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COMMENTS

ESTOPPEL AGAINST STATE, COUNTY, AND CITY

RICHARD A. CLARK

Because of the recent expansion of the activities engaged in by both state and municipal governments, the problem of legal hazards to which they are subject becomes increasingly important. One such hazard is estoppel. In general estoppel is the principle that one who wrongfully or negligently induces another to adversely change his position will be precluded from pleading the falsity of his acts or representations to his own advantage.¹

AGAINST THE PUBLIC IN GENERAL

The greater number of cases invoking or attempting to invoke estoppel against a governmental unit, especially in recent years, involves contracts or representations. The Washington decision of *State v. Northwest Magnesite Co.*² is typical. The state had leased certain

¹ *Carruthers v. Whitney*, 56 Wash. 327, 105 Pac. 831 (1909). For general treatment of the subject of estoppel in this field see 31 C. J. S., ESTOPPEL, 403-436, §§ 138-147, 19 AM. JUR., ESTOPPEL, 818-822, §§ 165-169.

² 127 Wash. Dec. 900, 182 P.(2d) 643 (1947).

school lands in 1917 to the assignor of the defendant for the purpose of developing magnesite deposits. The agreement provided for the payment of four per cent royalties to the state on the basis of lessee's gross receipts less certain specified costs. In 1934, in order to allow further development of the property, the commissioner of public lands orally modified the earlier arrangement so as to permit the defendant to remit royalties on the basis of net profits. Defendant subsequently at great expense developed the property paying royalties according to the modification. In 1943 the state instituted suit to recover royalties claimed due under the 1917 agreement. Defendant pleaded estoppel which the Supreme Court, in reversing the trial court, demed because the state was acting in a governmental as distinguished from a proprietary capacity. Even conceding *arguendo* that estoppel may lie in certain instances against a state acting governmentally, said the court, it would not lie here for three reasons: (1) the evidence did not justify an estoppel, (2) estoppel may not be used to enforce an illegal contract; and (3) estoppel may not be used to enforce the promise of one who has no authority to enter upon the undertaking.

The Washington court is reluctant to apply estoppel against the state when it acts in a governmental capacity.³ A few courts go further and hold that the state, because it is the sovereign, is never subject to estoppel, regardless of the capacity in which it acts.⁴ The majority view, like Washington's, allows estoppel against the state in the same instances in which it may be invoked against a county or city, *i.e.*, when it is acting in a proprietary capacity.

In most cases in which a distinction is made between governmental and proprietary activities municipalities are involved. It should be recognized that a municipal corporation is of a twofold character. It exercises under statute or charter a part of the sovereign power of the state. In addition, since a municipal corporation is created mainly for the interest, advantage, and convenience of the locality, it acts for its own private advantage.⁵ Realizing this, courts say that in its govern-

³ *Bennett v. Grays Harbor County*, 15 Wn.(2d) 331, 130 P.(2d) 1041 (1942).

⁴ *Refunding Board of Ark. v. State Highway Audit Commission*, 189 Ark. 144, 70 S. W.(2d) 1027 (1934), *State ex rel. Veale v. Paul*, 113 Kan. 412, 214 Pac. 425 (1923), *State v. McCurdy*, 171 Okl. 445, 43 P.(2d) 124 (1935), *Baker v. State Highway Dept.*, 166 S. C. 481, 165 S. E. 197 (1932).

⁵ *Seattle v. Stirrat*, 55 Wash. 560, 104 Pac. 834 (1909), *McQUILLAN, MUNICIPAL CORPORATIONS* (2d ed. Rev.) 408, § 136.

mental or public character the city acts for the common good of all, while in its proprietary capacity it is acting for its own benefit.⁶

Once the activity is found to be proprietary the governmental body is subject to the same rules that govern ordinary individuals, and consequently it should expect to receive no more favorable treatment than is fair between men.⁷

The distinction between the two forms of activity has been said to be based on public policy,⁸ on the exercise of police power,⁹ or upon the exercise of some public right.¹⁰ But since by hypothesis the conduct of the state or municipal corporation is misleading and detrimental, the real basis for the doctrine should be that to allow estoppel against such body would result in hindering the performance of its sovereign duties.¹¹

