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NO. 91703-5

SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals No. 70830-9-I)

STEVEN W. HYDE and SANDRA D. BROOKE,

Husband and wife,

Petitioners

v.

UNIVERSITY OF WASHINGTON MEDICAL CENTER; and STATE OF WASHINGTON,

Defendants, and

THE ASSOCIATION OF UNIVERSITY PHYSICIANS, d/b/a UW PHYSICIANS,

Respondent.

ANSWER TO PETITION FOR REVIEW

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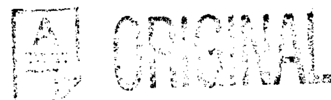

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I. INTRODUCTION

This is a medical malpractice action against the State of Washington, the University of Washington Medical Center (a hospital owned and operated by the University of Washington) and The Association of University Physicians, d/b/a UW Physicians. The sole basis for plaintiff/petitioners' claim against all defendants is the alleged negligence of a physician who treated petitioner Steven Hyde. That physician was a full-time member of the University of Washington medical school faculty and an employee of the University acting within the course and scope of her official duties. Although RCW 4.92.110[1] made it absolutely clear that pre-suit notice was required in order to sue "the state," petitioners inexplicably failed to comply.

When the defendants sought dismissal on this basis, petitioners sought to rescue themselves by asserting that their claim against UW Physicians ("UWP") could be separated from their claim against the State of Washington. They asserted that the pre-suit notice requirement does not apply to their claim against UWP, a not-for-profit charitable corporation created and ultimately controlled by the University, which bills and collects physician fees on behalf of the University. The Court of

[1] Laws of 2012, c. 250, § 1, effective June 7, 2012, repealed the previous exemption of medical negligence claims from RCW 4.92.110. This action was commenced on August 27, 2012. CP 1-3.

Appeals correctly rejected this attempt to create a loophole in the otherwise uniform and consistently upheld statutory scheme, enacted by the Legislature pursuant to Article II, Section 26 of our Constitution, which requires notice, an opportunity to investigate, and potentially resolve tort claims against the state prior to suit.

As the Court of Appeals recognized, for purposes of the state's conditional waiver of sovereign immunity, ample precedent supports the proposition that notice of suit requirements apply to persons and entities for which the state is liable in tort. It carefully reviewed the record and found as a matter of undisputed fact that UWP is such an entity, stating:

> UWP was created by a state entity, UW, to provide public health care on behalf of that entity and to support the public university. UWP was created "for the benefit of the UW medical school "exclusively for charitable, educational and scientific purposes" and "to aid in performing certain functions of and to carry out certain purposes of" the UW medical school. UWP is also required "to devote its income to the support of the University" and must retain all of its funds in excess of its annual operating expenses "for the benefit of the School of Medicine, as an Academic Support Fund to be used throughout the University by the School of Medicine for the education, research and other institutional needs of the School of Medicine. ... The activities of UWP subject state funds to liability. [[2]]

[2] *Id.* at 11.

Petitioners do not challenge any of these findings, each of which is amply supported by the record.[3] Nor have they provided any convincing reasons why this Court should overturn years of precedent holding that entities, including corporations, controlled by the government and carrying out public functions, share the state's limited tort immunities.

As to their constitutional claim, which was barely mentioned at the Court of Appeals' level and is inadequately briefed here, it is enough to say (as the lower court did[4]) that Article I, Section 12 does restrict the Legislature's constitutional authority under Article II, Section 26, to regulate the manner in which suits may be brought against the state, including suits against persons and entities for which the state is financially responsible in tort. Petitioners' have not refuted this common-sense proposition.

II. COUNTERSTATEMENT OF THE ISSUES

1. Does RCW 4.92.110's pre-suit notice requirement, which is a condition of the state's waiver of tort immunity, apply to a medical malpractice action against the state and a not-for-profit corporation, where the undisputed record shows the sole basis for the claim is the alleged negligence of a state employee and the corporation is an arm of the state?

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[3] *See* petition at 3-4.

[4] App. A at 11. The Court of Appeals' opinion is Appendix A (App. A) to the petition.

2. For purposes of the state's waiver of sovereign immunity, does application of RCW 4.92.110's pre-suit notice requirement to a corporation that is an arm of the state implicate Article I, Section 12 of the Washington Constitution, where the sole basis for the suit is the alleged negligence of a state employee and the state is financially responsible for the alleged damages?

