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,

PETITIONER'S SUPPLEMENTAL BRIEF

Marshall Casey, WSBA #42552
1020 N. Washington
Spokane, WA 99201
(509) 499-4811
Attorney for Petitioner

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I. INTRODUCTION

A case against an employee for her/his personal liability is not a case against a sovereign state as held by the United States Supreme Court in *Lewis v. Clarke*, 137 S. Ct. 1285, 1288, 197 L. Ed. 2d 631 (2017). The court of appeals decision relied on *McDevitt v. Harbor View Med. Ctr.* 179 Wn.2d 59, 68, 316 P.3d 469, 476–77 (2013) to determine the legislature could determine the manner in which an employee is sued for her/his personal liability. *McDevitt* only addressed the power of the legislature to determine how a named state agency could be sued.

The *Lewis* court faced almost the exact same issue as in this case. A limousine driver was working as an employee of a Native American tribe when he hit and injured another driver on the road. The employee was sued for his individual personal liability. The employee claimed the suit was actually against the sovereign tribe since (1) he was the tribe's employee, and (2) he was indemnified by the tribe. The *Lewis* court denied both these

arguments, instead holding that it was a claim against an individual and not the sovereign.

McDevitt was a narrow decision that held the legislature could determine how an arm of the state, Harbor View Medical Center could be sued. It based this decision on both sovereign immunity and Const. art. 2, sec. 26. *Lewis* and Washington law show that employees are personally liable for automobile collisions and can be sued without implicating the state. As recognized by *Lewis*, the state is not a party to this suit even by an indemnity agreement with the employee.

The legislature's power is to decide the manner in which the state is sued. The court's inherent power is to decide the procedure for commencing suit against everyone else. Since this is not a suit against the state, it violates the separation of powers to have the legislature decide the manner in which the cause of action can commence against Defendant Carmona.

II. RELEVANT FACTUAL SUMMARY

The original complaint in this matter named Defendant Carmona in her personal capacity. *CP 3-4*. It also named the SOUTHEAST WASHINGTON OFFICE OF AGING AND LONG TERM ADVISORY COUNCIL as a "domestic non-profit corporation organized to do business in the state of Washington." *CP 4*. This complaint did not claim relief against the state, and did not allege that this defendant was a state agency.

Following the declaration of Lori Brown that Southeast Washington Office of Aging and Long Term Council of Governments was a state agency the complaint was amended to only request relief against Defendant Carmona. *CP 53-55*.

At summary judgment Plaintiff Hanson sought relief against Defendant Carmona. *CP 61*. On appeal Plaintiff Hanson requested relief against Defendant Carmona.

III. ANALYSIS

(A) A case against an employee in their individual capacity is not a case against the sovereign state. (B) An indemnity agreement does not change the case into one against the state. (C) The appellate court and this court have interpreted Const. art. 2, sec. 26 and the separation of powers doctrine only in relation to named state agencies.

A. A Case Against an Employee in Their Individual Capacity is Not a Case Against the Sovereign State

Suits against an employee in their individual capacity are not suits against the sovereign state. *Lewis v. Clarke*, 137 S. Ct. 1288, 197 L. Ed. 2d 631 (2017). The *Lewis* court distinguished between suits filed against an agent of a sovereign in their official capacity, and ones filed against the employee in their individual capacity. *Id.* at 1290-1291. Official-capacity claims seek relief from the official's office, and thus the sovereign state. In

contrast, suits against individuals seek to impose individual liability upon the employee themselves. *Id.* at 1291.

The *Lewis* court looked at the substitution of the employee as a good test whether the case against the employee was in his/her individual capacity versus official capacity. If an employee is sued in their official capacity and leaves their position then their successor takes their place in the litigation. *Id.* In contrast, an employee sued in their personal capacity always has their same position in the lawsuit regardless of their employment. *Id.* Employees "sued in their personal capacity come to court as individuals." *Id.*, citation omitted.

