No. 99823-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

[No. 37419-0-III --- Court of Appeals Division III]

KYLIE HANSON, Individually, Petitioners,

v.

MIRIAM GONZALEZ CARMONA and JOHN DOE CARMONA, Husband and Wife, Individually, and the Marital Community Comprised Thereof, Respondents

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AMICUS BRIEF OF WASHINGTON CITIES INSURANCE AUTHORITY, WASHINGTON COUNTIES RISK POOL, ENDURIS, ASSOCIATION OF WASHINGTON CITIES, AND WASHINGTON STATE TRANSIT INSURANCE POOL

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I. IDENTIFY AND INTEREST OF AMICI

Amici include the following self-insured governmental risk pools formed pursuant to Chapter 48.62 RCW: Washington Cities Insurance Authority (WCIA); Association of Washington Cities (AWC); Washington Counties Risk Pool; Enduris; and the Washington State Transit Insurance Pool (WSTIP). Collectively, these government risk pools provide liability and property insurance coverage to more than 750 Washington cities, counties, special purpose governmental agencies, and public transit districts in the State of Washington which employ more than 40,000 public employees.

These public employees are presently secure in the knowledge that if they are sued for damages caused by their acts or omissions performed in the scope of their public employment, the plaintiff filing such suit will have a statutory obligation to provide notice to the public employer in advance of litigation. This will allow that employer time to investigate and potentially settle the claim to avoid the burdens and expense of litigation.

Amici have an interest in this case because if this Court reverses the Court of Appeals decision, it will create the very real potential that plaintiffs will bypass statutory notice requirements and thwart the purposes of the law through the unilateral decision to sue public employees in their "individual" capacities even though the employees were acting in the course of his or her public duties.

II. COURT OF APPEALS DECISION

Amici ask this Court to affirm the decision of the Court of Appeals, which reversed the superior court's denial of Miriam Gonzalez Carmona's motion for summary judgment and remanded to the superior court to enter judgment dismissing Kylie Hanson's suit against Ms. Carmona.[1]

III. STATEMENT OF THE CASE

Amici adopt the facts set forth by Respondent Miriam Gonzalez Carmona.

[1] 16 Wn. App.2d 834, 852-53 (2021).

IV. ARGUMENT

A. The Legislature's conditioning of the ability to bring suit against an employee of the government upon compliance with the notice of claim statute is within its express constitutional authority and does not violate the separation of the powers doctrine.

The Washington constitution does not contain a formal separation of powers clause. *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173. Nonetheless, "the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine." *Id*. Under the Separation of Powers doctrine, the "question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another." *Id., quoting, In re Juvenile Director*, 87 Wn.2d 232, 240, 552 P.2d 163 (1976). The prerogative for setting the conditions under which the State and its municipalities can be sued, under the State's constitution, belongs to the Legislature.

Article II, § 26 of the Washington Constitution provides that "[t]he legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state." *In McDevitt v. Harbor View Medical Center*, 179 Wn.2d 59, 64, 316 P.3d 469 (2013), this court commented that it had "historically recognized that the legislature has the constitutionally sanctioned power to alter the common law doctrine of sovereign immunity." *Id.*, *citing*, *Billings v. State*, 27 Wash. 288, 291, 67 P. 583 (1902) (recognizing that it is "only by virtue of [a] statute [passed under article II, section 26] that an action can be maintained against the state"); and *Coulter v. State*, 93 Wn.2d 205, 207, 608 P.2d 261 (1980) (stating that "the abolition of sovereign immunity is a matter within the legislature's determination").

In *Medina v. Public Utility Dist. No. 1 of Benton*, 147 Wn.2d 303, 312, 53 P.3d 993 (2002), this Court explained that "[t]he Washington Legislature waived sovereign immunity as to the political subdivisions of the State and its municipalities in 1967. *See* Laws of 1967, ch. 164, §§ 1, 4. Thus, the right to bring

suit was created by statute and is not a fundamental right. *See O'Donoghue v. State*, 66 Wn.2d 787, 405 P.2d 258 (1965) (since the State, as sovereign, must give the right to sue, it follows that it can prescribe the limitations upon that right). The Washington State Constitution specifically reserves the right of the legislature to regulate lawsuits against governmental entities by providing that the legislature "shall direct by law, in what manner, and in what courts, suits may be brought against the state." Const. art. 2, § 26.

Thus, this Court has already determined that the Legislature had the express constitutional authority to enact RCW 4.96.020 under Washington State Constitution, Article II, § 26.

This Court has also upheld RCW 4.96.020 against various constitutional challenges based on equal protection, *see Medina, supra*, 147 Wn.2d at 314, and due process under the Fourteenth Amendment. *Id. See, also, Castro v. Stanwood School Dist. No. 401*, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004) ("the tolling

language [of RCW 4.96.020] is clear and unambiguous and . . . the statute does not violate due process protections.")