3. Do these issues warrant Supreme Court review?

III. COUNTER STATEMENT OF THE CASE

On August 27, 2012, Plaintiffs Steven Hyde and his spouse Sandra Brooke sued the State of Washington, the University of Washington Medical Center,[5] and UWP, alleging injuries as a result of medical care delivered by a University employee, Dr. Virany Hillard. CP 1-3. Dr. Hillard is a neurosurgeon, and at the time was a full-time University of Washington ("UW") School of Medicine faculty member and also, by virtue of her UW employment, a UWP member and employee. CP 21-32. App. 1-3. Plaintiffs did not comply with RCW 4.92.110 by submitting a tort claim prior to commencing their action. CP 6.

A. Summary Judgment Motion

[5] The University of Washington Medical Center is a licensed acute care hospital owned and operated by UW. *See* RCW 28B.20.440 (authorizing operation of hospital on university grounds). It does not have a legal existence separate from the UW. UW itself is a state agency. *Hontz v. State,* 105 Wn.2d 302, 310, 714 P.2d 1176 (1986); *Hunter v. University of Washington,* 101 Wn. App. 283, 293, n.6, 2 P.3d 1022 (2000).

Defendants, represented by a special assistant attorney general, collectively moved for summary judgment on the basis that RCW 4.92.100 requires presentation of a claim to the state risk management division and that RCW 4.92.110 bars actions for tort damages against state entities that are commenced without submission of such a claim. CP 4. Plaintiffs responded by arguing, among other things, that RCW 4.92.100-110 do not apply to UWP.

B. Undisputed Facts Concerning UWP

With authorization by the UW's Board of Regents, UWP was incorporated by the dean of the UW School of Medicine in 1983 "for the benefit of the [UW] School of Medicine exclusively for charitable, educational and scientific purposes, and to aid in performing certain functions of and to carry out certain purposes of the [UW] School of Medicine." CP 38-44. Its principal and income are devoted exclusively to these purposes. *Id.* In the event of dissolution, all of its property passes to the UW. *Id.*

UW School of Medicine faculty members who are licensed to practice medicine in Washington and who have no independent private practice are eligible to become professional members of UWP. CP 50. All billing for their services is performed by UWP and the payments received

are UWP's property. CP 60. UW faculty who are UWP members are prohibited from practicing at any site unless approved by the dean. CP 71.

UWP's revenues are used in part to provide for compensation to faculty members in addition to what they may receive as UW employees. CP 60. In this way, the School of Medicine is able to offer a total compensation package that is adequate to attract and retain high-quality medical faculty without drawing upon other UW funding. CP 69. The Legislature has recognized and authorized this dual paycheck arrangement in the Executive Conflict of Interest Act.[6]

UWP's net revenues also are used by the School of Medicine to support its educational and research programs, and are available to support the UW's efforts to provide charity care to people of reduced means (CP 68-69), thereby furthering the UW's mission of transmitting and creating knowledge, as well as serving the public.

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[6] RCW 42.52.110 states what is sometimes termed "the single paycheck rule" for state employees. By amendments adopted in 1996, express provision for compensation through entities like UWP was excepted from this rule:

> No state officer or state employee may, directly or indirectly, ask for or give or receive or agree to receive any compensation, gift, reward, or gratuity from a source for performing or omitting or deferring the performance of any official duty, unless otherwise authorized by law except: (1) The state of Washington; or (2) in the case of officers or employees of institutions of higher education or of the Spokane intercollegiate research and technology institute, a governmental entity, an agency or instrumentality of a governmental entity, or a nonprofit corporation organized for the benefit and support of the state employee's agency or other state agencies pursuant to an agreement with the state employee's agency.

UWP does not operate any healthcare facilities independent of UW. Instead, UWP is contracted with the UW to provide medical services to patients at hospitals owned or managed by the UW and other practice sites approved by the dean. CP 66-77. Under the agreement between UWP and UW, UWP members are deemed agents of UW for professional liability purposes; UWP itself does not have professional liability coverage. CP 75-76. All records of care provided by its members at UW facilities are maintained by and are property of the UW. CP 73.

UWP is governed by a president, who is a UW School of Medicine faculty member appointed by the dean of the School of Medicine, and a board of trustees, which consists of the chairs of each clinical department within the School of Medicine, at-large trustees who are members of the School of Medicine faculty elected by their colleagues, and community members appointed by the dean. CP 48, 51-54.

C. Proceedings Below

The superior court initially entered an order, which on its face stated that summary judgment was denied entirely, but included language suggesting that the motion was denied only as to UWP. CP 79-84. Defendants timely sought reconsideration (CP 85-91) and, after receiving plaintiffs' response, the superior court issued a second order partially granting reconsideration, by which it dismissed the State and the UW from

the case with prejudice, but held "UW Physicians remains in the case." CP 92-94.

