No. 99823-0

THE SUPREME COURT OF WASHINGTON

KYLIE HANSON, individually

Petitioner.

vs.

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

Respondents,

ANSWER TO ATTORNEY GENERAL AMICUS

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I. Introduction

Plaintiffs have the common law right to sue tortfeasors such as Respondent Carmona for their independent tort duties. The individual is personally liable regardless of whether the tort was committed during the individual's employment. The procedure by which the plaintiff pursues this right in court is for this Court to set. This Court set that process for commencing a case in CR 3(a). In *Waples v. Yi*, this Court held the legislature could not burden the case commencement process.

In *McDevitt v. Harbor View Med. Center*, this Court held that suits against the state are an exception to this Court's power to set the procedure for commencing a case. If the suit is against the state, then Const. Art. II sec. 26 grants the legislature the power to set the suit commencement procedures.

To fit this exception for suits against the state, the Attorney General ("AG") argues that a suit against Respondent Carmona

for an independent tort is a suit against the state. To do this, the AG wrongly argues that (1) the "state" exception should be broadly interpreted to include any agent of the state acting in the scope of their employment, (2) the "state" should include any government funds, even those they indemnify after the suit starts, and (3) because the broad interpretation of the Constitution's term "state" fits the legislative intent and government's convenience, this Court should accept that constitutional interpretation.

The United States Supreme Court rejected the first two arguments in *Lewis v. Clarke*. (1) For the purpose of the real party in interest and sovereign immunity, the sovereign is not given a broad definition. The Washington Supreme Court precedent cited by the AG involves cases in which an agent was sued for performing a governmental function such as licensing or road placement. These are not cases where the agent is sued for performing functions common to the citizens of Washington.

These cases align with the "potential liability" test in *Lewis,* proving this Court's precedent in following that test.

(2) The state's argument on indemnity is the "whence the money to pay the damages award ultimately came" test rejected in *Lewis*. Despite the appellate court decision in *Hardesty v. Stenchever*, this Court did not adopt or use the test in *Bosteder v. City of Renton.* The choice to indemnify belongs to the state. The decision is made after the case commences and is done outside the court process. While favorable to the state, it is unworkable and unfair to injured plaintiffs seeking redress.

(3) It is the duty and power of this Court to say what the constitutional definition of "state" is. This should be done for the protection of Washington's citizens. The AG asks this Court to have the constitutional meaning of "state" defined by legislative intent and government convenience. This violates the role of this Court, just like the legislature is violating the role of this Court by trying to put burdens on a plaintiff commencing a suit against an individual for their personal versus state liability.

II. Analysis

In determining whether a plaintiff is entitled to pursue a claim against an individual defendant, the Court should look to whether the individual was subject to personal liability at the time suit is brought, not whether the government will ultimately pay the damages. This will ensure that the right of an injured party to seek damages from individual tortfeasors is protected, even when it is not convenient for the government. Legislative intent is not controlling in these instances because the legislature does not have the constitutional power to define the procedural rules for suing individuals. That power belongs to the Court.

1. **The Court should apply the "potential liability" test from *Lewis v. Clarke*, since the precedent cited by the Attorney General is most consistent with that test.**

An individual is sued as the state if they are merely a stand in for the state. *Lewis v. Clarke*, 137 S. Ct. 1285, 1290, 197 L. Ed. 2d 631 (2017). The determination of individual or state depends on whether the individual was sued in their personal or official capacity. *Id.* Because of this, the court should look at where the potential legal liability actually lies. *Id.* This is the "potential liability" test. *Id.* at 1292.

a. *Hagerman v. City of Seattle* supports the "potential liability" test and not the broad claim that every action against a state agent is an action against the state

The AG starts its argument with *Hagerman v. City of Seattle*, 189 Wash. 694, 66 P.2d 1152 (1937), to broadly claim that "the state must assent to how its agent is sued." Brief p. 9. However, *Hagerman* though does not stand for this principle.

Hagerman was addressing the liability of a corporate municipality in a pre-waiver of sovereign immunity landscape. The actual holding in *Hagerman* is that a corporate municipality can only be an agent of the state if it is exercising government functions on behalf of the state. If the municipality's potential liability comes from its exercise of government functions belonging to the state, then the suit against the municipality turns into a suit against the sovereign state. *Hagerman v. City of Seattle*, 189 Wash. 694, 698–99, 66 P.2d 1152, 1154 (1937).

Common law sovereign immunity belongs to the state and only extends to local governments when they were agents exercising state power. Debra L. Stephens, Bryan P. Harnetiaux, *The Value of Government Tort Liability: Washington State's Journey from Immunity to Accountability*, 30 Seattle U.L. Rev. 35, 38 (2006). As explained by Stephens and Harnetiaux:

> When local governmental entities were found to be immune from liability for tortious acts or omissions, they were not deemed immune in their own right. Instead, their immunity was said to derive from that of the state. As a result, cities and towns were imbued with immunity when

> they were performing "governmental functions" similar to those performed by the state, unless that immunity had been waived by statute; however, if a function was "proprietary" or "corporate" in nature, that function was subject to tort liability.

