No. 93034-1

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON COUNTIES RISK POOL, a public entity,
RESPONDENT,

vs.

TAMARA MARIE CORTER, a married individual, STEVE GROSECLOSE, an individual,
APPELLANTS

and

DOUGLAS COUNTY, a municipal corporation,
RESPONDENT.

APPELLANTS' REPLY ARGUMENT

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I. REPLY ARGUMENT

As the petition explains, this case is important because of its wide applicability to municipalities across the State of Washington. Citizens of the State of Washington face the inescapable reality that they will inevitably interact with the government through its employees. This decision will impact each and every interaction as it will dictate the stakes for violations of constitutional rights and the practical remedies for Washington State citizens going forward.

A. The Court of Appeals decision is contrary to state and federal law.

The question "What does a factual finding that an employee acted under 'color of law' entail?" has been answered by the Ninth Circuit.

In *McDade*, 223 F.3d 1135, 1139 (9th Cir. 2000), the Ninth Circuit confronted the question "whether a state employee who accesses confidential information through a government-owned computer database acts 'under color of state law.'" *McDade v. West* (*McDade I*).[1] The *McDade I* Court found in the affirmative. In answering, the *McDade I* Court stated the "acts, therefore, must be performed while the officer is acting, purporting, or pretending to act in the performance of his or her official duties." Id. at 1140. The *McDade I* Court reasoned that,

[1] *McDade II, McDade v. West*, 60 Fed.Appx. 146 (9th Cir. 2003), addressed whether Ms. West acted within the *scope of her employment* as required by California law.

""[b]ecause Ms. West's status as a state employee enabled her to access the information, she invoked the powers of her office to accomplish the offensive act. Therefore, however improper Ms. West's actions were, they clearly related to the performance of her official duties." *Id.*

The Court of Appeals' decision is in direct conflict with *McDade I & II*, the very cases it relies upon. Additionally, the Court of Appeals' decision fails to draw a distinction between "scope of official duties" and "scope of employment." Again, this is in direct conflict with *McDade I & II*. While *McDade I* found Ms. West to be acting within the scope of her official duties,[2] the court in *McDade II* found that Ms. West's same actions were not done within the scope of her employment.[3] The Court of Appeals' decision that "scope of official duties" was simply another way of saying "scope of employment" is not supported by *McDade I & II*.

Moreover, these terms are used in very different contexts. The "scope of official duties" standard is frequently utilized in federal law and typically in the context of government actor immunity. *Meriweather v. Hitchcock*, 869 F.2d 1497 (9th Cir. 1989)("This immunity fails to attach only when a probation officer acts clearly and completely outside the

[2] "Therefore, however improper Ms. West's actions were, they clearly related to the performance of her official duties." *McDade I* at 1140. The *McDade I* Court held Ms. West acted under color of law as she acted within the performance of her official duties.
[3] "West's illegal use of the database was not within the scope of her employment." *McDade II* at 148.

scope of official duties"); *Little v. City of Seattle*, 863 F.2d 681, 683 (9th Cir. 1988)("The court found that the supervisors would be absolutely immune from suit if their acts were 'within the scope of their official duties and the conduct [was] discretionary in nature.'"); *Hardage v. Jacobs*, 884 F.2d 582 (9th Cir. 1989); *Scheuer v. Rhodes*, 416 U.S. 232, 238-39, 94 S.Ct. 1683, 1687-88, 40 L.Ed.2d 90 (1974) (suggesting that the defendants enjoy absolute immunity for all acts performed within the scope of official duties). "Official duties" and the performance thereof, is often used in the context of § 1983 claims. *United States v. Walsh*, 194 F.3d 37, 52 (2d Cir. 1999) (the government actor "must be acting within his official duties, but the act of abuse need not be authorized by the system within which he works to be acting 'under color of law.' "); *Garcia v. Holder*, 756 F.3d 885, 892 (5th Cir. 2014) ("The under color of law inquiry turns upon the nexus between the petitioner, the improper conduct of those officials in question, and the officers' performance of their official duties."); *Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 24 (3d Cir. 1997) ("a state employee who pursues purely private motives and whose interaction with the victim is unconnected with his execution of official duties does not act under color of law."); *Adams v. Vandemark*, 787 F.2d 588 (6th Cir. 1986) ("Acts are done 'under color of . . . law' when government officials act or purport to act in the performance of their

official duties."); *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 838 (9th Cir.1996) (A police officer's actions are under pretense of law only if they are "in some way 'related to the performance of his official duties.' ").

On the other hand, "scope of employment" is a term typically used regarding issues of respondeat superior. *Breedlove v. Stout*, 104 Wn. App. 67, 69, 14 P.3d 897, 899 (2001) (Under the respondeat superior doctrine, an employer may be liable for its employee's negligence in causing injuries to third persons if the employee was within the "scope of employment" at the time of the occurrence).

The Court of Appeals took its decision one step further, holding that because Groseclose was found liable under § 1983, he necessarily was not acting within the scope of his employment. It is well accepted in Washington that a determination that a defendant is liable for constitutional violations under § 1983 does not automatically lead to the conclusion that the defendant was acting outside the scope of their employment. *Morinaga v. Vue*, 85 Wn. App. 822, 833, 935 P.2d 637 (1997). The question is this, "What does a factual finding that an employee acted under 'color of law' entail?" The Ninth Circuit answered stating that the performance of official duties is a foundational requirement. The Court of Appeals answered this question by using

reasoning that contravenes both state and federal law. This Court should accept review to correct that error.