When governmental bodies were in the early stages of development, strict adherence to the governmental-proprietary distinction as to matters of estoppel might have been advisable in order to permit development with a minimum of interference. This is a less valid argument today when most government bodies are as well-organized and -financed as large businesses. Examination of cases shows that the dividing line between governmental and proprietary activities is not distinct.¹² It is submitted that at this date a function should not be

⁶ *Seattle v. Stirrat*, *supra* note 5, *Hagerman v. Seattle*, 189 Wash. 694, 66 P.(2d) 1152 (1937), *Krings v. Bremerton*, 22 Wn.(2d) 220, 155 P.(2d) 493 (1945).

⁷ *Franklin County v. Carstens*, 68 Wash. 176, 122 Pac. 999 (1912), *State ex rel. Washington Paving Co. v. Clausen*, 90 Wash. 450, 156 Pac. 554 (1916), *State v. Carlyon*, 166 Wash. 498, 7 P.(2d) 572 (1932). *See Eagles v. General Electric Co.*, 5 Wn.(2d) 20, 104 P.(2d) 912 (1940).

⁸ *People v. Ill. Women's Athletic Club*, 360 Ill. 577, 196 N. E. 881 (1935), *Ex parte Volker v. McDonald*, 120 Neb. 508, 233 N. W. 890 (1931).

⁹ Estoppel cannot be used to defeat the exercise of police power. *Liles v. Creveling*, 151 Tenn. 61, 268 S. W. 625 (1925), *City of Clifton Forge v. Virginia Western Power Co.*, 129 Va. 377, 106 S. E. 400 (1921).

¹⁰ *Melvin v. Comm. Consol. School Dist.*, 312 Ill. 376, 144 N. E. 13 (1924), *Attorney General v. City of Methuen*, 226 Mass. 564, 129 N. E. 662 (1921).

¹¹ This reason frequently is used in tort cases. *See* note in 22 CORN. L. Q. 87, *Bochard, Government Liability in Tort*, 34 YALE L. J. 129 at 133 (1924).

¹² Compare *Krings v. Bremerton*, 22 Wn.(2d) 220, 155 P.(2d) 493 (1945) (operating a garbage disposal system held governmental) with *City of East Point v. Upchurch Packing Co.*, 58 Ga. Appl. 829, 200 S. E. 210 (1938) (operating an electric light and water plant held proprietary), *Bennett v. Grays Harbor County*, 15 Wn.(2d) 331, 130 P.(2d) 1041 (1942) (sale of property purchased by county at general tax foreclosure sale for want of other purchasers held governmental) with *Eagles v. General Electric Co.*, 5 Wn.(2d) 20, 104 P.(2d) 912 (1940) (property sold for taxes; state, having accepted purchase price, was estopped to assert lien on property for further unpaid fees), *Strand v. State*, 16 Wn.(2d) 107, 132 P.(2d) 1011 (1943) (disposal of public lands held proprietary) with *State v. Northwest Magnesite Co.*, 127 Wash. Dec. 900, 182 P.(2d) 643 (1947) (lease of school lands held governmental).

denominated governmental unless its discharge is essential to the existence of the governmental unit. No Washington case has been found adequately dealing with the rationale of the doctrine,¹³ nor has sufficient consideration been given in decisions to the burdens that might befall a public body if estoppel were allowed. For example, it is questionable whether finding an estoppel in the principal case would result in hampering government;¹⁴ yet the state would almost certainly be burdened if estoppel were to be allowed in tax matters. Since estoppel is permitted against the state or municipal corporation acting proprietarily, no different rule should apply when such body acts in what courts have heretofore classified as governmental unless there is this danger. This would not only be more just, but it would also increase business confidence and faith in government.