More recently, in *McDevitt*, supra, this Court examined a different notice of claim statute, RCW 7.70.100(1), which required a 90-day pre-suit notice, rather than the sixty days required by RCW 4.96.020. 179 Wn.2d at 64. This Court upheld RCW 7.70.100(1) based on the same rationale as numerous prior cases, namely the Legislature's authority to enact the condition precedent to suits against the State and its municipalities. *Id*. at 66. The Court in *McDevitt* again rejected a challenge to pre-suit notice statutes based on equal protection. Finally, this Court rejected an argument that RCW 7.70.100(1) violated the separation of powers doctrine because of the express Constitutional authority granted by Article II, § 26. *Id*. 179 Wn.2d at 68-69. Thus, where the State Constitution provides an express grant of authority to the Legislature, as it does in the case of setting conditions under with the government may be sued, its exercise of that express authority does not violate the separation

of powers doctrine. *See, e.g., Lacey Nursing Center, Inc., v. Department of Revenue,* 128 Wn. 2d 40, 52, 905 P.2d 338 (2002) ("RCW 82.32.180 is a conditional, partial waiver of the sovereign immunity afforded by Article II, § 26 of the Washington constitution. The right to bring excise tax refund suits against the state must 'be exercised in the manner provided by the statute.'") Indeed, this Court would arguably violate the separation of powers doctrine by invalidating a legislative act done pursuant to express constitutional authority. *See, McDevitt, supra*, 179 Wn.2d at 81-83, (Fairhurst, J. concurring in part and dissenting in part.); *See also, Keeting v. Public Ulilities District No. 1 of Clallam County*, 49 Wn.2d 761, 767, 306 P.2d 762 (1957) ("It is unconstitutional for the legislature to abdicate or transfer to others its legislative function.")

This principle was aptly described in *Myles v. Clark County*, 170 Wn. App. 521, 289 P.3d 650 (Div. 2 2012), *review denied*, 176 Wn.2d 1015, 297 P.3d 706 (2013), in which the

plaintiff argued that RCW 4.96.020 directly conflicted with the requirements for commencing a civil suit governed by CR 3(a):

> Because Wash. Const. art. II, § 26 empowers the legislature to determine the condition under which suits may be brought against the State, and because the pre-suit claim filing requirements of ch. 4.96 RCW derive from an appropriate and lawful exercise of legislative authority to conditionally waive sovereign immunity, we agree with Clark County and hold that the notice provisions of former RCW 4.96.020(4) are constitutional.

The Court in *Myles*, rejected a separation of powers argument based on an argued conflict with CR 3(a), explaining that it was "limited in its role in interpreting the constitution [and] has no power to construe or interpret a provision that is clear, plain and unambiguous in its terms." *quoting, City of Bellevue v. State*, 92 Wn.2d 717, 723, 600 P.2d 1268 (1979). The court went on to note, "[c]ourts do not sit to review or revise legislative action, but rather to enforce the legislative will when acting within its constitutional limits. A legislative act carries with it the presumption of its constitutionality and will not be declared void unless its invalidity appears beyond a reasonable

doubt." *quoting Robb v. City of Tacoma*, 175 Wash. 580, 586, 28 P.2d 327 (1933) (emphasis added). Because "the Washington Constitution clearly empowers the legislature to determine the manner in which suits may be brought against the State and its municipalities, and the provisions of ch. 4.96 RCW unambiguously derive from this enumerated power." *Myles*, 170 Wn. App. at 528.

As the Court in *Myles* noted, "[n]either art. II, § 26 nor former RCW 4.96.020(4) are ambiguous: acting under constitutional authority, the legislature has determined that to bring a tort suit against the State or its municipalities, plaintiffs must first notify the government. This reading of the statute does not encroach upon the judiciary's inherent power to promulgate rules for its practice." *Id*. at 529. After delivering the required notice, plaintiffs may still commence suit as dictated by CR 3(a). *Id*.

Finally, the Court in *Myles* correctly reiterated that under the Separation of Powers Doctrine, "[t]he question to be asked is

not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another." *Id., quoting, Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975) (emphasis added). Because "Art. II, § 26 unambiguously makes it the legislature's prerogative to determine the manner in which State entities may be sued" the *Myles* court ruled that the notice provisions of ch. 4.96 RCW are constitutional. 170 Wn. App. at 529.

