FILED
SUPREME COURT
STATE OF WASHINGTON
1/24/2022 10:51 AM
BY ERIN L. LENNON
CLERK

NO. 99823-0

SUPREME COURT OF THE STATE OF WASHINGTON

KYLIE HANSON, individually,

Respondent,

v.

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

Appellants.

AMICUS CURIAE BRIEF OF STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

Sara Cassidey, WSBA #48646
Assistant Attorney General
PO Box 40126
Olympia, WA 98504-0126
(360) 586-6328
OID #91023
sara.cassidey@atg.wa.gov

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

At issue in this case is whether the tort claim notice requirements in RCW 4.96 are valid under the separation of powers doctrine as applied to suits against local government employees acting in the scope of their employment. The issue raised here, however, also implicates the constitutional validity of such pre-suit notice requirements in RCW 4.92 as applied to suits against state employees acting in the scope of their employment. This is because both RCW 4.96 and 4.92 were enacted by the Legislature pursuant to its authority under article II, section 26 of the Washington Constitution. The State of Washington, which receives thousands of pre-suit tort claim filings every year pursuant to RCW 4.92, therefore has a substantial interest in the decision to be rendered in this case. *See* State Mot. for Leave to File Amicus Curiae Br. at 2-3.

In light of the implications on RCW 4.92 that any decision in this case will have, the State submits this amicus brief to assist the Court in understanding (1) the complete context in which pre-

suit tort claim notice requirements operate (including the historical context of such requirements as applied to the State and its employees), and (2) the difference between state sovereign immunity (as recognized by Washington appellate courts and the Washington legislature) and tribal sovereign immunity (as recognized by the United States Supreme Court). The State seeks to demonstrate the correctness of the Court of Appeals' decision in this case, as well as the negative effect that any reversal of that decision will have. This Court should affirm and hold that the pre-suit tort claim notice requirements of RCW 4.96 validly apply where a plaintiff seeks to bring a cause of action against a local government employee acting within the scope of their employment.

II. BACKGROUND ON STATE TORT CLAIM PROCESS

The Washington Constitution expressly reserves for the Legislature the power to enact laws related to how and where the State may be sued: "The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the

state." Const. art. II, § 26. In 1961, the Legislature acted pursuant to that authority and waived the State's sovereign immunity. *See* Laws 1961, ch. 136, § 1; *see also* Laws 1963, ch. 159, § 2. Currently, the waiver provides: "The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." RCW 4.92.090; App. 4.

That waiver, however broad, is conditional. In 1963, the Legislature required that an aggrieved party seeking damages arising out of tortious conduct by the State must comply with pre-suit claim filing procedures prior to initiating an action. *See* Laws 1963, ch. 159, §§ 3-4. Those statutory requirements have been amended many times and are codified in RCW 4.92.100 and .110. In 2006, the Legislature amended both statutes to expressly include tort claims against the State's employees acting in such capacity. *See* Laws 2006, ch. 82, §§ 1-2.

RCW 4.92.100(1) now requires "[a]ll claims against the state, or against the state's officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct, must be presented to the office of risk management." App. 5. RCW 4.92.110 requires that presentment occur 60 days before suit is filed. App. 7.

A purpose of these requirements is to allow the State time to engage in a "prompt and thorough investigation of claims and claimants, and careful evaluation of the potential costs and advantages of litigation or settlement." *Williams v. State*, 76 Wn. App. 237, 248, 885 P.2d 845 (1994); *see also Medina v. Public Utility Dist. No. 1 of Benton Cnty.*, 147 Wn.2d 303, 310, 53 P.3d 993 (2002) (acknowledging the same purpose of claim filing statutes as to local governmental entities).

Whenever an action or proceeding for damages is instituted against a state employee "arising from acts or omissions while performing, or in good faith purporting to perform, official duties" the employee "may request the attorney

general to authorize the defense of said action or proceeding at the expense of the state." RCW 4.92.060; App. 1. If the attorney general finds that the employee's acts or omissions were, or were purported to be "in good faith, within the scope of that person's official duties," then the request for individual defense will be granted. RCW 4.92.070; App. 2. In those cases, "the attorney general shall appear and defend" the employee, who shall assist and cooperate in the defense of such suit. *Id.* When any judgment is entered against a state employee acting within the scope of his or her official duties, "thereafter the judgment creditor shall seek satisfaction *only from the state*, and the judgment shall not become a lien upon any property of such officer, employee, or volunteer." RCW 4.92.075 (emphasis added); App. 3.

The totality of the provisions of RCW 4.92 have been recognized and incorporated by reference in court rule. CR 17(f).

III. ARGUMENT

Plaintiff Hanson's only constitutional challenge against RCW 4.96.020(4), the pre-suit tort claim notice requirement

applicable to local governments, is one under the separation of powers doctrine. *See* Pet. at 1-3; *Hanson v. Carmona*, Case No. 37419-0-III, slip op. at 14 (Mar. 9, 2021). Where legislation is a valid expression of the Legislature's article II, section 26 authority, however, there is no separation of powers problem. *Compare McDevitt v. Harborview Med. Cntr.*, 179 Wn.2d 59, 68, 72-75, 316 P.3d 469 (2013) (former RCW 7.70.100(1)'s pre-suit notice requirement was a valid enactment by the Legislature under article II, section 26 as applied to suits against the State), *with Waples v. Yi*, 169 Wn.2d 152, 155, 234 P.3d 187 (2010) (invalidating former RCW 7.70.100(1)'s pre-suit notice requirement as applied to suits against private parties).

Legislation enacted under article II, section 26 is valid so long as its reach is commensurate with the scope of sovereign immunity. Sovereign immunity, in turn, protects government employees when the State or local government is the real party in interest in the action.

Here, South East Washington Aging and Long Term Care (SEW-ALTC) – not Defendant Carmona – is the real party in interest to Hanson's negligence claim. This is because Carmona acted in the scope of her employment, is defended by SEW-ALTC, and her alleged conduct exposes funds of SEW-ALTC without any lien possibly attaching to Carmona's property. *See* RCW 4.96.041. Accordingly, RCW 4.96.020(4) validly applies here without violating the separation of powers doctrine.