At present for estoppel to be a successful defense it is necessary to show not only that the governmental unit was acting in a proprietary capacity but also that the official acted within the scope of his statutory powers.¹⁵ The rationales used are (1) that a person dealing with a public officer is presumed to know the limit of his authority,¹⁶ and (2) that it is legally impossible for a public officer to act beyond his authority.¹⁷

The general rule that the public body is not estopped by the unauthorized acts of its officers is not affected by the fact that it has received benefits.¹⁸ Nor does the doctrine of apparent authority apply.¹⁹

¹³ *Krings v. Bremerton*, 22 Wn.(2d) 220, 155 P.(2d) 493 (1945) quoting from 19 AM. JUR., ESTOPPEL, 820, § 168 seems to suggest that the reason is to prevent hampering of the public in the performance of its duties or the exercise of its police power. Compare with *Hagerman v. Seattle*, 189 Wash. 694, 66 P.(2d) 1152 (1937) which discusses the basis of immunity of municipal corporations in tort matters when agents are engaged in governmental duties.

¹⁴ It must be remembered, however, that the governmental-proprietary distinction was merely one basis for the ultimate holding in the case.

¹⁵ "Regardless of the capacity in which the state acts, whether proprietary or governmental, the principal of estoppel will not apply to an unauthorized act or ultra vires act of state officials." *Strand v. State*, 16 Wn.(2d) 107, 119, 132 P.(2d) 1011 (1943).

¹⁶ *Chehalis County v. Hutcheson*, 21 Wash. 82, 57 Pac. 341 (1899), *Paul v. Seattle*, 40 Wash. 294, 82 Pac. 601 (1905), *Brougham v. Seattle*, 194 Wash. 1, 76 P.(2d) 1013 (1938), *Pehrson v. School Dist. No. 334*, 194 Wash. 334, 77 P.(2d) 1022 (1938), *Bennett v. Grays Harbor County*, 15 Wn.(2d) 331, 130 P.(2d) 1041 (1942).

¹⁷ *State ex rel. Fishback v. Globe Casket Etc. Co.*, 82 Wash. 124, 143 Pac. 878 (1914), *State ex rel. National Bank v. Tacoma*, 97 Wash. 190, 166 Pac. 66 (1917), *State v. N. W. Magnesite Co.*, 127 Wash. Dec. 900, 182 P.(2d) 643 (1947).

¹⁸ *Paul v. Seattle*, 40 Wash. 294, 82 Pac. 601 (1905)

¹⁹ *Bennett v. Grays Harbor County*, 15 Wn.(2d) 331, 130 P.(2d) 1041 (1942), *Spieker v. Board of Rapid Transit Com'rs*, 37 Ohio Appl. 102, 174 N. E. 15 (1930). See *Paul v. Seattle*, *supra* note 18. But see *Hentherington-Berner Co. v. Spokane*, 75 Wash. 660, 135 Pac. 484 (1913).

The latter is not unreasonable since there is little justification for relying on appearances when the authority of public officers is defined by a readily accessible statute or ordinance.

If the contract or act is beyond the authority of both the acting official and the governmental unit itself, regardless of the capacity in which it acts, obviously estoppel cannot apply.²⁰ Otherwise the public would be deprived of safeguards which were intended in defining the powers of government.²¹ This is true even though the governmental body has received benefits.²²

Cases in which there is a total lack of power to enter into a certain transaction must be distinguished from those in which there is an irregular exercise of an existing power. Where a governmental body has entered into a permitted contract in an unauthorized manner and has actually received benefits from the transaction, recovery is allowed on either of two theories. Some courts invoke an estoppel.²³ Others permit recovery in quantum meruit. The latter rule is exemplified by the earlier Washington cases.²⁴

However, the recent case of *Hailey v. King County*²⁵ decided that the quantum meruit rule may not be invoked to fasten liability on a city or county for purely personal services, but that it is limited to situations where material benefits have been received. It is submitted that there is no substantial reason for this distinction, unjust enrichment occurring in either situation, and if the "obligation to do justice"²⁶ is recognized in one case there is no sound reason for ignoring it in the other. Although the dissent in *Green v. Okanogan County*²⁷

²⁰ *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063 (1893), *State v. Pullman*, 23 Wash. 583, 63 Pac. 265 (1900), *State ex rel. Spring Water Co. v. Monroe*, 40 Wash. 545, 82 Pac. 888 (1905), *Turner Investment Co. v. Seattle*, 70 Wash. 201, 126 Pac. 426 (1912), *State ex rel. Booth v. Tatro*, 199 Wash. 421, 92 P.(2d) 206 (1939), *State v. N. W. Magnesite Co.*, 127 Wash. Dec. 900, 182 P.(2d) 643 (1947).