In the case at bar, Ms. Hanson argues that by expressly including within the notice of claim statute "all local governmental entities and their officers, employees, or volunteers, acting in such capacity" the Legislature exceeded its power under Const. art II, § 26. However, as noted below, because the State and its municipalities are required to defend and indemnify its employees for claims against them for acts within the course and scope of their employment, the Legislature could reasonably conclude that such a claim is the equivalent of

a lawsuit against the government and that pre-suit notice serves the same important purposes. RCW 4.96.041(2). *See, e.g., Woods v. Bailet*, 116 Wn. App. 658, 666, 67 P.3d 511 (2003), *citing Hardesty v. Stenchever*, 82 Wash. App. 253, 261, 917 P.2d 577, 581 (1996) ("Clearly, Stenchever performed the actions upon which Hardesty bases her claim entirely within the scope of his employment at the UW.... [T]he 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 [the claim-filing statute] applies."); *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983) ("A suit against members of the PDC is in effect a suit against the State.") Thus, it does not matter how a particular plaintiff characterizes the lawsuit, i.e. suing an individual not their government employer. What matters is whether a government employee was acting within the course and scope of their employment at the time of the alleged tortious conduct.

Ms. Hanson claims that the Legislature cannot determine "what manner, and in what courts" everyone may be sued. That is not what RCW 4.96.020 does. It sets the conditions for suing the government, including suits against government employees, which are, in effect, lawsuits against the government. The Legislature thus acted within its constitutional prerogative by requiring pre-suit notice of claims against government employees whose actions result in government liability. *Woods, supra*, 116 Wn. App. at 667 ("Claim-filing statutes that impose reasonable procedural burdens do not violate the Constitution."); *McDevitt, supra*, 179 Wn.2d at 68 ("This classification of plaintiffs suing state defendants does not infringe on a fundamental right or create a suspect classification. It is also rationally related to a legitimate government interest because of 'the multitude of departments, agencies, officers and employees and their diverse and widespread activities, touching virtually every aspect of life within the state.' *Id.,* (citation omitted). The complexity of state operations and the difficulty associated with

budgeting and allocating funds for this multitude of departments and agencies provides a legitimate government interest in enacting the pre-suit notification requirement of former RCW 7.70.100(1).") Requiring pre-suit notices of claims as a condition to suing a government employee thus directly promotes the purposes underlying the claim statutes, including notice and an opportunity for pre-suit settlement.

This purpose of allowing for the pre-suit investigation, analysis, and settlement of claims is critically important and of immeasurable value to the public agencies who are given this opportunity (and, therefore, to the taxpayers). The claims data from 2015 to the present from one of the amici, Washington Cities Insurance Authority, revealed that its member cities received more than 3,900 tort claims in that time period; and less than 5% of those claims resulted in litigation against the member city—with the remaining claims either being settled or abandoned in advance of litigation. This data also showed that the average time to settle a non-litigated claim was just over 90

days; but the average time to settle a claim in litigation was over 450 days.

In sum, the Legislature has the express constitutional authority to determine the way the State and its municipalities may be sued. Because government liability and exposure to damages result from lawsuits against government employees (even if the employing agency is not named), Const. art II, § 26 empowers the Legislature to require pre-suit notice of claims when a government employee is sued for acts within the course and scope of their employment, regardless of how that lawsuit is characterized by a plaintiff.

B. Suits Against Public Employees for Acts Performed in the Course of Their Public Employment are Effectively Suits Against the State.

Washington's Constitution grants the legislature the authority to "direct by law, in what manner, and in what courts, suits may be brought against the state." Const. Art. 2, §26. This provision recognizes the fundamental rule that the sovereign

state cannot be sued without its consent, and that no judgment can be entered against it in any court without express legislative authority. *Title Guaranty & Surety Co. v. Guernsey*, 205 F. 94 (1913); *Coulter, supra*, 93 Wn.2d at 207.

The legislature in 1967 enacted Chapter 4.96 RCW to conditionally waive sovereign immunity for local governmental agencies for damages arising out of their tortious conduct. Because the authority to waive sovereign immunity is vested in the legislature, the legislature also has the constitutional authority to impose conditions upon the exercise of the right to seek recovery against the sovereign state or its local agencies. See, *Nelson v. Dunkin*, 69 Wn.2d 726, 729, 419 P.2d 984 (1966).

Among the conditions imposed by the legislature was the obligation to present the local governmental agency with a notice of the claim in advance of commencing suit. This had the purpose and effect of allowing the local government time to investigate the claim and, in appropriate cases, negotiate a resolution of the claim before expending taxpayer funds on costly litigation.

Until *Bosteder v. City of Renton*, 155 Wn.2d 18, 117 P.3d 316 (2005) this Court had not directly addressed the question of whether the former version of RCW 4.96.020 applied to suits against individual public employees who were sued for acts undertaken within the course of their public employment. While the lead opinion in *Bosteder* held that "the statute applies to suits against individuals when the alleged acts were committed within the course of their employment." *Id.*, 155 Wn.2d at 41; only 4 justices signed onto this portion of the decision. The remaining 5 justices in a plurality opinion held that Chap. 4.96 RCW did not apply to suits against individual public employees. In response to *Bosteder*, the legislature amended Chap. 4.96 RCW in 2006 to expressly apply the provisions of that chapter to the officers, employees, and volunteers of local governmental entities when acting in such capacity. This reflects the legislature's acknowledgement that suits against public employees for acts performed in the course of their public employment are effectively suits against the public employer; and its express

intention that the pre-suit notice requirements are mandated for suits against both the public entity and its agents.