Indeed, a majority of this Court has seemingly already acknowledged the Legislature's authority to enact such conditions precedent as to suits against government employees. *See Bosteder v. City of Renton*, 155 Wn.2d 18, 117 P.3d 316 (2005). The Legislature exercised that authority immediately after the *Bosteder* decision by amending RCW 4.92 and 4.96 to clarify its intent that such pre-suit notice requirements apply to government employees acting in such capacity. *See* Laws of 2006, ch. 82, §§ 1-3.

Further, neither the recent decision of the United States Supreme Court in *Lewis v. Clarke,* 137 S. Ct. 1288, 197 L. Ed. 2d 631 (2017), which relates to the scope of tribal sovereign immunity under federal law, nor the pre-sovereign immunity waiver decision in *Hutton v. Martin*, 41 Wn.2d 780, 252 P.2d 581 (1953), which relates to city liability when acting in a proprietary as opposed to governmental capacity, is controlling here.

Finally, a decision reversing the Court of Appeals would ignore decades of precedent by Washington appellate courts and unanimous action by the Washington legislature. It would also negate the very purpose of claim filing statutes, thereby undermining the public policy and comprehensive statutory schemes enacted in RCW 4.92 and 4.96.

This Court should affirm.

A. Washington Precedent Has Long Recognized Claims Against Government Employees Acting in the Scope of Their Employment Are Claims Against the Government

Under the doctrine of sovereign immunity, it would defy logic and reason to conclude that a suit against an agent of the

State is not a suit against the State requiring consent. *See Hagerman v. Seattle*, 189 Wash. 694, 697, 66 P.2d 1152 (1937) ("since the state may not be sued without its consent, therefore its agent cannot be"). Put another way, where the State or local government is the real party in interest, sovereign immunity is implicated and statutory conditions precedent to filing suit enacted under article II, section 26 validly apply.

Prior to 2005, these principles were amply demonstrated by opinions from both this Court and the Court of Appeals. *See, e.g.*, *Hagerman,* 189 Wash. at 697; *Hardesty v. Stenchever*, 82 Wn. App. 253, 258-62, 917 P.2d 577 (1996), *review denied* 130 Wn.2d 1005 (1996). These seminal cases are discussed below.

1. Opinions of this Court

In 1937, this Court recognized that "[t]he state is sovereign, and the municipality is its governmental agency; *since the state may not be sued without its consent, therefore its agent cannot be.*" *Hagerman*, 189 Wash. at 697 (emphasis added). *Hagerman* involved an auto accident caused by a negligent city

employee operating a city truck for the city's health department; the plaintiff sued only the city, which claimed immunity for engaging in a governmental function.[1] *Id.* at 694-96. This Court agreed that the immunity applied. *Id.* at 704.

Over 25 years later, in *Kelso v. City of Tacoma*, another auto liability case, this Court recognized the agency reasoning of the *Hagerman* decision. 63 Wn.2d 913, 914, 390 P.2d 2 (1964). "The common-law right of sovereign immunity is not in the municipality but in the sovereign from which the immunity is derived." *Id.* at 916. "Their immunity, like their sovereignty, is in a sense borrowed, and the one is commensurate with the other." *Id.* at 917. Because *Kelso* was decided after the 1961 waiver of state sovereign immunity, the Court determined that the defendant city was subject to liability for its tortious conduct, if any, during the automobile collision. *Id.* at 918-19 ("'If the

[1] Historically, sovereign immunity only applied to local governments for governmental functions, not proprietary functions. The distinction was abrogated by the waiver of sovereign immunity. *See* RCW 4.96.

immunity of the State is destroyed, . . . there is no basis for holding that the county, as a civil division of the State, is still immune.'" (quoting, *Holmes v. Erie County*, 266 App. Div. 220, 42 N.Y.S.2d 243 (1943))).

Thus, by analogy, just as a local government as a division of the State derives its sovereignty from the State, so too do state and local government employees when acting on behalf of their employers. And, just as a local government loses sovereign immunity when the State waives sovereign immunity, so too do state and local government employees.

The year after *Kelso*, this Court decided whether former RCW 4.92.010, requiring suits against the State to be filed in Thurston County, applied to a suit filed in Spokane County that sought to enjoin certain state officials from locating and constructing a state highway. *Deaconess Hosp. v. Wash. State Highway Comm'n*, 66 Wn.2d 378, 403 P.2d 54 (1965). Although the Court split over whether former RCW 4.92.010 applied and

thereby divested Spokane County of jurisdiction,[2] the Court agreed the relevant question was "[w]hether the sovereign state is the real party in interest to the action" despite the action having been brought solely against state officials. *Id.* at 388-89 (Hale, J., minority opinion on jurisdiction, discussing *State ex rel. Robinson v. Superior Court*, 181 Wash. 541, 43 P.2d 993 (1935); *State ex rel. Robinson v. Superior Court*, 182 Wash. 277, 46 P.2d 1046 (1935); *Wiegardt v. Brennan*, 192 Wash. 529, 73 P.2d 1330 (1937); *State ex rel. Fleming v. Cohn*, 12 Wn.2d 415, 121 P.2d 954 (1942)); *Id.* at 381-84 (Hamilton, J., majority opinion on jurisdiction, discussing same).

[2] In 1965, former RCW 4.92.010 was considered to be a statute of jurisdiction and not merely one of venue. *See J.A. v. State Dep't of Soc. & Health Servs.*, 120 Wn. App. 654, 660, 86 P.3d 202 (2004) (discussing early cases interpreting former RCW 4.92.010). That changed after amendments to the statute in 1973 and recognition by Washington appellate courts that purported restrictions on the subject matter jurisdiction of the superior courts would violate article IV, section 6 of the Washington Constitution. *See* Laws of 1973, ch. 44, § 1; *J.A.*, 120 Wn. App. at 660-61.