²¹ *State v. Pullman*, *supra* note 20.

²² *State v. Pullman*, *supra* note 20; *Bennett v. Grays Harbor County*, 15 Wn.(2d) 331, 130 P.(2d) 1041 (1942).

²³ *Wykes v. City Water Co.*, 184 Fed. 752 (C. C. A. 9th 1911), *State v. Register of State Land Offices*, 193 La. 883, 192 So. 519 (1939), *Reeves v. Leich*, 194 La. 1070, 195 So. 542 (1940), *City of Port Arthur v. Young*, 37 S. W.(2d) 385 (Tex. 1931). *Accord*, *Seward v. Fiskien*, 122 Wash. 225, 210 Pac. 378 (1922), a Washington case utilizing this approach which stands alone in actually allowing an estoppel to be invoked against a governmental agency when it has acted in its "sovereign" capacity. *See State v. Pullman*, 23 Wash. 583, 63 Pac. 265 (1900).

²⁴ Cases collected in *Gehr v. Ferry County*, 179 Wash. 68, 72, 36 P.(2d) 71 (1934).

²⁵ 21 Wn.(2d) 53, 149 P.(2d) 823 (1944).

²⁶ *Marsh v. Fulton County*, 10 Wall (77 U. S.) 676 at 684, which is quoted with approval in *Hailey v. King County*, *supra* note 25 at p. 57

²⁷ 60 Wash. 309, 111 Pac. 226 (1910).

quoted with approval in the *Hailey* case²⁸ seems to throw doubt on the quantum meruit rule in both situations, the quotation's effectiveness should be limited to the purpose for which it was primarily cited,²⁹ and as stated above, the quantum meruit rule still applies where material benefits are involved.

Although the rule is well settled in Washington that estoppel cannot be applied against the people when acting in their sovereign capacity, three cases suggest that an exception may be made to this rule when necessary to prevent "manifest injustice."³⁰ This approach has not yet been used nor its limits defined.³¹ Nevertheless, the way is open for its use by the court to prevent the harsher consequences of the doctrine.

Thus one who asserts estoppel against a public body has an extremely difficult task. He must show (1) that the transaction was proprietary, (2) not ultra vires, and (3) that the governmental agent acted within his authority. His task is eased somewhat by the quantum meruit rule in cases involving municipal corporations where the corporation received material benefits, but this rule does not apply where purely personal services are involved. There is also the possibility of a "manifest injustice" approach.

WITH REFERENCE TO CLAIM STATUTES

Estoppel to assert failure to timely present claims against a county or city is but one aspect of the general doctrine of estoppel.³² Two recent Washington cases have presented this problem.³³

In *Forseth v. Tacoma*,³⁴ plaintiff, a seventeen-year-old girl, was seriously injured in a collision between a negligently driven Tacoma

²⁸ 21 Wn.(2d) 53, 149 P.(2d) 823 (1944).

²⁹ The reason given was that it was necessary in order to protect the public against weak or dishonest officials.

³⁰ *Bennett v. Grays Harbor County*, 15 Wn.(2d) 331, 130 P.(2d) 1041 (1942), *Krings v. Bremerton*, 22 Wn.(2d) 220, 155 P.(2d) 493 (1945), *State v. N. W. Magnesite Co.*, 127 Wash. Dec. 900, 182 P.(2d) 643 (1947).

³¹ *Bennett v. Grays Harbor*, *supra* note 30 at p. 343, referring to *Franklin County v. Carstens*, 68 Wash. 176, 122 Pac. 999 (1912) said, "the facts in that case were clearly such as to warrant equitable estoppel against the county in order to prevent what otherwise would have been a manifest gross injustice."

³² For information involving cases wherein the plaintiff has failed to file a claim within the statutory period see 82 A. L. R. 749 and 153 A. L. R. 329. For digest of cases dealing with the problem of estoppel and waiver where a notice has been filed within the prescribed statutory period but is defective in form see 148 A. L. R. 637.