Petitioner's arguments in support of her petition for review focus largely on the specific facts of her action against defendant Miriam Gonzalez. Her claim against respondent arose from a motor vehicle accident; and petitioner cites to the frequency in which automobile accidents occur; the public policy concerns favoring compensation of those who are injured in automobile accidents; and the supposed unfairness in imposing the pre-suit notice requirements of Chap. 4.96 RCW when an individual is involved in an automobile accident with a public employee acting in the course of his/her employment.

Though petitioner's focus is on the specific facts of her case; she is not asking this Court for a "motor vehicle accident" exception to the pre-suit notice requirements. She is asking this Court to rule broadly that the pre-suit notice requirements cannot be required in any lawsuit against a public employee whenever a plaintiff elects to sue that public employee in his or

her individual capacity – whether that public employee was operating a motor vehicle; performing medical procedures in a public hospital; educating students in public schools; operating a public transit system along our streets, highways, or rails; or performing any of the myriad other public services which the state's public employees perform.

Petitioner's focus on the fact that she sued the public employee in her "individual" capacity draws a distinction that is not meaningful in the context of analyzing the pre-suit notice requirements of Chapter 4.96 RCW. These requirements apply to all actions in which the public officer, employee, or volunteer is sued for tortious acts performed in his/her capacity as a public officer, employee, or volunteer—without regard to the capacity in which the plaintiff may elect to sue them. And when such officer, employee, or volunteer is sued for acts or omissions while performing or in good faith purporting to perform his or her official duties; such officer, employee, or volunteer is entitled to be defended and indemnified by the governmental employer.

RCW 4.96.041. Thus such suits against public employees are effectively suits against the state subject to the pre-suit notice requirements of Chapter 4.96 RCW.

Petitioner relies largely on *Lewis v. Clarke*, 137 S.CT. 1285, 197 L.Ed. 2d 631 (2017) in support of her contention that a suit against a public employee is not necessarily a suit against the state if the employee is sued in his/her individual capacity. In *Lewis v. Clarke*, *supra*, plaintiffs were injured when an employee of the Mohegan Gaming Authority, acting in the course and scope of his employment with the Gaming Authority, caused a motor vehicle accident on a public highway. The plaintiffs sued the defendant in his individual capacity; and the defendant moved to dismiss for lack of subject matter jurisdiction based on tribal sovereign immunity, arguing that the Gaming Authority was an arm of the Mohegan Tribe and given that he was an employee of the Gaming Authority (though not necessarily an officer or member of the tribe), that immunity should extend to him.

The court in *Lewis* held that the tribal employee could not assert sovereign immunity, noting:

> This is a negligence action arising from a tort committed by Clarke on an interstate highway within the State of Connecticut. The suit is brought against a tribal employee operating a vehicle within the scope of his employment but on state lands, and the judgment will not operate against the Tribe. This is not a suit against Clarke in his official capacity. It is simply a suit against Clarke to recover for his personal actions, which **"will not require action by the sovereign or disturb the sovereign's property."** *Id.* at 1292 (emphasis added) (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949)).

Notably, the issue presented in *Lewis* was whether the defendant was entitled to assert complete immunity from suit; not whether procedural notice requirements as a condition to bringing suit were a permissible exercise of legislative authority; which is the issue presented here. Petitioner and other potential plaintiffs who are injured by the acts or omissions of public employees are not prohibited from bringing suit against the public employee or his/her employer. They need only provide that employer with notice in advance of commencing litigation

to provide the agency an opportunity to investigate the claim and potentially engage in efforts to resolve the claim to avoid the expenses associated with litigation. This court has long held that such pre-suit notice requirements are appropriately within the legislature's constitutional authority. See, e.g., *Coulter*, supra, 93 Wn.2d at 207; *Medina, supra*, 147 Wn.2d at 312.

V. CONCLUSION

For the reasons set forth above, and for the reasons provided by Ms. Carmona's Answering Brief, Amici respectfully requests that the Court affirm the Court of Appeals decision in this case.

This document contains 3535 words, excluding the parts of the document exempted from the word count by RAP 18.17

Respectfully submitted this 21st day of January, 2022.

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CERTIFICATE OF SERVICE

I Certify, under penalty of perjury, under the laws of the State of Washington, that I caused to be filed and served a copy of the foregoing AMICUS BRIEF on the 21st day of January, 2022, via e-mail and U.S. Mail, as follows:

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