Pursuant to RAP 2.3(b)(4) stipulation, UWP sought discretionary review, CP 97-110, which the Court of Appeals granted. On appeal, petitioners for the first time raised the argument that requiring compliance with RCW 4.92.110 as a condition of suing UWP in tort for acts committed in the course of official duties for the UW has constitutional implications. Their constitutional analysis consisted of the following two sentences:

> The Association cannot receive the benefit of Chapter 4.92 RCW's claim requirement without violation of the state constitution. It is neither municipal corporation nor "public" corporation, and, if it were to receive the benefit of the claim filing requirement of Chapter 4.92 RCW, it would be recipient of a privilege or immunity which does not exist for other corporations. [[7]]

The Court of Appeals reversed, holding "Because UWP functions as an arm of the state and exposes state funds to liability, it constitutes a state entity for purposes of tort claim notice requirements."[8] Its holding regarding the relationship between UWP and the UW is based on this Court's decisions in *Hontz v. State,* 105 Wn.2d 302, 310, 714 P.2d 1176 (1986) (holding that Harborview Medical Center, operated by the UW

[7] Resp. Brf. at 4.

[8] App. A to petition at 1.

under contract with King County, is an arm of the state) and *Good v. Associated Students of the University of Washington*, 86 Wn.2d 94, 542 P.2d 762 (1975), which held that a not-for-profit corporation organized by the UW to support student activities was an "arm and agency" of the UW. Regarding the exposure of the state to liability, it also relied on its own long-standing precedents, which hold that the requirement to file a claim before suing "the state" applies to suits against Harborview Medical Center, a county owned hospital operated by the UW,[9] and suits against individual UW physicians acting in the course and scope of their official duties,[10] as well as a case holding that the local government analogue to RCW 4.92.110 applies to malpractice claims against public corporations created to provide health care to its citizens.[11]

It rejected petitioners' constitutional argument, reasoning that Article II, Section 26 of the Constitution authorizes the Legislature to regulate "suits against the state," and that, "[S]o long as the entity at issue constitutes an instrumentality of the state for purposes of applying the

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[9] *Kleyer v. Harborview,* 76 Wn. App. 542, 887 P.2d 468 (1995).

[10] *Hardesty v. Stenchever,* 82 Wn. App. 253, 917 P.2d 577 (1996).

[11] *Woods v. Bailet,* 116 Wn. App. 658, 67 P.3d 511 (2003).

statute [RCW 4.92.110], as is the case with UWP, there is no violation of the privileges and immunities clause."[12]

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals' holding that UWP is an arm of the State is supported by Undisputed Facts and Consistent with Settled Law.

The Hydes do not dispute the following facts: (1) at the time they commenced suit, RCW 4.92.110 required a claim to be submitted more than 60 days before commencing a tort action against the "the state;"[13] (2) they did not comply with the statute;[14] (3) their intent in commencing suit, in which they named the State of Washington, the University of Washington Medical Center, and UWP as defendants, was to hold the State of Washington liable for the allegedly tortious actions of a UW employee—Dr. Hillard—who was acting in the course of her official state duties;[15] (4) solely by virtue of her UW medical school faculty appointment, Dr. Hillard, received additional compensation from UWP, an entity created and ultimately controlled by the UW, which bills and

[12] App. A at 11.

[13] Laws of 2012, c. 250, § 1.

[14] CP 6.

[15] CP 1-3.

collects professional fees for services rendered by UW faculty members,[16] and uses the funds it collects for the UW to further the UW's educational, scientific and patient care missions, including to pay statutorily authorized additional compensation to UW medical faculty for work performed as UW employees;[17] and (5) the UW is financially responsible for any judgment entered against UWP as a result of Dr. Hillard's alleged negligence.[18]

Applying the law to these undisputed facts, it is important to note that the requirement to give notice before suing the state for tort damages is a constitutionally authorized condition of the state's waiver of sovereign immunity. *Medina v. Pub. Util. Dist. No. 1 of Benton Cnty.*, 147 Wn. 2d 303, 312, 53 P.3d 993 (2002). The purpose of the requirement is to allow governmental defendants time to investigate claims and pursue settlement before they are sued. *Estate of Connelly ex rel. Connelly v. Snohomish Cnty. Pub. Util. Dist. No. 1*, 145 Wn. App. 941, 944-45, 187 P.3d 842 (2008). Like other aspects of governmental immunity, this requirement cannot be circumvented by "a mere pleading device," such as naming UWP rather than the UW or UW employee. *Young v. Duenas*, 164 Wn.