2. Opinions of the Court of Appeals

Six years after *Deaconess Hospital*, the Court of Appeals likewise addressed the application of former RCW 4.92.010 to state officials. *See Say v. Smith*, 5 Wn. App. 677, 491 P.2d 687 (1971). There, the plaintiffs had sued two state officials in Pierce, not Thurston, County without also naming the State as a defendant. *Id.* at 678. The *Say* court reaffirmed that

> "the state, while not named as a party, may be considered a party to an action brought against its officers only when the action is of such a character that a judgment or decree cannot be rendered therein without affecting some right or interest in a material sense valuable to the state as an entity, so that the decree of judgment effectively operates against the state, rather than the officers sued."

Id. at 682 (quoting *State ex rel. Fleming*, 12 Wn.2d at 425). Applying that test, the *Say* court held:

> [T]his action is of such a character that the only effective judgment – from the plaintiffs' standpoint – which could be entered in this case would necessarily affect a right or interest of the state as an entity in a material sense; *namely, the expenditure level and overall use of general fund revenues, title to which lies in the people of the state as a whole.*

Id. at 682 (emphasis added).

Twenty-five years later, the Court of Appeals applied a similar test when considering whether the tort claim requirements of former RCW 4.92.100 and .110 applied to state employees acting in the scope of their employment. *Hardesty*, 82 Wn. App. at 258-62. In *Hardesty*, a patient brought a medical negligence claim against the State, UW Medical Center, and a physician employed by UW Medical Center. *Id.* at 256. The trial court dismissed the claims against the State and UW Medical Center because the plaintiff failed to comply with the tort claim filing requirements in former RCW 4.92.110, which only expressly referred to the State. *Id.* But, the trial court allowed the claim to go forward against the physician, finding that he acted in his "individual capacity" when he made decisions about the patient's medical care. *Id.* at 256, 260. The Court of Appeals reversed, concluding that the physician's actions were performed within the scope of his official duties at UW. *Id.* at 260.

It is apparent that the Court of Appeals in *Hardesty* was concerned with identifying whether the State, though no longer

a defendant, was nonetheless the real party in interest in the litigation against the state-employed physician. Of note, the court recognized that (1) under RCW 4.92.060, state employees performing official duties had the right to ask for defense at state expense; (2) under RCW 4.92.070, the attorney general was obligated to grant the request if he or she finds the employee acted in good faith in the scope of their official duties; and (3) under RCW 4.92.075, after the attorney general has represented the employee and a judgment is entered, the judgment creditor was limited to seeking satisfaction from the State and could not put a lien on the employee's property. *Id.* at 260-61.

The Court of Appeals also rejected a "tortured reading of the statute" proffered by the plaintiff under which a person's "scope of employment" would *not* be tantamount to the person's "official duties." *Id.* at 261. The court explained:

> Clearly, [the physician] performed the actions upon which [the patient] bases her claim entirely within the scope of his employment at the UW. As a physician at the UW, treating patients is his "official" duty. He has no others. Under RCW 4.92,

> the attorney general is required to defend him and satisfy any judgment against him. The suit, therefore, exposes state funds to liability, making this *precisely the type of case to which RCW 4.92 applies.* If, as [the patient] argues, [the physician] is liable only in his individual capacity and not as an employee of the UW and the State, she would have no basis upon which to assert a claim against the institutional defendants.

Id. at 261 (emphasis added). Thus, under *Hardesty*, a state employee's official duty – and thus official capacity – is equivalent to the scope of their employment.

The Court of Appeals reaffirmed this principle as recently as 2003, by extending *Hardesty's* reasoning to former RCW 4.96. *Woods v. Bailet,* 116 Wn. App. 658, 666, 67 P.3d 511 (2003). Similar to *Hardesty,* the plaintiff in *Woods* sued physicians employed by a local governmental entity without first filing a tort claim with that entity. *Id.* at 661. The claims all stemmed from the physicians' conduct performed within the scope of their duties as employees. *Id.* In affirming the dismissal of the suit for failure to comply with former RCW 4.96.010, the court explained:

> [The local governmental entity] itself is protected by the claim-filing statute, and [its] funds are exposed to liability by lawsuits against its doctors for acts committed within the scope of their employment. Accordingly, in this case, as in *Hardesty*, the claim-filing statute applies to a lawsuit against [the local governmental entity's] doctors to the same extent that it would apply to a lawsuit against [the entity].

Id. at 666-67.

In sum, Washington appellate courts have long been unified in their understanding of the governing standards that determine whether the State is the real party in interest to litigation and thus whether the State's sovereignty, and conditional waiver thereof, has been implicated. This Court should apply those same standards here.

It is undisputed in this case that Carmona was acting in the scope of her employment with SEW-ALTC at the time of the accident.[3] *See Hanson*, slip op. at 3. Because SEW-ALTC can

[3] While this case arises from an order on summary judgment, a plaintiff cannot utilize artful pleading to circumvent the claim filing requirements of RCW 4.92 and 4.96. *See Deaconess Hosp.*, 66 Wn.2d at 389 (Hale, J., minority opinion

only act through its employees and agents, because the suit against Carmona for conduct taken in the scope of her employment entitles her to defense at SEW-ALTC's expense, and because that suit exposes only SEW-ALTC's funds to liability, *see* RCW 4.96.041, SEW-ALTC is the real party in interest in this suit. As SEW-ALTC is a local governmental entity, Hanson needed to comply with the claim filing requirement of RCW 4.96.020(4) in order to avail herself of the conditional waiver of SEW-ALTC's sovereign immunity.

B. In Response to this Court's Decision in *Bosteder,* the Legislature Swiftly Clarified Its Intent that RCW 4.92 and 4.96 Apply to Government Employees

In addition to the well-established precedent discussed above, the Washington legislature has also addressed the scope of the conditional waiver of the State's sovereign immunity. In 2006, after this Court's split opinion in *Bosteder*, the Legislature

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on jurisdiction, recognizing that the plaintiff's allegations and argument that its action was not against the State "must be regarded as conclusions and, of course, [are] not binding upon the state").

amended the tort claim filing requirements in RCW 4.92 and 4.96 to expressly apply to government employees acting in such capacity.