³³ Two earlier cases had assumed that a city could waive the provisions of the statute and that an estoppel could lie. *Cole v. Seattle*, 64 Wash. 1, 116 Pac. 257 (1911), *Collins v. Spokane*, 64 Wash. 153, 116 Pac. 663 (1911).

³⁴ 127 Wash. Dec. 268, 178 P.(2d) 357 (1947).

city bus, on which she was a passenger, and another vehicle. The city carried liability insurance, and the insurance company adjuster was requested by the city's Department of Public Works to interview the plaintiff and if possible to settle her claim. He informed her of his authority and led her to believe she needed no lawyer but was safe in conducting negotiations with him. He then delayed the negotiations until more than sixty days had elapsed, after which he informed her of the sixty day limitation prescribed by the city charter for the filing of claims. Dissatisfied with the adjuster's offer, she filed claim and then brought suit against the city alleging it had waived and was now estopped from insisting upon strict enforcement of the limitation period. The Supreme Court held that the city was not precluded from pleading the charter provisions even assuming the adjuster was the agent for the city, saying that such provisions are mandatory and that municipal officers cannot disregard them.

In *Caron v. Grays Harbor County*,⁸⁵ plaintiff, an abstractor for a local title company, fell from a ladder in the county clerk's office while examining records. She filed a claim within the prescribed period but it was defective in form. Conceding the necessity of substantial compliance with the statute she urged that the county commissioners had waived all rights to insist upon it. The Supreme Court in affirming the trial court said that the commissioners did not have the power to waive observance of the statutory requirements, nor could an express attempt to waive estop the county from asserting such lack of compliance.

There is a difference between these cases in that in the *Forseth* case there was a complete failure to file the claim within the allotted time, while in the *Caron* case the claim although timely was defective in form. A few courts representing a minority think that this difference is sufficiently important to justify divergent holdings.⁸⁶ However, the majority treat the principles involved as analogous, the rationale being that such provisions are intended to protect the public and afford the

⁸⁵ 18 Wn.(2d) 397, 139 P.(2d) 626 (1943).

⁸⁶ *Hurley v. Town of Bingham*, 63 Utah 589, 228 Pac. 213 (1924), at p. 215, "There is a wide distinction between presenting a defective claim which at least names the time, place, and the circumstances of the injury and in presenting no claim at all. In the first supposed case the municipality is at least notified sufficiently to investigate the merits of the claim, which evidently is the main purpose of the statute. In the second supposed case the city receives no notice at all, and the very purpose of the statute is defeated."

city or county opportunity to make a complete and intelligent investigation of the facts.³⁷

In adopting this rule the Washington court has aligned itself with the weight of authority in this country³⁸ In most claim statute cases there is talk of both waiver and estoppel. If there is lack of power in a municipal corporation to waive compliance with a statute,³⁹ it seems that estoppel should be inapplicable. However, there is a contrary view on the basis that waiver and estoppel are different.⁴⁰ Conceding the difference,⁴¹ estoppel should still not lie since generally a prohibition or complete lack of power in a statute cannot be circumvented by applying the doctrine of estoppel.⁴² As seen heretofore, lack of power was always a good defense in a suit against a municipality, and if it should now be held that a city is estopped by reason of the conduct of its officers even though the activity is beyond the powers of the city, then the rule that an ultra vires act by a city does not subject it to liability would be nullified.⁴³

Are the majority courts correct in holding that there is no power in the city or its officials to waive compliance with the statute? The question is perhaps best answered by the recent California case of *Farrell v. Placer County*,⁴⁴ in which the court said.

³⁷ *Caron v. Grays Harbor County*, 18 Wn.(2d) 397, 139 P.(2d) 626 (1943), *Forseth v. Tacoma*, 127 Wash. Dec. 268, 178 P.(2d) 357 (1947).

³⁸ It seems that eighteen states may be classified as being in accord with the view expressed by the Washington court while at least six states take the opposite position. See material referred to in note 32, *supra*.