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[16] CP 21-32, 50, 60, 68-69, 71.

[17] CP 38-44.

[18] CP 75-76.

App. 343, 350, 262 P.3d 527, 531 (2011), quoting *Will v. Michigan,* 491 U.S. 58, 70–71, 109 S.Ct. 2304 (1989).

Petitioners do not challenge the numerous precedents recognizing that, for governmental immunity purposes, "the state" means more than just a governmental entity created by statute or constitutional provision. In this regard, it is well-settled that "suits against state officials in their official capacities are treated as suits against the state." *See, e.g. Harrell v. Washington State ex rel. Dep't of Soc. Health Servs.,* 170 Wn. App. 386, 405, 285 P.3d 159 (2012), *review granted*, 176 Wn. 2d 1011, 297 P.3d 706 (2013), citing *Hafer v. Melo,* 502 U.S. 21, 25, 112 S.Ct. 358 (1991).

Hardesty v. Stenchever, 82 Wn. App. 253, 261, 917 P.2d 577 (1996) illustrates application of this principle to notice of claim requirements. It held that a claim was required before suing a UW physician based on acts performed in the course of employment, stating that where a suit "exposes state funds to liability ... [it] ...is precisely the type of case to which RCW 4.92 applies." Of note, at the time *Hardesty* was decided, RCW 4.92.100 did not expressly provide pre-suit notice for actions against state employees or volunteers, as it now does.[19] Yet, the court had no difficulty concluding that a malpractice suit against a UW

[19] *See* Laws of 1986, c. 82, § 2 (adding requirement to give notice before suing state officers and employees).

physician for acts performed in the course of official duties, was in effect a suit against the state and, therefore, required pre-suit notice. *Id.* at 260-261. The situation here is identical; Dr. Stenchever, like Dr. Hillard, was a state employee and, by virtue of that employment, a member of UWP. The UW is financially responsible in either case.

Just as there was no valid reason to allow plaintiffs in *Hardesty* to evade the notice requirement by naming the involved UW physician as a defendant, there is no valid reason why petitioners should be allowed to circumvent the notice requirement by the device of naming an entity created by UW to bill and collect its employed physicians' fees. Their sole argument to the contrary, that an entity must be created by statute in order to be considered part of the state, is inconsistent with settled precedent. For example, *Kleyer v. Harborview,* 76 Wn. App. 542, 887 P.2d 468 (1995), held that RCW 4.92.110's requirement to submit a claim prior to suing the state applies to claims against Harborview Medical Center, notwithstanding the fact Harborview is a county-owned facility.

Kleyer is consistent with this Court's decision in *Hontz v. State,* 105 Wn.2d 302, 310, 714 P.2d 1176 (1986), which held that the mere fact of a contract between the UW and King County, whereby the UW assumed operational control and liability for medical negligence claims, was enough to convert the hospital into "an arm of the state." Both cases

applied a functional test to conclude that a suit against Harborview is "in legal effect a suit against the State."[20] Here, the Court of Appeals followed the same approach and reached the same conclusion.

There is no support for petitioners' assertion that a corporation cannot be deemed an arm or instrumentality of the state. In this regard, their effort to distinguish *Good v. Associated Students of Univ. Wash.*, is particularly unconvincing. *Good* involved the question whether the UW Board of Regents had authority to set up a not-for-profit corporation to administer student activities and to require students to pay fees to that corporation. On that issue, the court said,

> We believe that the range of powers given to the board is sufficiently wide to encompass their decision to provide student activities and services through a separate nonprofit corporation, so long as that entity is in essence an agency of the university and subject to ultimate control by the board. This view is buttressed by the fact that the legislature is well aware of the corporate nature of the ASUW.

Id. at 97.

Petitioners' also make no effort to distinguish other cases, cited below, which illustrate the varieties of circumstances where corporations will be treated as instrumentalities of government. *Lebron v. Nat'l R.R.*

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[20] Although the issue in *Hontz* was whether Harborview was functionally an arm of the state for purposes of 42 U.S.C. § 1983 liability, the same analysis is applicable for purposes of deciding whether a tort claim must be filed. *See Jones v. University of Washington,* 62 Wn. App. 653, 663, 814 P.2d 1236 (1991).

