IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

No. 99823-0

From Court of Appeals
No. 37419-0-III

KYLIE HANSON, individually,

Petitioner,

v.

MIRIAM GONZALEZ CARMONA and JOHN DOE CARMONA, husband and wife, individually, and the marital community comprised thereof,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Before 2006, the government entity notice of claim statute, RCW 4.96.020, did not specifically reference government entity officers, employees or volunteers. Nevertheless, courts had held the statute applied to claims against individual government entity employees as well as government entity employers. See, e.g. *Woods v. Bailet*, 116 Wn. App. 658, 665-66, 67 P.3d 511 (2003).

In 2005, this court, in *Bosteder v. City of Renton*, 155 Wn.2d 18, 117 P.3d 316 (2005), squarely addressed whether the statute applied to claims against individual government entity employees. In a divided opinion, five justices held that RCW 4.96.020 did not apply to claims against individual government employees or officers, remarking that "The Legislature could easily have added a few words to RCW 4.96.020(4) if it intended the statute to apply to city officials as individuals." 155 Wn.2d at 57.

In 2006, the Legislature, specifically in response to *Bosteder*, amended the statute to state that its provisions apply to claims for damages against all local governmental entities "and their officers, employees or volunteers, acting in such capacity." RCW 4.96.020(1). It also added the words "and their agents" to the statute's title. As a result of this amendment,

this court, in *State v. Clark*, 178 Wn.2d 19, 24, 308 P.3d 590 (2013) described *Bosteder* as having been "superseded by statute."

This personal injury case arose from a collision between a vehicle owned and operated by Petitioner Kylie Hanson (Hanson) and one owned by a local government entity, South East Washington Aging and Long Term Care (SEW ALTC) and operated by SEW ALTC employee and Respondent Miriam Carmona (Carmona) in the course and scope of her employment.

Eleven days before the expiration of the statute of limitations, Hanson filed suit against Carmona and her employer without submitting a pre-suit notice of claim to SEW ALTC as required by RCW 4.96.020. After Carmona and SEW ALTC raised the issue of non-compliance with RCW 4.96.020 via a motion for summary judgment, Hanson, recognizing her legal predicament because of the expiration of the statute of limitations, filed an amended complaint that dropped Carmona's employer as a defendant. Then, in resisting Carmona and SEW ALTC's motion, Hanson argued that RCW 4.96.020 was a reflection of sovereign immunity, that Carmona was personally liable for her negligence, and that the statute did not apply because Hanson was suing only Carmona (and not her government entity employer). Hanson made no specific constitutional argument - she did not contend that RCW 4.96.020, as applied to a claim against a government entity employee acting in the course and scope of her

employment, was violative of due process, equal protection, or separation of powers.

The trial court denied Carmona's motion for summary judgment, and Carmona sought discretionary review. The Court of Appeals accepted review and, in a published opinion, reversed, remanded, and directed the trial court to enter judgment dismissing Hanson's suit against Carmona. In so doing, the Court of Appeals rejected Hanson's separation of powers argument, holding that *McDevitt v. Harborview Med. Ctr.*, 179 Wn.2d App. 59, 316 P.3d 469 (2013) controlled, rather than *Waples v. Yi*, 109 Wn.2d 152, 234 P.3d 187 (2010), as urged by Hanson.

As amended, RCW 4.96.020 clearly applies to claims against individual government entity employees acting within the course and scope of their employment. With the exception of one case where the statute at issue operated to shorten the statute of limitations (*Hunter v. North Mason High School*, 85 Wn.2d 810 (1975)), constitutional challenges to Washington government notice of claim statutes have been repeatedly rejected. With respect to Hanson's separation of powers challenge, in *McDevitt* the court recognized that notice of claim statutes are a constitutional exercise of legislative authority under Article II, §26 of the Washington State Constitution because they establish conditions under which the "state" can be sued. Because a suit against an individual

government entity employee acting within the course and scope of her employment exposes government entity assets to judgment, such a suit is effectively against the "state." Accordingly, RCW 4.96.020, as it applies to individual government entity employee acts within the course and scope of employment, and as applied to Hanson here, is a constitutional exercise of legislative authority under Article II, §26.

Given the above, the Court of Appeals' decision was correct, and Carmona respectfully requests that Hanson's Petition for Review be denied.

II. STATEMENT OF CASE

A. Accident From Which Case Arose

On September 6, 2016, Hanson was the driver of a vehicle involved in a collision with a vehicle owned by SEW ALTC and driven by SEW ALTC employee Miriam Carmona (Carmona) in the course and scope of her employment. CP 67; CP 133.