The *Lewis* case is exactly on point here. Clarke was driving a limousine for the Mohegan Tribe of Indians of Connecticut when he got in an automobile accident in Connecticut. *Id.* at 1289. Lewis sued Clarke in his individual capacity for his liability in violating the traffic laws. In response Clarke claimed immunity because he was an employee of a sovereign tribe. *Id.*

Clarke claimed that the sovereign tribe was the real party in interest since he was its employee. The *Lewis* court rejected this argument. The *Lewis* court was clear that extending sovereign immunity to employees goes beyond the common-law sovereign immunity principals. *Id.* at 1292.

Pre-suit notice to the government is a remnant of Washington's waiver of sovereign immunity. 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, 41 (2006); see *McDevitt*, 179 Wn.2d at 64-68; *Myles v. Clark Cty.*, 170 Wn. App. 521, 528, 289 P.3d 650, 654 (2012) ("[P]resuit claim filing requirements of ch. 4.96 RCW derive from an appropriate and lawful exercise of legislative authority to conditionally waive sovereign immunity.")

Washington's treatment of the sovereign immunity before its waiver shows it agrees with the United State's Supreme Court in *Lewis*. Suits against an individual employee for his/her

independent tort were allowed, and only the state agency would be dismissed based on sovereign immunity.

In *Hutton v. Martin*, 41 Wn.2d 780, 252 P.2d 581 (1953) a garbage truck driver employed by the City of Grandview hit and killed another driver. The case went to trial and a jury returned a verdict against both the driver and the City. *Id.* at 782. The trial court then dismissed the City as sovereignly immune, but left the judgement against Martin as the defendant driver. *Id.* at 782.

On appeal the employee driver challenged the error of the jury instructions in regards to the rules of the road. *Id.* at 786-791. However, the employee driver clearly did not claim it was a suit against the state and thus he was sovereignly immune. Along with this, the court never even mentions the issue as possibly applying. It was so well settled that sovereign immunity only applied to the state and not individual employees that no one even raises it for the employee driver.

The party that did claim sovereign immunity was the named city. The *Hutton* court analyzed whether or not the city was sued as a state entity, and it determined that municipal corporations only had immunity "in the exercise of those governmental powers and duties imposed upon them as representing the state." *Id.*

Both *Lewis* and *Hutton* show that merely being an employee of the state does not make claims against you claims against the state. Defendant Carmona is independently liable here for this collision, and just because she is employed by a governmental agency does not make the state a party to the suit.

B. Indemnity Agreements Do Not Change This Into A Case Against The State

In *Lewis* the United States Supreme Court determined that indemnity provisions do not convert the case into one against the sovereign. *Lewis,* 137 S. Ct. at 1292. The *Lewis* court points out that unlike tort liability, states institute indemnification policies

voluntarily, and they are not generally self-executing. *Id.* at 1293-4.

The *Lewis* court looked at an interesting issue that would come up if indemnification were to change the real party in interest. Indemnification can be done by anyone including two different sovereign states. For instance, in *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 426, 117 S. Ct. 900, 902, 137 L. Ed. 2d 55 (1997) the federal government had indemnified a state instrumentality. If the indemnity agreement had changed the real party in interest, then the 11th amendment would not have applied to protect the state instrumentality from federal court. The Supreme Court in *Regents* determined that indemnity did not change the real party interest, and thus the rights of the parties. *Id.*

In *Lewis*, the *Regents'* issue was used to show how looking at indemnity, versus the real party in interest can actually mess with the legal analysis on a party's fundamental rights. *Lewis,*

137 S. Ct. at 1292. The court should look at who the judgment will bind since it is the parties' rights that are affected. *Id.*

Defendant Carmona has argued that because RCW 4.96.041(1) allows an employee to request the local government to defendant her, it makes the state a real party in interest. However, RCW 4.96.041(2) is clear that this is not the case since it says, "[a]ny monetary judgment against the officer, employee, or volunteer shall be paid on approval of the legislative authority of the local governmental entity or by a procedure for approval created by ordinance or resolution." Emphasis added.

Importantly, RCW 4.96.041's extension of indemnity is completely outside the litigation process. Unlike the tort claim which is triggered by the plaintiff making a complaint, indemnity here is triggered by the defendant employee requesting it from the local government. RCW 4.96.041(1). Also unlike the tort claim, the decision to grant indemnity is outside the court process, since it is done by the legislative body of the local government. RCW 4.96.041(2).