1. The split decision in *Bosteder*

In *Bosteder*, the plaintiff brought a claim for trespass against a city, six city police officers, and a county inspector related to the search of his property pursuant to a warrant.[4] *Bosteder*, 155 Wn.2d at 25. The plaintiff filed a tort claim with the city on the same day he served the complaint and summons on the city. *Id.* Sixty days later, the plaintiff filed an amended complaint alleging that sixty days had passed following the filing of the tort claim as required by former RCW 4.96.020. *Id.* at 26. At no time did the plaintiff file a tort claim with the county. *Id.* The trial court dismissed the trespass claim against all defendants. *Id.* at 26-27.

[4] The plaintiff in *Bosteder* also brought claims under 42 U.S.C. § 1983. 155 Wn.2d at 25. As the disposition of those claims is not relevant here, they are not discussed further.

On appeal, a majority of this Court in two opinions reversed the dismissal of the trespass claim. *Id.* at 59. Justice Sanders, joined by three other Justices, looked at the plain language of former RCW 4.96.020(4), which required sixty days pre-suit notification for damages claims against a "local governmental entity," and former RCW 4.96.010(2), which defined "local governmental entity" without any reference to individuals. *Id.* at 56-57. He determined that, "the statute plainly does not apply to individuals." *Id.* at 57. Justice Ireland reached the same conclusion in a separate opinion. *Id.* at 59.

Accordingly, Hanson correctly notes that the *Bosteder* majority based its analyses on principles of statutory construction. Pet. at 15. As a result, nothing about those analyses disavowed prior precedent related to the scope of the State's – and thus the local government's – sovereignty. Indeed, the majority acknowledged that the Legislature *could* validly extend former RCW 4.96.020(4) to cover employees acting in such capacity, but that the Legislature simply had not *yet* done so:

"[T]he 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." *Id.* at 57 (Sanders, J., emphasis added). As discussed below, the Legislature promptly exercised its authority to clarify its intent.

Justice Fairhurst, joined by three other Justices, disagreed that any textual amendment to former RCW 4.96.020(4) was necessary and, instead, agreed with the holdings reached by the Court of Appeals in *Hardesty* and *Woods*. *Id.* at 41. Thus, Justice Fairhurst rejected giving plaintiffs the ability to avoid the claim filing statute through "mere semantics." *Id.* at 44. Rather, she concluded it was "less reasonable to assume the legislature intended to leave such a gaping hole in its claim filing statutes" than it was to find "the legislature intended the procedural requirements to apply to any claims alleging the government was at fault – either as an entity or through the conduct of its individual employees." *Id.* at 45.

2. The legislative response to *Bosteder*

Justice Fairhurst was correct about the Legislature's intent. In response to *Bosteder*, the Legislature acted during the very next session to amend RCW 4.92 and 4.96 so that pre-suit notice requirements expressly applied to government employees acting in such capacity. *See* Substitute House Bill (SHB) 3120 (2006), Laws of 2006, ch. 82, §§ 1-3; App. 8-11.

As noted by Carmona, the various bill reports on SHB 3120 all referenced *Bosteder*. *See* Op. Br. at 15. During the first public hearing on HB 3120, the bill's prime sponsor explained:

> This is my bill and brought to me by people who found this hole. . . . Those people who are in the business of insuring local government. *And there's no sense in having a . . . notice requirement for tort claims if it doesn't hit the target that it should.* So it's a very simple kind of bill coming out of a decision that pointed out the flaw.

Public Hearing, HB 3120, House Judiciary Committee, 59:49-1:00:18 (Feb. 1, 2006) (testimony of Rep. Patricia Lantz; emphasis added), *available at* https://www.tvw.org/watch/?eventID=2006021368. *See also* Public Hearing, SHB 3120, Senate

Judiciary Committee, 19:10-19:27 (Feb. 21, 2006) (testimony of Rep. Lantz that "this is . . . another example of how the Court is able to find gaps in our work and here we are ready to . . . repair it."), *available at* https://www.tvw.org/watch/?eventID=2006021102.

During the public hearings, there was no testimony opposing the bill or suggesting that what the Legislature proposed doing exceeded its authority. *See* Public Hearing, HB 3120, House Judiciary Committee, 1:00:18-1:04:54 (Feb. 1, 2006); Public Hearing, SHB 3120, Senate Judiciary Committee, 1:23:00-1:24:55 (Feb. 21, 2006). Ultimately, SHB 3120 passed both the House and Senate unanimously. Laws of 2006, ch. 82.

The result of the legislative clarification in 2006 was to make the text of RCW 4.92.100, .110, and 4.96.020 coextensive with the scope of the State and local government's sovereignty, discussed above in Part III. A.

C. Neither the United States Supreme Court's Decision in *Lewis v. Clarke* nor This Court's Decision in *Hutton v. Martin* Is Controlling

This Court must presume the constitutionality of the Legislature's 2006 amendments and cannot declare them invalid unless their unconstitutionality "appears beyond a reasonable doubt." *See State v. Delbosque*, 195 Wn.2d 106, 125, 456 P.3d 806 (2020). Hanson has failed to meet that burden and asks this Court to tear a gaping loophole into the claim filing statutes based on a fundamental misunderstanding of Washington law as it relates to the scope of sovereign immunity. *See* Pet. at 11-13; Pet'r's. Suppl. Br. at 1-2, 4-8. In particular, she primarily relies on distinguishable federal law about tribal sovereignty. *See* Pet'r's. Suppl. Br. at 1-2, 4-6, 8-11 (discussing *Lewis v. Clarke*). Hanson also misconstrues the import of *Hutton v. Martin*, 41 Wn.2d 780, a decision issued nearly a decade before the waiver of sovereign immunity. *See* Pet'r's. Suppl. Br. at 6-8. Hanson's reliance on those cases is misplaced.