B. Identity of Carmona's Employer, SEW ALTC, and its Compliance with RCW 4.96.020

SEW ALTC is an Area Agency on Aging, established pursuant to RCW 74.38, to administer grants for programs for older individuals and adults with disabilities within Asotin, Benton, Columbia, Franklin, Garfield, Kittitas, Walla Walla, and Yakima counties. CP 17-18. SEW ALTC is a local governmental entity governed by a council of governments

and established by interlocal agreement between the member counties. CP 18. The administrative office of SEW ALTC is in Yakima. *Id.*

As required by RCW 4.96.020, at all times material hereto, SEW ALTC had on file with the Yakima County Auditor a document identifying the agent of SEW ALTC for the purposes of receiving notices of claim. CP 18. In addition, at all material times, SEW ALTC had available at its Yakima office, a tort claim form and instructions on how the form should be presented, together with the name, address and business hours of the agent appointed to receive the claim. *Id.*

C. Information Indicating that Carmona's Employer was a Local Government Entity.

The police report for the subject accident, in the space for "registered owner's info" stated "Aging and Longterm Care SE." CP 67. The report then identified the owner's "insurance company and policy number" as "Enduris 2016-00-601." *Id.*

Enduris is a government entity risk pool whose members consist of government boards, government authorities, and government special purpose districts. CP 88. At all material times, Enduris has maintained a website, and if one does a "Google" search of the unique word "Enduris", the website is the first result that appears. CP 89.

Clicking the "about Enduris" link on the Enduris website homepage leads to a description of Enduris' history and defines Enduris as "government risk experts" with a membership that includes "over 500 local governments or special purpose districts that 'pool' resources to share the risk and reduce costs." CP 89. Clicking on the "claims" link leads to a page which allows for the downloading of an RCW 4.96.020 "claim for damage form." *Id.*

Greg Albi (Albi), a passenger in Hanson's car, made a claim against SEW ALTC for injuries arising from the subject accident, and Enduris claims analyst Carrie Miller (Miller) handled that claim. CP 89. On November 30, 2017, Miller sent Albi a letter stating that, before Enduris could pay anything on his behalf, he needed to fill out a claim for damages form. *Id.*

Albi submitted a claim for damages form to SEW ALTC and Enduris subsequently evaluated and settled his claim. CP 89.

On May 25, 2018, Miller sent a letter to Hanson. CP 90. From having handled Albi's claim, Miller understood Hanson was the driver of the vehicle in which Albi was riding at the time of the accident and that, at least at the time of the accident, Hanson was Albi's girlfriend. *Id.* In her letter to Hanson, Miller identified the Enduris "member" as the "Southeast Washington ALTC Council of Governments." *Id.* Miller advised Hanson

that Enduris was the "coverage provider" for the "above-listed member," that Enduris had not heard from her regarding the accident and had been unable to reach her, and Miller advised Hanson that Enduris was thus closing its file. *Id.* Miller also advised Hanson that the statute of limitations in Washington was three years from the date of the accident, or, in this instance, September 6, 2019. *Id.*

If Hanson or her representative had contacted Miller about making a personal injury claim, Miller would have told Hanson, as she told Albi, that prior to Enduris paying on any injury claim Hanson had against SEW ALTC, Hanson would first have to file a claim for damage form she could obtain from SEW ALTC. CP 90.

The Washington Secretary of State's website contains information for an entity with the business name "Southeast Washington Office of Aging and Longterm Care Advisory Council" and identifies the business as a "WA non-profit corporation." CP 74. The form describes the "nature of business" as:

> The purpose of Southeast Washington Office of Aging and Long Term Care Advisory Council is to advise Southeast Washington Aging and Long Term Care Council of Governments on the needs of the elderly, allocation of funds for seniors, and to seek additional funding for long term care services.

CP 74.

D. Pertinent Procedure Below

Hanson filed her initial complaint on August 26, 2019. CP 13. There was no evidence that, before doing so, Hanson filed an RCW 4.96.020 Notice of Claim with SEW ALTC.

On October 7, 2019, Defendants filed a motion for summary judgment asking that the case be dismissed with prejudice because of Hanson's failure to file a Statutory Notice of Claim and because of the expiration of the statute of limitations. CP 9; CP 12-16.

In response to the summary judgment motion, Hanson filed an amended complaint which dropped the government entity as a Defendant, leaving Carmona as the sole Defendant. CP 53. Hanson then argued that her failure to file a Notice of Claim under RCW 4.96.020 was the result of SEW ALTC having "concealed its identity" as a government entity and that, regardless, she was not required to comply with RCW 4.96.020 to pursue a claim against Carmona in her "individual capacity." CP 57-62. Hanson also argued that RCW 4.96.020's requirement, as it pertains to claims against individual government entity officers and employees, is unconstitutional. *Id.*

The trial court apparently accepted Hanson's argument and, on February 7, 2020, issued an order granting Defendants' motion with respect to the entity defendant, but denying it with respect to Hanson's claim against

Carmona, stating in its summary judgment order that the case "may proceed against Miriam Gonzales Carmona in her individual capacity." CP 145-148.

