it has not resolved before: Whether Ms. Dold's
2 failure to file pre-suit notice precludes her from pursuing claims against the individual
3 Defendants under Washington law. This is precisely the type of inquiry that is commonly
4 addressed on a motion for summary judgment. As Defendants note, the only meaningful
5 difference between the motion as written and a proper summary judgment motion is the lack of a
6 section entitled "Summary Judgment Legal Standard," a standard with which the Court is already
7 familiar. Dkt. # 104 at 3.

8 Plaintiffs would not be prejudiced by construing the motion as a partial summary
9 judgment motion. Plaintiffs have had sufficient opportunity to be heard. In their response to this
10 motion, Plaintiffs do not address the merits of Defendants' argument. Instead, Plaintiffs focus
11 exclusively on the procedural propriety of the motion and their argument that Defendants waived
12 the argument through dilatory litigation conduct. *See generally* Dkt. # 91. This suggests
13 agreement that Washington's pre-suit notice requirements apply equally to claims brought
14 against individual governmental defendants, too (as discussed below). And this motion does not
15 depend on any factual determinations; it is a pure question of law. Therefore, Plaintiffs have not
16 been deprived of an opportunity to present facts relevant to this motion.

17 Accordingly, the Court treats the motion as a motion for partial summary judgment. A
18 court may grant summary judgment if the movant shows that "there is no genuine dispute as to
19 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.
20 56(a). The evidence must be viewed in the light most favorable to the nonmoving party, and all
21 reasonable inferences therefore should be drawn in that party's favor. *Anderson v. Liberty*
22 *Lobby, Inc.*, 477 U.S. 242, 255 (1986).

1 B. Ms. Dold's State Law Claims Against Individual Defendants

2 The Court agrees with the individual Defendants: the plain meaning of Washington's pre-
3 suit claim filing provision requires an individual to file a written claim before initiating any civil
4 action, no matter if that action is brought against a governmental entity or against a government's
5 individual agents and employees. The applicable statute states:

6 No action subject to the claim filing requirements of this section shall be
7 commenced against any local governmental entity, *or against any local*
8 *governmental entity's officers, employees, or volunteers, acting in such capacity,*
for damages arising out of tortious conduct until sixty calendar days have elapsed
after the claim has first been presented to the agent of the governing body thereof.

9 RCW 4.96.020(4) (emphasis added); *see also* RCW 4.96.020(1) (noting that this section of the
10 code applies for "all local governmental entities and their *officers, employees, or volunteers,*
11 *acting in such capacity*" (emphasis added)).

12 As Washington courts have explained, the Washington legislature amended the pre-suit
13 filing provision in 2006 to ensure that the provision applies to claims brought against individual
14 governmental defendants. *See Wright v. Terrell*, 162 Wash. 2d 192, 195 n.1, 170 P.3d 570
15 (2007) ("In response to our decision in *Bosteder*, the legislature amended RCW 4.96.020 to
16 provide that claims against individual government employees are subject to the claims filing
17 statute."); *Strong v. Terrell*, 147 Wash. App. 376, 383 n.4, 195 P.3d 977 (2008) (same); *Hanson*
18 *v. Carmona*, 16 Wash. App. 2d 834, 840–42, 491 P.3d 978, *review granted*, 198 Wash. 2d 1009,
19 495 P.3d 837 (2021) (collecting cases). This statutory amendment applies to claims (like those
20 at issue here) filed after June 7, 2006. *Strong*, 147 Wash. App. at 383 n.4. In their opposition
21 brief, Plaintiffs do not contest that the pre-suit notice statute applies equally to claims brought
22 against individual government defendants.

23 Accordingly, Ms. Dold needed to file notice before initiating any claim against the
24 individual Defendants. As the Court held in its prior order, Ms. Dold did not file a claim form.

1 And the three-year statute of limitations for her state law claims has long since run. *Huntington*
2 *v. Samaritan Hosp.*, 101 Wash. 2d 466, 468, 680 P.2d 58 (1984) (“In general, a wrongful death
3 action must be commenced within 3 years of the date of death.”). Ms. Dold cannot now cure the
4 deficiency in notice. Therefore, the Court must dismiss Ms. Dold’s state law claims against the
5 individual Defendants with prejudice. *See Westway Const.*, 136 Wash. App. at 867.

6 Notwithstanding this conclusion, Plaintiffs argue that the individual Defendants have
7 waived their affirmative defense based on pre-suit notice deficiencies because of their “dilatory
8 conduct” in pursuing this defense. Dkt. # 91 at 6–11. First, Plaintiffs observe that the individual
9 Defendants brought this motion in March 2022, nearly two years after this action began and
10 nearly six months after the Court issued its previous order on state law claims against the
11 County. Second, they point out that the parties have engaged in extensive and costly discovery
12 that could have been avoided if individual Defendants had filed this motion earlier in litigation.