1. *Lewis v. Clarke*

In *Lewis*, the United States Supreme Court determined that a suit "against a tribal employee operating a vehicle within the scope of his employment but on state lands" when "the judgment will not operate against the Tribe" "is not a suit against [the employee] in his official capacity." 137 S. Ct. at 1291. Rather, the Court concluded "it is simply a suit against [the employee] to recover for his personal actions, which 'will not require action by the sovereign or disturb the sovereign's property.'" *Id.* (quoting *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949)). The court found that tribal sovereign immunity was "simply not in play" and that the employee, not the Tribe's Gaming Authority, was the real party in interest. *Id.*

The Court reached those conclusions by determining that tribal sovereign immunity was no broader than state or federal sovereign immunity, and it did so relying solely on *federal* cases interpreting such immunities in reference to *federal* law. *Id.* at

1290-92. Indeed, many of the cases cited by the Court involved the Eleventh Amendment of the United States Constitution and causes of action under 42 U.S.C. § 1983.[5] *Id.* While the United States Supreme Court is the final arbiter of the scope of the Eleventh Amendment and section 1983 claims, it is not the final arbiter of the scope of article II, section 26 of the Washington Constitution or state tort law. This Court is.

And this Court has developed its own standards for determining when the State is the real party in interest in suits alleging state causes of action. It is those standards that apply in this case, not the standards developed under federal law. Thus, this Court's decision will not be reviewable by the United States

[5] Other cases cited involved the immunity of the federal government or the separate availability of individual personal immunities. *See Lewis*, 137 S. Ct. at 1291-92 (citing *Larson*, 337 U.S. at 687; *Dugan v. Rank*, 372 U.S. 609, 611, 620-622, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971); *Van de Kamp v. Goldstein*, 555 U.S. 335, 342-344, 129 S. Ct. 855, 172 L. Ed. 2d 706 (2009)).

Supreme Court, further demonstrating the inapplicable nature of the *Lewis* opinion. *Cf.* 28 U.S.C. § 1257(a) (writs of certiorari).

In addition, Indian tribes have a different status under the federal constitution than do sovereign states and "the immunity possessed by Indian tribes is not coextensive with that of the States." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 756, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). *See also United States v. Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.").

In *Lewis*, the Court also held that "an indemnification provision cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak." 137 S. Ct. at 1292. The Court again relied on case law interpreting the Eleventh Amendment. *Id.* (discussing *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 117 S. Ct. 900, 137 L. Ed. 2d 55 (1997)). It determined that "[t]he critical inquiry

is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab." *Id*. at 1292-93.

Even assuming arguendo that the above inquiry bears on this Court's analysis, the legislative scheme in Washington is significantly different than that presented in *Lewis.* Of note, RCW 4.92.075 and 4.96.041(4) both require that, after a successful suit against a government employee defended by the government, judgment creditors "shall" seek satisfaction only from the State or local governmental entity and the judgment "shall not" become a lien against the employee's property.[6] By contrast, the tribal code's indemnification provision in *Lewis* did not similarly bind the Tribe and release the employee from the legal consequence of the judgment. 137 S. Ct. at 1292-93 (discussing Mohegan Tribal Code § 4-52).[7] This difference is

[6] There is an exception to those requirements for punitive damages when awarded against a local government employee. *See* RCW 4.96.041(1). No such exception applies to awards of damages against state employees. *See* RCW 4.92.075

[7] Mohegan Tribal Code § 4-52 is set forth in its entirety in Appendix 12.

key, as the *Lewis* Court may have reached a different conclusion had the tribal code legally bound the Tribe and not the employee to the adverse judgment.

In sum, *Lewis* is distinguishable from this case because the sovereign immunity claimed by the tribal employee was a federal immunity claimed under federal law. Here, the sovereign immunity of the local government employee is based not on federal law but on article II, section 26 of the Washington Constitution. Therefore, Washington law applies to Hanson's negligence claims, and not the federal precedent applicable to Indian tribes in *Lewis*.

Moreover, if one is inclined to look to federal law for persuasive legal analysis, the most helpful analogue is not *Lewis*; rather, it is the Federal Tort Claims Act as amended by the Westfall Act in 1988, which provides, in relevant part:

> Upon certification by the Attorney General that the defendant employee was acting *within the scope of his office or employment at the time of the incident* out of which the claim arose, any civil action or proceeding commenced upon such claim

> in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1) (emphasis added).

Congress enacted the Westfall Act in response to *Westfall v. Erwin*, 484 U.S. 292, 295, 300, 108 S. Ct. 580, 98 L. Ed. 619 (1988), which held that absolute immunity did not shield federal official functions from state-law tort liability unless the challenged conduct was within the scope of employment *and* was discretionary in nature. The Westfall Act superseded that decision by conferring "federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." *Osborn v. Haley*, 549 U.S. 225, 229-30, 127 S. Ct 881, 166 L. Ed. 2d 819 (2007). Indeed, the Act's "core purpose" was "to relieve covered employees from the cost and effort of defending the lawsuit, and to place those burdens on the Government's shoulders." *Id.* at 252.

The State is unaware of any precedent in the past 33 years challenging the Westfall Act as beyond the plenary authority of Congress to enact laws related to the federal government's sovereignty. Such an argument would be both novel and without merit. Similar to how the Westfall Act does not exceed Congress's authority to enact laws related to the sovereign immunity of the United States, the conditions precedent to suit in RCW 4.92 and RCW 4.96 fall within the Washington legislature's authority under article II, section 26 to enact laws related to the sovereign immunity of the State.

2. *Hutton v. Martin*

Second, Hanson improperly cites *Hutton* for the proposition that, pre-waiver, it was well-settled that sovereign immunity only applied to the State and not individual employees. *See* Pet'r's. Suppl. Br. at 7-8. *Hutton* has limited authoritative value given its procedural posture and intervening precedent.

In *Hutton*, this Court reversed a judgment n.o.v. dismissing a defendant city. 41 Wn.2d at 782-86. It determined

that municipal garbage disposal, unlike operating a city truck for the city's health department, was a proprietary function that did not implicate sovereign immunity. *Id.* at 786.