Division III of the Court of Appeals accepted discretionary review and, in an unpublished opinion, reversed, remanded, and directed the trial court to enter judgment of dismissal in favor of Carmona. *Hanson v. Gonzalez Carmona*, 16 Wn. App. 2d 834 (2021). This Petition for Review followed.

III. ARGUMENT AND AUTHORITIES

A. Standard of Review

An appellate court reviews summary judgment orders *de novo*. *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015). The interpretation of a statute, and the constitutionality of a statute, are questions of law for the court and the standard of review is *de novo*. *State v. Bright*, 129 Wn.2d 257, 265, 916 P.2d 922 (1996) (interpretation of statute); *State v. Gresham* 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

B. Requirements of RCW 4.96.020 in General

Filing a claim for damages in the form prescribed by RCW 4.96.020 before the expiration of the statute of limitations is a "condition precedent" to the commencement of any action for damages against a local

governmental entity or a local government entity's officer or employee. RCW 4.96.010(1); RCW 4.96.020.[1]

The purpose of the tort claim presentment requirement is to allow government entities time to investigate, evaluate, and settle claims before they are sued. *Fast v. Kennewick Public Hospital District*, 188 Wn. App. 43, 54, 354 P.3d 858 (2015) reversed on other grounds, 187 Wn.2d 27 (2016). Where a claimant/plaintiff fails to comply with the requirements of RCW 4.96.020, dismissal is warranted. See *Reyes v. City of Renton*, 121 Wn. App. 498, 86 P.3d 155, review denied 152 Wn.2d 1031, 103 P.3d 200 (2004); *Harbered v. City of Kettle Falls*, 120 Wn. App. 498, 84 P.3d 1241, *review denied* 152 Wn.2d 1025 (2004).

C. Hanson's Separation of Powers Challenge Should be Rejected Because Article II § 26 Gives the Legislature the Power to Determine Whether and How "the State" Can be Sued, RCW 4.96.020 is a Reflection of That Constitutional Allocation of Power, and a Claim/Suit Against a Government Employee, Acting Within the Course and Scope of His/Her Employment, is, in Effect, a Claim/Suit Against the State

The constitutionality of a pre-suit notice of claim statute was addressed by this court in *McDevitt v. Harborview Medical Center*, 179

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[1] As indicated *supra*, at pg. 5, SEW ALTC is an entity created by an interlocal agreement. Such an entity is a "local governmental entity" within the meaning of RCW 4.96.020. See RCW 4.96.010(2).

Wn.2d 59, 316 P.3d 469 (2013). There, the court rejected a separation of powers challenge to the 90-day pre-suit notice requirement for a medical malpractice action[2] holding that, because the defendant was a state entity, the statutory requirement was a permissible exercise of legislative authority under Article II, § 26 of the Washington State Constitution to "direct by law, in what manner, and in what courts, suits may be brought against the state."

Hanson argues that *McDevitt* is inapposite, and that *Waples* and *Putnam v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009) control because she brought suit against Carmona as an individual, and did not bring suit against the "state", or a municipal subdivision of the state. This argument should be rejected because where a government employee commits a tort while acting within the course and scope of her employment, the government entity is ultimately financially responsible (see RCW 4.96.041). Thus, a suit against a government employee, acting within the course and scope of employment, is, in effect, a suit against the "state"[3].

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[2] The 90-day pre-suit notice requirement was abolished by the Legislature in 2013 via House Bill 1533.

[3] This point was recognized by four justices of the Washington Supreme Court in *Bosteder*:

While not specifically addressing separation of powers, the Court of Appeals has twice held that tort claim notice requirements for state entities extend to those who function on behalf of the state, particularly where that activity exposes state funds to liability. See *Hardesty v. Stenchever*, 82 Wn. App. 253, 917 P.2d 577 (1996) and *Hyde v. University of Washington Medical Center*, 186 Wn. App. 926, 347 P.3d 918 (2015)[4].

Consistent with *Hardesty* and *Hyde*, in other contexts, Washington court have held that a suit is against the "state", even if the state is not specifically named as a defendant, if the state will ultimately be responsible for paying the claim. See e.g. *Centralia College Ed. Ass'n v. Board of Trustees of Community College Dist. No. 12*, 82 Wn.2d 128, 503 P.2d 1357

> Despite the above analysis, interpreting the claim filing statute in this manner would have serious consequences that we think the Legislature did not intend when the statutory context is considered. RCW 4.96.041 requires local governments to pay for the defense of their employees when they are sued individually for acts committed within the scope of their employment. Unlike Oregon, Oklahoma and Indiana, Washington does not have a statute that requires plaintiffs to sue only the local government (rather than individual employees) for acts committed within the scope of employment (statutory citations omitted). Thus, whether plaintiffs name individuals in the suit, the local government entity, or both, the local government's finances will be implicated if the alleged acts occurred in the scope of the individual's employment. 155 Wn.2d at 44.