³⁹ Among cases stating that a municipality is completely powerless to waive compliance with such statutes are. *Cooper v. Butte County*, 17 Cal. Appl.(2d) 43, 61 P.(2d) 516 (1936), *Kline v. San Francisco United School District*, 40 Cal. Appl.(2d) 174, 104 P.(2d) 661 (1940), *Hall v. Los Angeles*, 19 Cal.(2d) 198, 120 P.(2d) 13 (1941), *Walter v. Ottawa*, 240 Ill. 259, 88 N. E. 651 (1919), *Brown v. Winthrop*, 275 Mass. 43, 175 N. E. 50 (1931). Others merely say that waiver is beyond the official's powers. *Phillips v. City of Abilene*, 195 S. W.(2d) 147 (Tex. 1946). This seems to be the approach used in the *Caron* and *Forseth* cases.

⁴⁰ 14 Rocky Mt. L. Rev. 219 criticizing *Hall v. Los Angeles*, *supra* note 39, a case similar to the *Caron* case. See *Garrison v. California Employment Stabilization Com'n*, 64 Cal. Appl.(2d) 820, 149 P.(2d) 711 (1944) at p. 716. "It is unnecessary to pass upon the power [of the commission] to make the rule, because the commission is estopped to take such a position [denying the power]." This case seems to stand alone on this point; in all other cases there is expressly or impliedly found the power of waiver in the body sought to be estopped. The importance of a lack of power to waive as effecting estoppel is brought out by a comparison of two Texas cases, *City of Waco v. Thralls*, 172 S. W.(2d) 142 (Tex. 1942) and *Phillips v. City of Abilene*, 195 S. W.(2d) 147 (Tex. 1946).

⁴¹ Difference is discussed in *Reynolds v. Travelers Insurance Co.*, 176 Wash. 36, 28 P.(2d) 310 (1934).

⁴² *Bardsley v. Sternberg*, 17 Wash. 243, 49 Pac. 499 (1897), *State v. Pullman*, 23 Wash. 583, 63 Pac. 265 (1900), *Phillips v. City of Abilene*, 195 S. W.(2d) 147 (Tex. 1946).

⁴³ *Cooper v. Butte County*, 17 Cal. Appl.(2d) 43, 61 P.(2d) 516 (1936).

⁴⁴ 23 Cal.(2d) 624, 145 P.(2d) 570 at 573 (1944).

It has been intimated by some authorities that the claim statute is the measure of power of the governmental agency in paying tort claims involved, and hence any deviation from that procedure cannot be dispensed with by waiver, estoppel, or otherwise. That conclusion, at least with respect to the time of filing the claim, is not supported by the statute or reason. The various reasons advanced for the adoption of the claim statutes, that is, to afford the agency an opportunity to investigate the merits of the claim and to arrive at a settlement, thus avoiding litigation, are not inconsistent with the view that the statute is not the measure of power. Hence the filing of the claim within ninety days, while mandatory upon the claimant and a condition precedent to his cause of action, is nothing more than a procedural requirement as to the agency, which, as to the claimant, may be excused by estoppel.

This approach, it is submitted, is correct. Claim statutes were not designed as shields to avoid liability to bona fide claimants. Since a requirement of the minority view is that the city must have an opportunity to make a thorough investigation of the claim,⁴⁵ it offers the same essential protection to the municipality as does the majority rule while eliminating decisions based on mere form and technicality. This requirement may not have been met in the *Caron* case since the commissioners never received certain information, but it would seem satisfied in the *Forseth* case, where before the sixty day period the city through its agent obtained sufficient information so as to enable it to adequately investigate the accident. This approach merely exemplifies the idea that in certain instances a public body should expect to receive no more than just treatment. As was appropriately said in *Farrell v. Placer County*:⁴⁶

If we say with Mr. Justice Holmes, "Men must turn square corners when they deal with the government," it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens.

In conclusion it seems that estoppel should not lie unless power to waive compliance with a statute is properly found. It is submitted that the better reasoned cases hold that such statutes are essentially procedural in nature and not the measure of the municipality's power.

⁴⁵ *Farrell v. Placer County*, *supra* note 44, *Badger v. Upper Darby Twp.*, 348 Pa. 551, 36 A.(2d) 507 (1944).

⁴⁶ *Supra* note 44, at p. 572, quoting from MacQuire and Zimet, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 HARV. L. REV. 1241 (1935).