Id., emphasis added.

In *Hagerman,* the money was going to come from the municipal corporation regardless of where the potential liability came from. This Court only addressed whether the potential liability came from a government or proprietary function. This aligns with the potential liability test laid out in Lewis, and not with the arguments of the AG.

The claim against Respondent Carmona arises from tort duties she owed independent of any governmental function. She is not a municipality, so *Hagerman* does not apply perfectly. However, if *Hagerman* has any relevance, it is that when the liability comes from a source other than the government function, then it is not a case against the state's liability. This supports the "potential liability" test of *Lewis*.

b. The Supreme Court cases cited by the AG support the "potential liability test."

Lawsuits brought against employees in their governmental capacity are just another way of pleading an action against the state, and are therefore actions against the state. *Lewis*, 137 S. Ct. at 1290–91. This is part of the potential liability test. The Supreme Court cases cited by the AG all involve employees named in their governmental capacity acting as proxies for the state. These employees were exercising governmental power and making governmental decisions for the state.

The following is a summary of the cases cited:

- *Deaconess Hosp. v. Washington State Highway Comm'n*, 66 Wn.2d 378, 379–80, 403 P.2d 54, 56 (1965): Washington's highway commissioner was sued for the location and construction of "state primary highway No. 2."
- *State ex rel. Robinson v. Superior Court for Spokane Cty.*, 181 Wash. 541, 541-543, 43 P.2d 993

(1935): An action against the director of agriculture about the license suspension of an ice cream a business.

- *Wiegardt v. Brennan*, 192 Wash. 529, 530, 73 P.2d 1330, 1330 (1937): Action brought against the state director of fisheries on his order about clamming on property.
- *State ex rel. Fleming v. Cohn*, 12 Wn.2d 415, 416, 121 P.2d 954, 955 (1942): Action against the director of licenses for Washington to give relators their license.

Each of these cases was based on the potential liability coming from a recognized state governmental action. This is particularly clear in *State ex rel. Robinson* where the whole jurisdiction issue turned around whether the agricultural director was acting within an authorized delegation of legislative power. This court determined that the agricultural director was outside of delegated state power and was therefore not being sued for

using governing powers. Under such circumstances, the action is one against an individual and not against the state. *State ex rel. Robinson*, 181 Wash. At 543.

These cases support the "potential liability" test laid out in *Lewis*. When the person was sued for the use of their "official capacity," then it was a case against the state. This is exactly the same as the holding by the United States Supreme Court in *Lewis*.

2. The Court should reject the "whence the money to pay the damages award ultimately came" test that the AG recommends be done by looking at indemnity and changes in the judgement lien after the suit commences

The AG says that because the local government decided to defend Carmona individually this compels a finding that the state is the new Defendant. The Attorney General is essentially asking the Court to substitute a new party based on where the money will come to pay the damages. This is the from "whence the money to pay the damages award ultimately came" test that was rejected as unworkable by the United States Supreme Court

in *Lewis v. Clarke*, 137 S. Ct. 1285, 1287, 197 L. Ed. 2d 631 (2017).

a. Indemnification that then changes the judgment lien at the end cannot determine the real party in interest because indemnification occurs after the case commences outside the court process

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *McDevitt v. Harbor View Med. Ctr.,* 179 Wn.2d 59, 76, 316 P.3d 469, 478 (2013), J. Chambers' concurrence, quoting *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wash.2d 974, 979, 216 P.3d 374 (2009) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803)). "The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide." Const. Art. IV., sec. 1.

The local government's determination of whether to indemnify an employee is made after the employee is sued, and only upon the employee's request. RCW 4.96.041; *Eugster v. City of Spokane*, 115 Wn. App. 740, 745–46, 63 P.3d 841, 844 (2003). The decision to defend and indemnify the employee is then done by the legislative authority or local government entity. RCW 4.96.041(2).

The AG's argument is that this indemnity process and change in the judgment lien which occurs after the CR 3(a) filing and without any court or plaintiff input is a binding decision that this an action against the state. The AG argues that this is in the government's best interest, but unfortunately does not tell this Court how it furthers the injured plaintiff's interests, or at the least does not interfere with the plaintiff's right to access the courts.

The AG's argument on indemnity limits a plaintiff's right to access the court and commence a case under CR 3(a). If the government's indemnification decision determines whether a

suit is against the state, then the government can retroactively void an otherwise proper suit against an individual tortfeasor.

The AG's argument also removes from the court all decisions on who the real party in interest is. Whether the local government got the indemnity decision right is determined outside the court, and outside of any input from the plaintiff. This would allow local governments to force courts to accept their decisions about whether a suit is against the state or a private individual. That violates the constitution.

Along with this, the AG's argument that indemnity turns an individual into the state is unworkable in general. The AG does not explain what happens if the legislature changes the indemnity rules, but retains the pre-suit notice requirement. Does that make it unconstitutional? If the local government extends contractual indemnity to a private contractor or engineer? Does that indemnity turn the private contractor or engineer into a state entity?