The *Hutton* Court issued no decision as to any immunity of the city employee defendant, and none of the parties argued it. Of note, the defendant city and the defendant employee were represented by separate defense counsel. *Id.* at 781. There is no indication as to why that was or whether the employee sought to join the city's motion for judgment n.o.v.

Further, in the decades since *Hutton*, Washington appellate courts have uniformly recognized that government employees acting in the scope of their employment are entitled to immunity to the same extent the sovereign claims it. *See supra* Part III. A. Accordingly, nothing about *Hutton* controls the analysis here as to the scope of the State's sovereign immunity.

D. Reversal Will Negate the Fundamental Purpose of Claim Filing Statutes

Hanson seeks to portray this case as one with narrow implications, affecting only those claims where the government

employee is engaged in some activity, like driving, for which they would still owe a duty even if not employed by the government. *See* Pet. at 3-4, 12. She suggests that there may be employees "such as a flagger on a road performing the flagger job" who have no duty to do that job correctly outside of employment. *Id.* at 3-4. This proposed limiting principle is illusory: the rule Hanson seeks is much broader and will swallow the tort claims statutes whole.

As this Court has recently recognized, government employees, even when performing the most fundamental governmental functions – policing and providing long-term care services – still owe a duty of reasonableness to those with whom they interact. *See, e.g.*, *Turner v. Wash. State Dep't of Soc. & Health Servs.,* 198 Wn.2d 273, 295-97, 493 P.3d 117 (2021) (discussing *Restatement (Second) of Torts* § 302); *Beltran-Serrano v. City of Tacoma*, 193 Wn2d 537, 550-52, 442 P.3d 608 (2019) (discussing *Restatement (Second) of Torts* § 281). It is difficult to conceive a situation in which a plaintiff

would concede that the government employee did not owe such a separate duty. Certainly, a person directing traffic of their own accord, perhaps following an accident, would likewise owe that duty to act reasonably.

This means that, while the great majority of claims against the State are currently resolved without the need for litigation, and while comparatively few claims presently result in lawsuits naming individual employees as defendants, *see* State Mot. for Leave to File Amicus Curiae Br. at 3-5, invalidating tort claim filing statutes as applied to government employees acting in the scope of their employment will herald a sea change. The State reasonably anticipates that, if the decision below is reversed, many more plaintiffs will choose to name individual employees as defendants, instead of the government entity, in order to avoid the tort claim filing statutes and the waiting periods they impose.

Such circumvention would effectively undermine the Legislature's policy for pre-suit investigation and resolution of governmental tort claims and would increase the expense of

litigation. *See* RCW 4.92.100, .110; 4.96.020(4). The Legislature's policy applies whether the potential plaintiff seeks to sue the sovereign or its agents, for whom the sovereign is vicariously liable. *See id.* This Court should uphold those enactments as constitutionally valid under article II, section 26.

IV. CONCLUSION

For all the foregoing reasons, as well as those provided by Carmona, the decision below should be affirmed.

This document contains 6,096 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 24th day of January, 2022.

s/ Sara A. Cassidey
SARA A. CASSIDEY
Assistant Attorney General
WSBA No. 48646
7141 Cleanwater Dr. S.W.
P.O. Box 40126
Olympia, WA 98504-0126
Phone: (360) 586-6328
Email: sara.cassidey@atg.wa.gov

CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the AMICUS CURIAE BRIEF of STATE OF WASHINGTON with attached APPENDIX with the Clerk of the Court using the electronic filing system which caused it to be served on the following electronic filing system participants as follows:

Marshall W. Casey
Sweetser Law Office, PLLC
1020 N. Washington
Spokane, WA 99201
mcasey@sweetserlawoffice.com

Attorneys for Petitioner

Christopher J. Kerley
Evans, Craven & Lackie, PS
818 W. Riverside Ave., Ste. 250
Spokane, WA 99201
ckerley@ecl-law.com
sking@ecl-law.com

Attorneys for Respondents

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 24th day of January 2022, at Olympia, Washington.

s/ Sara A. Cassidey
SARA A. CASSIDEY
Assistant Attorney General
WSBA No. 48646

APPENDIX

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RCW 4.92.060

Action against state officers, employees, volunteers, or foster parents—Request for defense.

Whenever an action or proceeding for damages shall be instituted against any state officer, including state elected officials, employee, volunteer, or foster parent licensed in accordance with chapter 74.15 RCW, arising from acts or omissions while performing, or in good faith purporting to perform, official duties, or, in the case of a foster parent, arising from the good faith provision of foster care services, such officer, employee, volunteer, or foster parent may request the attorney general to authorize the defense of said action or proceeding at the expense of the state.

[1989 c 403 § 2; 1986 c 126 § 5; 1985 c 217 § 1; 1975 1st ex.s. c 126 § 1; 1975 c 40 § 1; 1921 c 79 § 1; RRS § 890-1.]

NOTES:

Findings—1989 c 403: "The legislature finds and declares that foster parents are a valuable resource providing an important service to the citizens of Washington. The legislature further recognizes that the current insurance crisis has adversely affected some foster family homes in several ways: (1) In some locales, foster parents are unable to obtain liability insurance coverage over and above homeowner's or tenant's coverage for actions filed against them by the foster child or the child's parents or legal guardian. In addition, the monthly payment made to foster family homes is not sufficient to cover the cost of obtaining this extended coverage and there is no mechanism in place by which foster parents can recapture this cost; (2) foster parents' personal resources are at risk. Therefore, the legislature is providing relief to address these problems." [1989 c 403 § 1.]

RCW 4.92.070

Actions against state officers, employees, volunteers, or foster parents—Defense by attorney general—Legal expenses.