B. The Court of Appeals' Decision is Contrary to Public Policy as it Defeats the Purpose of § 1983.

The Court of Appeals' decision is also contrary to public policy as it defeats the purposes of § 1983. Section 1983 is intended primarily to remedy constitutional violations and deter future violations of constitutional rights. As outlined in the Petition, the Court of Appeals' decision significantly reduces, if not eliminates, the benefits conferred by § 1983 and the indemnification provisions of RCW 4.96.041.

The Court of Appeals' decision held that because Groseclose was found liable under § 1983, he necessarily was not acting within the scope of his employment. Since the decision sees "scope of official duties" as another way of saying "scope of employment," under RCW 4.96.041 there can be no indemnification for a § 1983 judgment as RCW 4.96.041 requires the government actor to have been in the performance of his or her official duties. Thus, according to the Court of Appeals' decision, a § 1983 judgment necessarily removes the government actor from RCW 4.96.041. This aversely impacts the public interest.

First, the remedy of monetary damages against government entities in the State of Washington is greatly reduced, if not eliminated, when

government employees face § 1983 judgments. For Washington State citizens, monetary damages may be the only realistic avenue for vindication of constitutional rights. When citizens are forced to seek monetary damage remedies against judgment proof government actors, the remedy of monetary damages is no remedy at all. Moral victories will not serve as a motivation to navigate the complexities of § 1983 litigation and the burdens of a lawsuit.

Second, the ability to deter is compromised. Section 1983, in concert with RCW 4.96.041, deters the government itself from violating constitutional rights. If a government entity must indemnify its employees under RCW 4.96.041 for § 1983 claims then that entity has incentive to rigorously train and supervise its employees regarding protection of constitutional rights. A municipality cannot be held liable under § 1983 merely for failing to supervise its employees. *Webster v. City of Houston*, 689 F.2d 1220, 1226 (5th Cir. 1982). It is the § 1983 claim in concert with indemnification under RCW 4.96.041 that deters government entities from allowing its employees to do as they please. The Court of Appeals' decision removes this ability to deter.

Additionally, the Court of Appeals' decision deters attorneys from taking up such cases. Claims under § 1983 are complex and require a great deal of time, experience, skill, research, and cost to pursue. If the Court of Appeals' decision stands, attorneys will be reluctant to take such cases, if at

all, when forced to seek judgments against often judgment proof employees. Indemnification through RCW 4.96.041 provides the incentive to attorneys handling § 1983 cases. Plaintiffs operating as "private attorney generals" will be reduced, if not eliminated, under the Court of Appeals' decision.

Finally, the legislature passed RCW 4.96.041 in part to protect government employees from financial ruin and encourage the best pool of applicants to government positions. In the rare circumstance that a government employee is not judgment proof, a § 1983 judgment will almost certainly create financial ruin for that employee. While government employees face claims that are not under § 1983, for the most part, such claims come with the protection of joint and several liability. Thus, the government entity will be the deep pocket that is pursued financially for a judgment. However, the calculus is different when a constitutional right violation is at play with a § 1983 claim, as a government entity cannot be held liable under respondeat superior for § 1983 claims. *Monell v. Dep't of Soc. Servs. Of City of N.Y.*, 436 U.S. 658, 663 n. 7, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). There is no respondeat superior. There is joint and several liability. Thus, a § 1983 judgment will fall on the individual employee alone.

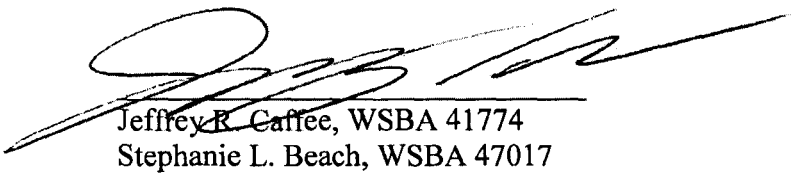
C. Conclusion

Given the position of power and authority government entities have over a citizen, the prevention of constitutional rights violations should be of paramount importance. However, the Court of Appeals' decision ensures that government entities in the State of Washington are given a greater incentive to prevent car accidents than violations of constitutional rights. This is not sound public policy. This Court should accept review of this case as it will have significant impact across the State of Washington and shape public policy on violations of constitutional rights and the remedies afforded to Washington State citizens.

For these reasons, review should be accepted in this case because under RAP 13.4(b), considerations 1 and 4 apply.

DATED this the 23rd day of May, 2016.

VAN SICLEN, STOCKS & FIRKINS



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CERTIFICATE OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on May 23, 2016, she caused the foregoing *Petition for Review* to be served on the following parties of record and/or interested parties by sending copies by U.S. Mail (postage prepaid), to the below as follows:

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Dated this 23rd day of May, 2016 Auburn, Washington.

Toni Miller

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From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, May 23, 2016 12:16 PM
To: 'Toni Miller'
Cc: Jeff Caffee; Stephanie Beach
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Subject: Washington Counties Risk Pool v. Corter and Douglas County - No. 93034-1

Good Morning:

Attached to this email is Appellants' Reply Argument in regard to Washington Counties Risk Pool, Respondent, v. Corter and Groseclose, Appellants, and Douglas County, Respondent. The Case No. is 93034-1. Appellants' attorneys are Jeffrey R. Caffee, WSBA #41774, and Stephanie L. Beach, WSBA #47017. The phone number for our office is (253) 859-8899.

Sincerely,

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