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.

RESPONDENTS' SUPPLEMENTAL BRIEF

EVANS, CRAVEN & LACKIE, P.S.
Christopher J. Kerley, WSBA #16489
818 W. Riverside Ave., Suite 250
Spokane, WA 99201
(509) 455-5200
ckerley@ecl-law.com
Attorneys for Respondents Miriam Gonzalez Carmona and John Doe Carmona

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I. INTRODUCTION

In addition to the facts, points and authorities set forth in Respondents' Answer to Hanson's Petition for Review, in the wake of this court's acceptance of review, Respondents, pursuant to RAP 13.7(d), request that the court consider the following.

II. ADDITIONAL PERTINENT FACTS

In her initial Complaint, Petitioner Kylie Hanson ("Hanson") named Miriam Carmona's ("Carmona") purported employer as a co-defendant. CP 3-8. She also alleged that the car Carmona was driving at the time of the accident was owned by Carmona's employer, that the employer allowed Carmona to use the vehicle for a business purpose, that Carmona, at the time of the accident, was operating the vehicle within the course and scope of her employment, and that, accordingly, Carmona's employer was liable for her negligence. *Id.*

In response to Carmona and SEW ALTC's Motion for Summary Judgment (CP 9-11), Hanson filed an Amended Complaint. CP 53-56. Therein, she omitted Carmona's

employer as a co-defendant and also omitted all allegations regarding the ownership of the vehicle, Carmona's operation of the vehicle in the course and scope of her employment, and Carmona's employer being vicariously liable for Carmona's negligence. *Id.*

III. ARGUMENT AND AUTHORITIES

Article II, §26 of the Washington State Constitution gives the legislature the authority to determine whether, and under what circumstances and conditions, the "state" can be sued. The legislature's 1961 abolition of sovereign immunity via RCW 4.92.092 reflects that constitutional authority. In *Kelso v. Tacoma*, 63 Wn.2d 913, 390 P.2d 2 (1964) this court recognized that municipal corporations derive their existence and authority from the state and held that, as a consequence, the state's consent to be sued per RCW 4.92.092 extended to municipalities. In 1967, the legislature enacted RCW 4.96.010, which specifically abolished sovereign immunity for local governmental entities.

Consistent with this abolition of sovereign immunity, the legislature enacted statutes requiring the state and local governmental entities to defend and indemnify governmental employees sued for acts/omissions committed while performing their official duties, limiting a plaintiff who obtains a judgment against a government employee acting in the course and scope of his/her employment to recovery from the state or local governmental entity, and establishing pre-suit notice requirements for claims against the state and local governmental entities. Because these statutes are all derived from Article II, §26, Hanson's separation of powers argument should be rejected.

Hanson's core argument is that the application of RCW 4.96.020 to a government employee, acting in the course and scope of his/her employment, is an unconstitutional extension of sovereign immunity to a private individual. Hanson emphasizes that Carmona is personally liable for violations of tort duties and that, at the time summary judgment was granted, Carmona was being sued in her "personal capacity" as the only defendant in

the lawsuit and that "[a]ll of this [was] appropriate to proceed against defendant Carmona for her personal liability, that is outside suit against the state." Petition for Review, Pg. 13.

Hanson's mistaken assumption is that Carmona could be held "personally liable" in this case. Even though Carmona was sued in her "individual and personal capacity" she, by statute, was entitled to a defense at the expense of her government entity employer and, if a judgment were to be entered against her, the Plaintiff's sole source of recovery would be from her government entity employer. See RCW 4.96.041.[1] Put another way, even where a plaintiff sues an individual municipal (or state) government employee or official in his/her purported "individual" and/or "personal" capacity, if at the time of the allegedly tortious act, the official or employee was acting within the course and scope of her employment, the plaintiff is, in reality, seeking recovery from the government entity employer.

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[1] This statute parallels RCW 4.92.060 and 4.92.070, which apply to claims against state officers and employees.

Courts from other jurisdictions have refused to allow a plaintiff to avoid the requirements of a notice of claim statute by the pleading artifice of suing the government employee or official in his/her "individual" capacity. See e.g., *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888 (1982) (a plaintiff cannot circumvent the requirements of the Idaho Tort Claims Act, including the requirement of pre-suit notice, simply by bringing a claim against a government employee in his "individual capacity"); *Rios v. Montgomery County*, 852 A.2d 1005 (Maryland 2004) (statutory pre-suit notice of claim requirement applies to actions brought against local governmental entity employees where Tort Claims Act makes local governments liable to provide a legal defense and to pay judgments for compensatory damages); *Anderson v. House of the Good Samaritan Hosp.*, 752 NY Supp. 2d 815 (NY 2002) (where municipality is required, by statute, to indemnify an employee who is found liable for negligence in the discharge of his duties or if he was acting within the course and scope of his

employment, provisions of notice of claim statute apply, even though suit has commenced against the employee individually); *McGehee v. DePoyster*, 708 So.2d 77, (Mississippi 1998) (even if government employee is sued in his individual capacity, notice of claim requirement applies if act complained of occurred within the scope and course of employment); *Poole v. Clase*, 476 NE2d. 828 (Indiana 1985) (because, under Indiana law, municipal employer was required to defend a sued employee, plaintiff required to give pre-suit notice to municipal employer).

IV. CONCLUSION

Based on the foregoing argument and authorities, and the argument and authorities set forth in her Answer to Hanson's Petition for Review, Respondent Carmona respectfully submits that the Court of Appeals' decision in this matter was correct and requests the decision be affirmed in all respects.

V. CERTIFICATE OF WORD COUNT

I certify the total word count of Respondent's Supplemental Brief, pursuant to the requirements of RAP 18.17, contain 929 words, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks.

RESPECTFULLY SUBMITTED this 1 day of November, 2021.

EVANS, CRAVEN & LACKIE, P.S.

By _____

Christopher J. Kerley, WSBA #16489
818 W. Riverside Ave., Suite 250
Spokane, WA 99201
(509) 455-5200 ckerley@ecl-law.com
Attorneys for Respondents
Miriam Gonzalez Carmona and
John Doe Carmona

CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing RESPONDENTS' SUPPLEMENTAL BRIEF on the 1 day of November, 2021, as follows:

Attorney for Petitioner	
Sweetser Law Office, PLLC	U.S. Mail [X]
Marshall W. Casey	E-mail [X]
Isaiah Peterson	Facsimile [ ]
1020 N. Washington	Hand Delivered [ ]
Spokane, WA 99201	Electronic Court Filing [X]

Christopher J. Kerley, WSBA #16489
Attorney for Respondents
Miriam Gonzalez Carmona and
John Doe Carmona

EVANS CRAVEN & LACKIE, P.S.

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