Passenger Corp., 513 U.S. 374, 399, 115 S. Ct. 961 (1995), holds that a corporation is an agency of the Government "when the State has specifically created that corporation for the furtherance of governmental objectives, and not merely holds some shares but controls the operation of the corporation through its appointees." Decades earlier, *Clallam Cnty., Wash. v. United States*, 263 U.S. 341, 342, 44 S. Ct. 121 (1923) , held that a Washington corporation organized, capitalized and controlled by the federal government for purposes of producing lumber for use in war planes was immune from state taxation. Using nearly identical logic, the Ninth Circuit held that the Alaska Railroad Corporation was an arm of the state of Alaska for purposes of Eleventh Amendment immunity because, even though the state was insulated from liability for the corporation's actions, it served a "central government function." *Alaska Cargo Transport, Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 381 (9th Cir. 1993).

UWP is similar; its creation was authorized by the Board of Regents to serve the statutorily authorized purposes of the UW, including its School of Medicine and hospitals, it is ultimately controlled by the UW (acting through the Dean of the School of Medicine), and the Legislature has recognized its operation as a part of the UW by adoption of an exception to the single pay-check rule in RCW 42.52.110.

Petitioners' effort to distinguish *Woods v. Bailet*, 116 Wn. App. 658, 67 P.3d 511 (2003) also fails. That case involved interpretation of the phrase "local government entities" in RCW 4.96.020. The court concluded that the term included a corporation ("PacMed") established under RCW 35.21.270, notwithstanding the fact statute did not specify claims must be submitted before suing "public corporations" or their employees.[21] The Hydes argue, despite the very similar purposes of PacMed and UWP, that the absence of specific statutory authorization for UWP's creation by the UW distinguishes *Wood*. This is a distinction without a difference in this context; the "arm of the state" and "instrumentality" cases do not depend to any degree on the entity being created specifically by statute. For example, no statute specifically created the relationship between the UW and Harborview. Rather, the relationship that required filing of a tort claim was created by contract.[22] Although such contracts are authorized by statute,[23] that authorization is no different than the UW Board of Regents' authority under RCW 28B.10.130, which was interpreted in *Good* to allow establishment of non-profit corporations deemed necessary to fulfill the UW's mission.

[21] 116 Wn. App. at 664.

[22] *Kleyer v. Harborview*, 76 Wn. App. at 543, n.1.

[23] RCW 36.62.290.

B. Petitioners' Constitutional Arguments lack Merit.

Petitioners' constitutional argument assumes the Court of Appeals erred in its determination that UWP is an arm of the state for purposes of tort immunity, and reasons from that assumption that applying RCW 4.92.110 to a private corporation affiliated with the state amounts to the grant of a privilege or immunity that is not available to other corporations, and that there is no reasonable ground for doing so.[24] As the Court of Appeals correctly pointed out, however, this argument loses its logical underpinnings if the entity in question is one for which the state is liable in tort.

Further, the argument proves too much, because Article 1, Section 12 also prohibits the grant of privileges and immunities to "any citizen ... which upon the same terms shall not belong equally to all citizens." Therefore, under petitioners' view of the law, the Legislature would be prohibited from requiring pre-suit notice with respect to actions against state employees and volunteers, for action taken in the course of official duties.

Petitioners' suggestion that the Court of Appeals violated the separation of powers doctrine by interpreting the statute is similarly

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[24] Petition at 7.

unsupported. Courts have the right and duty to interpret statutes.[25] The Court of Appeals conclusion that the statutory requirement to give notice prior to suing "the state" extends to arms of the state, represents nothing other than the exercise of traditional judicial power to declare the meaning of legislative enactments.[26]

V. CONCLUSION

The Court of Appeals' decision does not present an issue warranting Supreme Court review. Accordingly, the petition should be denied.

Respectfully submitted this 24 day of June, 2015.

BENNETT BIGELOW & LEEDOM, P.S.

By: ______________________
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[25] *Franklin Cnty. Sheriff's Office v. Sellers*, 97 Wn. 2d 317, 330, 646 P.2d 113 (1982) (courts have "inherent authority to determine the correct law").

[26] *Cecchi v. Bosa*, 186 Wash. 205, 209, 57 P.2d 1064, 1065 (1936) ("A statute, when interpreted by the court, speaks according to the judicial interpretation given it.").

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and at all times material hereto, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein. I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below:

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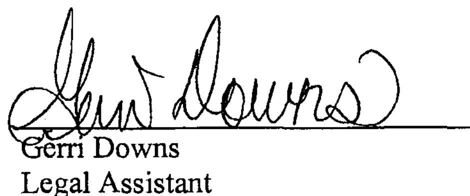
Dated this 24th day of June 2015, at Seattle, Washington.



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Attached for filing please find Respondent's Answer to Petition for Review.

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