The decisions on who pays for liability are often made outside of the court system. For example, this is often done through an insurance contract for defense and indemnity. Those do not change the real party in interest from the liable party to the insurance company. "Whence the money to pay the damages award ultimately came" through indemnity is not a proper test and is unworkable. *Lewis*, 137 S. Ct. at 1287.

b. This Court did not use "Whence the money to pay the damages award ultimately came" in *Bosteder v. City of Renton* even though the Court of Appeals had already used it in *Hardesty v. Stenchever*

The AG relies heavily on the appellate case of *Hardesty v. Stenchever*, 82 Wn. App. 253, 917 P.2d 577 (1996), to argue this "whence the money to pay the damages award ultimately came" test turns an individual into the state. This Court chose not to follow *Hardesty's* logic on this matter in *Bosteder v. City of Renton*, 155 Wn.2d 18, 59, 117 P.3d 316, 336 (2005). As noted by the AG, Justice Fairhurst relied on *Hardesty's* logic, but she

ended up in the minority on that issue. Brief p. 21; *Wright v. Terrell*, 162 Wn.2d 192, 195, 170 P.3d 570, 571 (2007).

At the time of *Bosteder* in 2005, the state and local governments were required to indemnify their employees.

The appellate decision of *Hardesty* in 1996 had used these indemnification requirements, and whence the money to pay the damages ultimately comes to determine a suit against the employee was a suit against the state. *Hardesty*, 82 Wn. App. at 260-261. However, the claim notice statute in 1996 said it applied to the state, and omitted employees and agents from its determination.

Bosteder addressed whether there was legislative authority to require claim notice for employees. In doing this, J. Fairhurst used *Hardesty* to argue that suits against individuals were suits against the state, since that is where the money ultimately came from. *Bosteder,* 155 Wn.2d at 41. J. Fairhurst though ended up being in the minority on this issue, and the holding of the court

rejected the principal that the state's indemnity creating the state as the real party in interest. *Wright*, 162 Wn.2d at 195.

Bosteder was testing the legislative intent of the claims notice statute, and not its constitutionality. *Bosteder*, 155 Wn.2d at 59. J. Ireland concurrence. This current case is the constitutional test and if "whence the money to pay the damages award ultimately came" was not sufficient for the legislative intent test it should not be applied in the constitutional separation of powers issue here. This Court has already refused to apply *Hardesty*, and it should refuse to do so here.

3. The Court, not the legislature, determines the constitutional meaning of "state," and it should define the term in a way that protects Washington's citizens.

"It is the function of the judiciary to test legislation against constitutional restrictions. Courts do not review the wisdom of legislative acts or the policy contained therein." *Bosteder* 155 Wn.2d at 59, J. Ireland concurrence/dissent. This Court's

essential judicial function is to decide whether challenged acts or omissions violate the constitution, even when making that decision is difficult. *Colvin v. Inslee*, 195 Wn.2d 879, 903, 467 P.3d 953, 966 (2020), J. Gonzalez dissenting.

The legislature can change the substantive law defining the primary rights of parties. *Waples*,169 Wn.2d at 161. The procedure though by which those rights are effectuated belongs to the court. *Id. Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 980, 216 P.3d 374, 377 (2009)

Respondent Carmona is a tortfeasor who ran a red light and injured Appellant Hanson. Regardless of her employer, Respondent Carmona has personal liability in this matter. *See Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 400, 241 P.3d 1256, 1267 (2010). The substantive law as it stands today is that suit may be brought against Respondent Carmona for her personal liability without including her employer. *See Orwick v. Fox*, 65 Wn. App. 71, 80, 828 P.2d 12, 18 (1992)

(holding the city employer was not a necessary party to sue the city employee).

The legislature here added a procedural requirement before a plaintiff could access courts and commence an action against Respondent Carmona. This violates the separation of powers doctrine as held by *Waples* and places a burden on Appellate Hanson's right to access the court.

The AG spends pages 18-23 of their brief discussing legislative intent behind RCW 4.96.020 adding employee to the language. Then the AG spends pages 32-35 arguing why following the Constitution will be inconvenient for the government. Those are not at issue. No amount of intent or government inconvenience can validate unconstitutional legislation. The constitution is designed to protect the individual rights or Washington citizens and not government convenience. Const. Art. I, sec. 1.

III. Conclusion

The separation of powers doctrine is a genius of the American system, developed at our foundation. Madison, James, *Federalist Papers No. 34* (1788). It was developed to protect us against corrupt government, and should not be set aside due to convenience or legislative intent. Governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights. Const. Art. 1, sec. 1. The separation of powers is part of this, and cannot be superseded by legislative intent, government convenience, or the Attorney General. This Court is asked to vindicate its power here and protect Ms. Hanson's right to access the court regardless of the AG's opposition to her rights.

In submitting this brief, I certify that the number of words contained in the document, 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 are 3,041.

Respectfully submitted this 16th day of February, 2022.

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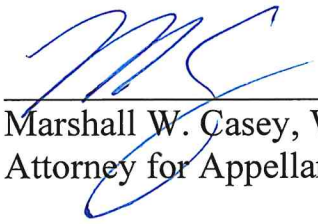

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