[4] Significantly, this court denied review of both cases. See 130 Wn.2d 1005 (1996) (*Hardesty*) and 184 Wn.2d 1005 (2015) (*Hyde*).

(1973) (Because community college district is integral part of state system of higher education and any judgment or decree against district would affect state in material economic sense, state is party in interest even though not named as a defendant and suit must be brought in Thurston County; *State ex rel Fleming v. Cohn*, 12 Wn2d 415, 425, 121 P.2d 954 (1942) (In case against state officer, state is a *de facto* party where action is of such character such that judgment or decree cannot be rendered without affecting material right or interest of state); *Say v. Smith*, 5 Wn. App. 677, 491 P.2d 687 (1971) (Because suit against individual state officials potentially effects material right or interest of state, action is effectively against state and must be brought in Thurston County).

Here, Hanson's claim against Carmona was essentially a claim against SEW ALTC. Accordingly, RCW 4.96.020 required Hanson to present a notice of claim to SEW ALTC as a condition precedent to suing Carmona.

D. A Plaintiff Must Exercise Due Diligence to Determine if a Potential Defendant is a Government Entity or Government Entity Employee Acting Within the Course and Scope of Her Employment, and if Hanson had Exercised Due Diligence Here, She Would Have Learned that Suing Carmona and/or Her Employer Required Compliance with RCW 4.96.010, 020.

Hanson complains that the decision of the Court of Appeals requires an injured party to identify the employer's governmental status before

bringing a suit against a tortfeasor driver, and that "this can be a problematic barrier to justice." Petition for Review, Pg. 17. This argument should be rejected because, had she exercised due diligence, Hanson would have learned the identity of Carmona's government entity employer.

On this point, *Woods v. Bailet*, 116 Wn. App. 658, 67 P.3d 511 (2003) is illuminating. There, the plaintiff, in resisting dismissal of her claim for failure to comply with RCW 4.96.020, made an argument similar to that advanced by the Hanson: that she did not understand that the defendants' employer was a government entity. Woods was a medical malpractice case where two physicians, Bailet and Rowland, performed surgery on the plaintiff, Woods. At the time of the surgery, the doctors were employed by the Pacific Hospital Preservation and Development Authority, doing business as Pacific Medical Center and Pac Med Clinics. Pac Med was created by the City of Seattle to provide free and low cost health care and was a public entity.

Woods sued the doctors on the basis of lack of informed consent. The trial court granted the doctors' motion for summary judgment on the ground that Woods had failed to comply with RCW 4.96.010. In the context of a due process challenge, which the court rejected, Woods argued she was given insufficient notice that the defendant doctors worked for a government entity and that, accordingly, the claim filing statute did not

apply. More specifically, she claimed that Pac Med's name contained no clues that would inform a person that it was a government entity. In rejecting this argument, the court stated:

> That minimal inquiry would have revealed that the doctors worked for Pac Med and that Pac Med is a quasi-municipal corporation and therefore subject to claim-filing requirements. Although the doctors performed the operation at a private hospital, they first treated Woods at a Pac Med clinic. Pac Med's website states that it is a public development authority created by the City of Seattle. Upon reading any of the broad common law definitions of "quasi-municipal corporation" quoted above, a plaintiff exercising due diligence would have discovered that RCW 4.96.010 applied to Pac Med. Again, although the inquiry was an additional burden on Woods' ability to file suit, it was not such an insurmountable barrier to relief that it violated principles of fundamental fairness in this case.

116 Wn. App. at 668.

Here, minimal inquiry would have revealed that the owner of the vehicle and Carmona's employer was a government entity. The police report for the accident identified "Enduris" as the "insurance co." for "Aging and Longterm Care, SE." CP 67. A simple Google search of the name "Enduris" would have produced a link to Enduris' website. CP 89. The Enduris website plainly identifies Enduris as a risk pool for government entities. *Id.* Indeed, Enduris claims analyst Miller settled the claim of Albi, Hanson's passenger, after he contacted Enduris and completed the appropriate RCW 4.96.020 claim form. CP 90. Had Hanson done the same,

Miller similarly would have directed her to fill out a claim form as a necessary predicate to making a claim against SEW ALTC. *Id.* But for whatever reason, that was never done.

IV. CONCLUSION

For the reasons set forth above, Respondent Carmona respectfully requests that Hansen's Petition for Review be denied.

RESPECTFULLY SUBMITTED this 18 day of June, 2021.

EVANS, CRAVEN & LACKIE, P.S.

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CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing ANSWER TO PETITION FOR REVIEW on the 18th day of June, 2021, as follows:

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