Having this indemnity process create a claim against the state puts the plaintiff outside the protection of the court system. The indemnity process involves only the employee and the legislative body of the local government agency. According to Defendant Carmona's argument, if those non-court processes act in a certain way, then they convert this claim into one against the state and move the power to determine court procedures into the hands of the legislature. This would be fundamentally unfair to all the injured parties of Washington.

The real parties in interest are the ones the judgment will bind. It is them who the court is to give access to, and their rights that the court is to protect. See *Putman v. Wenatchee Valley Med. Ctr.,* P.S., 166 Wn.2d 974, 979, 216 P.3d 374, 376 (2009). "The critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab." *Lewis*, 137 S. Ct. at 1292–93.

C. Const. art. 2, sec. 26 Has Allowed the Legislature to Only Decide How Named State Agencies Are Sued

The appellate court and this court have both ruled on when the legislature has the power under Const. art. 2, sec. 26 to create pre-suit notice requirements without violating the separation of powers doctrine. *Myles v. Clark Cty.*, 170 Wn. App. 521, 529, 289 P.3d 650, 654 (2012); *McDevitt v. Harbor View Med. Ctr.*, 179 Wn.2d 59, 68, 316 P.3d 469, 476–77 (2013). In both of these cases the opinions only relate to the named state agency.

In *Myles* the trial court had dismissed Clark County because of the lack of pre-suit notice. *Myles,* 170 Wn. App. at 526-7. The appellate court was asked to invalidate RCW 4.96.020 because it conflicted with CR 3(a) and violated the separation of powers doctrine. The court of appeals held that the Const. art. 2, sec. 26 empowered the legislature to determine the manner in which suits may be brought against the state, and therefore pre-suit notice before suing the county was a proper exercise of legislative authority. *Id.* at 528.

While *Myles* does not directly address the status of a county as a state agency, the appellate court was following the long tradition in Washington that counties are geographical subdivisions of the state. Debra L. Stephens, Bryan P. Harnetiaux, 30 Seattle U.L. Rev. at 42 (2006). *Myles* only addressed the right of the legislature to say how a subdivision of the state is sued as a named defendant. *Myles* does not allow the legislature to restrict how non-state parties are sued.

Likewise in *McDevitt*, this court looked at a suit that named "a state agency and arm of the state", Harbor View Medical Center. *McDevitt*, 179 Wn.2d at 74. The holding of *McDevitt* was clear that "presuit notice requirement of former RCW 7.70.100(1) as applied to the State is a constitutional application of law under article II, section 26 of the Washington Constitution." *McDevitt*, 179 Wn.2d at 76, emphasis added.

Const. art. 2, sec. 26 did not grant the legislature general power to determine "what manner, and in what courts" everyone

may be sued. Instead, it limited the legislative grant to only sues that are brought "against the state."

The appellate court in *Myles* and this Court in *McDevitt* have upheld legislative power to set pre-suit notices when the state, or state agencies are named. Defendant Carmona is an individual who is personally liable for her tort regardless of her employer. *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 400, 241 P.3d 1256, 1267 (2010). Defendant Carmona was not named as a state agency, but as an individual.

CONCLUSION

Plaintiff Hanson claimed relief against Defendant Carmona. As briefed prior, this claim is against Defendant Carmona in her individual capacity and for her personal liability. Sovereign immunity and Const. art 2, sec. 26 apply only when the state is a real party in interest, and not when they are merely

an indemnifier. The United States Supreme Court has addressed this in *Lewis v. Clarke* and its reasoning should be adopted here.

Respectfully submitted this 4th day of November, 2021.

I certify that the words in this document, exclusive of the items identified in RAP 18.7 are 2,271.

Marshall W. Casey, WSBA #42552
Attorney for the Petitioner Hanson

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 4th day of November, 2021, I cause a true and correct copy of the foregoing document to be delivered via the Washington State Appellate Court's Secure Portal Electronic Filing System and via the following Method

Christopher J. Kerley Counsel for Respondents		SENT VIA EMAIL: ckerley@ecl-law.com

Dated this on 4th of November, 2021.

Marshall W. Casey

M CASEY LAW

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Address:
1020 N WASHINGTON ST
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