13 Plaintiffs rely heavily on *King v. Snohomish Cnty.*, 146 Wash. 2d 420, 47 P.3d 563
14 (2002). In *King*, the defendant County moved to dismiss three days before trial after nearly four
15 years of litigation. *Id.* at 425. The County argued in that motion that the plaintiff failed to
16 satisfy the pre-suit notice statute. *Id.* at 423, 425. The Washington Supreme Court concluded
17 that the County had waived its affirmative defense. *Id.* at 427. The Court observed that “a
18 defendant may waive an affirmative defense if either (1) assertion of the defense is inconsistent
19 with defendant's prior behavior or (2) the defendant has been dilatory in asserting the defense.”
20 *Id.* at 424 (citing *Lybbert v. Grant Cnty.*, 141 Wash.2d 29, 39, 1 P.3d 1124 (2000)). And while
21 the Court concluded that the defendant was not dilatory because the defense had been raised in
22 the defendant’s answer, it concluded that the County’s conduct was inconsistent with its
23 affirmative defense. *Id.* at 424–25. In particular, the Court found that the County’s affirmative
24 defense—in which the County sought to dismiss the entire case on procedural grounds—was

1 inconsistent with the years of extensive and costly factual discovery engaged in by the parties,
2 none of which concerned the affirmative defense.

3 The present case is distinguishable. First, the conduct of the individual Defendants has
4 *not* been inconsistent with its assertion of the affirmative defense. The Court in *King* concluded
5 that the County engaged in substantial discovery inconsistent with its last-minute attempt to raise
6 an affirmative defense. Here, while the parties have engaged in substantial fact discovery, such
7 discovery is consistent with the individual Defendants' argument that Ms. Dold's state law
8 claims are barred by the pre-suit notice statute. This is because there remain several federal
9 claims involving substantially the same conduct and case theory. Plaintiffs assert several claims
10 based on 42 U.S.C. § 1983 relating to the death of Mr. Dold. While the § 1983 legal inquiry may
11 differ in some respects from a state law wrongful death claim, the underlying factual questions—
12 on the cause of Mr. Dold's death, the nature of the deputies' conduct, and the timeline of
13 events—are substantially the same. Thus, there is no inconsistency: Defendants could
14 reasonably believe that Ms. Dold's state law claims are barred, while engaging in extensive fact
15 discovery relating to the federal claims.

16 Second, Defendants have consistently asserted this defense throughout litigation. The
17 *King* defendant did not, for example, move for summary judgment on this ground (despite filing
18 summary judgment motions on other grounds) or provide any indication (outside of its initial
19 answer) suggesting an intent to rely on this defense. By contrast, Defendants have consistently
20 argued that Plaintiffs failed to comply with the pre-suit notice statute. Two Defendants (the
21 County and Mr. McGee) previously moved for partial summary judgment on the same theory
22 relatively early in litigation, thereby putting Plaintiffs on notice. Dkt. # 13. And Defendants
23 filed this motion on the same day as they filed their motion for complete summary judgment;
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1 they did not wait until the eve of trial to make this argument, instead pressing this theory
2 alongside their other legal theories.

3 Third, the purported delay is shorter than in *King*. In *King*, the defendant listed the claim
4 filing defense in its answer but then “did not raise claim filing again or seek dismissal on that
5 basis until three days before trial, nearly four years after the Kings' complaint was filed.” 146
6 Wash. 2d at 425. By contrast, Defendants filed this motion about two years after the start of the
7 action; and during a sizable portion of this two-year period, Defendants were presumably waiting
8 for the Court’s order on the previous motion. Defendants filed the motion well before the
9 scheduled trial date.

10 Accordingly, the Court concludes that the individual Defendants did not waive their
11 affirmative defense based on Ms. Dold’s failure to satisfy the pre-suit notice requirements.

12 C. Ms. Duncan’s Negligent Retention Claim

13 As a final note, Plaintiffs contend that Defendants’ motion seeks dismissal of *Ms.*
14 *Duncan*’s negligent-retention claim. The Court does not read Defendants’ motion to request this
15 relief. While the motion is not completely clear about the precise relief sought, the motion is
16 directed to claims brought by Ms. Dold; there is no legal argument of any kind about claims by
17 Ms. Duncan. This makes sense: In its previous order, the Court found that Ms. Duncan *did*
18 comply with the pre-suit notice requirements. So there would be no justification for summary
19 judgment based on lack of pre-suit notice. Nevertheless, to avoid any doubt, the Court
20 emphasizes that this order in no way affects claims brought by Ms. Duncan.

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IV.

CONCLUSION

The Court GRANTS the individual Defendants' motion. *See* Dkt. # 72. The Court DISMISSES with prejudice Plaintiff Jennifer Dold's state law claims against the individual Defendants, Mr. McGee and Mr. McCoy.

Dated this 22nd day of November, 2022.



John H. Chun
United States District Judge