If the attorney general shall find that said officer, employee, or volunteer's acts or omissions were, or were purported to be in good faith, within the scope of that person's official duties, or, in the case of a foster parent, that the occurrence arose from the good faith provision of foster care services, said request shall be granted, in which event the necessary expenses of the defense of said action or proceeding relating to a state officer, employee, or volunteer shall be paid as provided in RCW **4.92.130**. In the case of a foster parent, necessary expenses of the defense shall be paid from the appropriations made for the support of the department to which such foster parent is attached. In such cases the attorney general shall appear and defend such officer, employee, volunteer, or foster parent, who shall assist and cooperate in the defense of such suit. However, the attorney general may not represent or provide private representation for a foster parent in an action or proceeding brought by the department of social and health services against that foster parent.

[**1999 c 163 § 5**; **1989 c 403 § 3**; **1986 c 126 § 6**; **1985 c 217 § 2**; **1975 1st ex.s. c 126 § 2**; **1975 c 40 § 2**; **1921 c 79 § 2**; RRS § 890-2.]

NOTES:

Effective date—1999 c 163: See note following RCW **4.92.130**.

Findings—1989 c 403: See note following RCW **4.92.060**.

RCW 4.92.075

Action against state officers, employees, or volunteers—Judgment satisfied by state.

When a state officer, employee, or volunteer has been represented by the attorney general pursuant to RCW **4.92.070**, and the body presiding over the action or proceeding has found that the officer, employee, or volunteer was acting within the scope of his or her official duties, and a judgment has been entered against the officer, employee, or volunteer pursuant to chapter **4.92** RCW or 42 U.S.C. Sec. 1981 et seq., thereafter the judgment creditor shall seek satisfaction only from the state, and the judgment shall not become a lien upon any property of such officer, employee, or volunteer.

[**1989 c 413 § 2**.]

RCW 4.92.090

Tortious conduct of state—Liability for damages.

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

[**1963 c 159 § 2**; **1961 c 136 § 1**.]

RCW 4.92.100

Tortious conduct of state or its agents—Claims—Presentment and filing—Contents.

(1) All claims against the state, or against the state's officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct, must be presented to the office of risk management. A claim is deemed presented when the claim form is delivered in person or by regular mail, registered mail, or certified mail, with return receipt requested, or as an attachment to email or by fax, to the office of risk management. For claims for damages presented after July 26, 2009, all claims for damages must be presented on the standard tort claim form that is maintained by the office of risk management. The standard tort claim form must be posted on the department of enterprise services' website.

(a) The standard tort claim form must, at a minimum, require the following information:

(i) The claimant's name, date of birth, and contact information;

(ii) A description of the conduct and the circumstances that brought about the injury or damage;

(iii) A description of the injury or damage;

(iv) A statement of the time and place that the injury or damage occurred;

(v) A listing of the names of all persons involved and contact information, if known;

(vi) A statement of the amount of damages claimed; and

(vii) A statement of the actual residence of the claimant at the time of presenting the claim and at the time the claim arose.

(b)(i) The standard tort claim form must be signed either:

(A) By the claimant, verifying the claim;

(B) Pursuant to a written power of attorney, by the attorney-in-fact for the claimant;

(C) By an attorney admitted to practice in Washington state on the claimant's behalf; or

(D) By a court-approved guardian or guardian ad litem on behalf of the claimant.

(ii) For the purpose of this subsection (1)(b), when the claim form is presented electronically it must bear an electronic signature in lieu of a written original signature.

(iii) When an electronic signature is used and the claim is submitted as an attachment to email, the conveyance of that claim must include the date, time the claim was presented, and the internet provider's address from which it was sent. The attached claim form must be a format approved by the office of risk management.

(iv) When an electronic signature is used and the claim is submitted via a facsimile machine, the conveyance must include the date, time the claim was submitted, and the fax number from which it was sent.

(v) In the event of a question on an electronic signature, the claimant shall have an opportunity to cure and the cured notice shall relate back to the date of the original filing.

(c) The amount of damages stated on the claim form is not admissible at trial.

(2) The state shall make available the standard tort claim form described in this section with instructions on how the form is to be presented and the name, address, and business hours of the office of risk management. The standard tort claim form must not list the claimant's social security number and must not require information not specified under this section. The claim form and the instructions for completing the claim form must provide the United States mail, physical, and electronic addresses and numbers where the claim can be presented.

(3) With respect to the content of claims under this section and all procedural requirements in this section, this section must be liberally construed so that substantial compliance will be deemed satisfactory.

[**2020 c 57 § 21**; **2013 c 188 § 1**; **2012 c 250 § 1**; **2009 c 433 § 2**; **2006 c 82 § 1**; **2002 c 332 § 12**; **1986 c 126 § 7**; **1979 c 151 § 3**; **1977 ex.s. c 144 § 2**; **1967 c 164 § 2**; **1963 c 159 § 3**.]

NOTES:

Intent—Effective date—2002 c 332: See notes following RCW **43.19.760**.

Purpose—Severability—1967 c 164: See notes following RCW **4.96.010**.

*Puget Sound ferry and toll bridge system, claims against: RCW **47.60.250**.*

RCW 4.92.110

Tortious conduct of state or its agents—Presentment and filing of claim prerequisite to suit.

No action subject to the claim filing requirements of RCW **4.92.100** shall be commenced against the state, or against any state officer, employee, or volunteer, acting in such capacity, for damages arising out of tortious conduct until sixty calendar days have elapsed after the claim is presented to the office of risk management in the department of enterprise services. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty calendar day period. For the purposes of the applicable period of limitations, an action commenced within five court days after the sixty calendar day period has elapsed is deemed to have been presented on the first day after the sixty calendar day period elapsed.

[**2015 c 225 § 5**; **2009 c 433 § 3**; **2006 c 82 § 2**; **2002 c 332 § 13**; **1989 c 419 § 14**; **1986 c 126 § 8**; **1979 c 151 § 4**; **1977 ex.s. c 144 § 3**; **1963 c 159 § 4**.]

NOTES:

Intent—Effective date—2002 c 332: See notes following RCW **43.19.760**.

Intent—Effective date—1989 c 419: See notes following RCW **4.92.006**.

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 3120

Chapter 82, Laws of 2006

59th Legislature
2006 Regular Session

TORT CLAIMS--STATE AND LOCAL GOVERNMENTS

EFFECTIVE DATE: 6/7/06

Passed by the House February 14, 2006
Yeas 97 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate March 2, 2006
Yeas 46 Nays 0

BRAD OWEN

President of the Senate

Approved March 15, 2006.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Richard Nafziger, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 3120** as passed by the House of Representatives and the Senate on the dates hereon set forth.

RICHARD NAFZIGER

Chief Clerk

FILED

March 15, 2006 - 3:45 p.m.

Secretary of State
State of Washington

SUBSTITUTE HOUSE BILL 3120

Passed Legislature - 2006 Regular Session

State of Washington 59th Legislature 2006 Regular Session

By House Committee on Judiciary (originally sponsored by Representatives Lantz, Priest, Kirby and Williams)

READ FIRST TIME 02/03/06.

AN ACT Relating to notice requirements for tort claims against state and local governments and their officers, employees, or volunteers; and amending RCW 4.92.100, 4.92.110, and 4.96.020.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 4.92.100 and 2002 c 332 s 12 are each amended to read as follows:

All claims against the state, or against the state's officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct shall be presented to and filed with the risk management division. All such claims shall be verified and shall accurately describe the conduct and circumstances which brought about the injury or damage, describe the injury or damage, state the time and place the injury or damage occurred, state the names of all persons involved, if known, and shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six months immediately prior to the time the claim arose. If the claimant is incapacitated from verifying, presenting, and filing the claim or if

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the claimant is a minor, or is a nonresident of the state, the claim may be verified, presented, and filed on behalf of the claimant by any relative, attorney, or agent representing the claimant.

With respect to the content of such claims this section shall be liberally construed so that substantial compliance will be deemed satisfactory.

Sec. 2. RCW 4.92.110 and 2002 c 332 s 13 are each amended to read as follows:

No action shall be commenced against the state, or against any state officer, employee, or volunteer, acting in such capacity, for damages arising out of tortious conduct until sixty days have elapsed after the claim is presented to and filed with the risk management division. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty-day period.

Sec. 3. RCW 4.96.020 and 2001 c 119 s 2 are each amended to read as follows:

(1) The provisions of this section apply to claims for damages against all local governmental entities and their officers, employees, or volunteers, acting in such capacity.

(2) The governing body of each local ((~~government [governmental]~~)) governmental entity shall appoint an agent to receive any claim for damages made under this chapter. The identity of the agent and the address where he or she may be reached during the normal business hours of the local governmental entity are public records and shall be recorded with the auditor of the county in which the entity is located. All claims for damages against a local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, shall be presented to the agent within the applicable period of limitations within which an action must be commenced. The failure of a local governmental entity to comply with the requirements of this section precludes that local governmental entity from raising a defense under this chapter.

(3) All claims for damages arising out of tortious conduct must locate and describe the conduct and circumstances which brought about the injury or damage, describe the injury or damage, state the time and place the injury or damage occurred, state the names of all persons

involved, if known, and shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six months immediately prior to the time the claim arose. If the claimant is incapacitated from verifying, presenting, and filing the claim in the time prescribed or if the claimant is a minor, or is a nonresident of the state absent therefrom during the time within which the claim is required to be filed, the claim may be verified, presented, and filed on behalf of the claimant by any relative, attorney, or agent representing the claimant.

(4) No action shall be commenced against any local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct until sixty days have elapsed after the claim has first been presented to and filed with the governing body thereof. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty-day period.

Passed by the House February 14, 2006.
Passed by the Senate March 2, 2006.
Approved by the Governor March 15, 2006.
Filed in Office of Secretary of State March 15, 2006.

Sec. 4-52. Indemnification and defense against claims.

(a) *Indemnification.* If a public official or employee gives the respective Mohegan Tribal Entity prompt written notice of any claim, demand, or suit (a "Claim") directed to or served upon such public official or employee, the Mohegan Tribal Entity shall save harmless and indemnify its public official or employee from financial loss and expense arising out of any claim by reason of acts resulting in damage or injury, if such act is found not to have been wanton, reckless or malicious; further provided, that no such indemnification shall be required if the public official or employee is found, by a court of competent jurisdiction, to have been acting outside the scope of his or her official functions and duties or outside his or her scope of employment. The written notice required under this sub-section 4-52(a) shall be delivered in person or by certified mail to the Attorney General of The Mohegan Tribe and to either the Chairman of the Mohegan Tribal Council, the Chairman of the Management Board of the Mohegan Tribal Gaming Authority, or to the chief executive officer or Management Board of any other Mohegan Tribal Entity, as applicable. Delivery of the original or a true copy of any such claim shall satisfy this requirement of written notice.

(b) *Defense of claim.* The Mohegan Tribal Entity shall provide for the defense of any such public official or employee in any civil action or proceeding in any Mohegan Tribal, State or Federal court or arbitral panel arising out of any alleged Act which occurred or is alleged to have occurred while the public official or employee was acting in the discharge of his or her official functions and duties or within the scope of employment, except that the Mohegan Tribal Entity shall not be required to provide for such a defense whenever the Mohegan Tribal Entity, based on its investigation of the facts and circumstances of the case, determines that the public official or employee has acted outside his or her official functions and duties or outside the scope of employment or has acted wantonly, recklessly or maliciously. The Mohegan Tribal Entity shall notify the public official or employee in writing of this determination and of the individual's right to retain separate legal counsel.

(c) The responsibility of a Mohegan Tribal Entity to provide a defense for its public official or employee is separate from its duty to indemnify. The Mohegan Tribal Entity may provide a defense without prejudicing any right to refuse to indemnify.

(d) The Mohegan Tribal Entity shall be entitled to contribution, indemnification or reimbursement from its employee or public official for legal fees and expenses incurred by the Mohegan Tribal Entity, if a court finds that the act of the employee was not in the discharge of official functions and duties or was outside the scope of employment.

(Res. No. 2007-06, 1-31-2007; Res. 2018-09, 10-18-2017; TGA Res. No. 2018-02, 10-18-2017)

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

January 24, 2022 - 10:51 AM

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