No. 98548-1

SUPREME COURT
OF THE STATE OF WASHINGTON

DAISY A. AMO,

Petitioner,

v.

HARBORVIEW MEDICAL CENTER and ALSON BURKE, M.D.,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Respondents Harborview Medical Center (Harborview) and Alson Burke, MD, respectfully request that this Court deny Daisy Amo's Petition for Review.

Ms. Amo filed suit against Harborview, a state entity, and its employee Dr. Burke for claims sounding in tort, but did not submit a notice of tort claim before doing so, as required by RCW 4.92.100-110. Division I of the Court of Appeals properly held that Ms. Amo's failure to submit a notice of tort claim barred her action, and affirmed the trial court's dismissal of that action in an unpublished decision.

In seeking review here, Ms. Amo asserts that the statutory requirement for a notice of tort claim violates her rights under the Fourteenth amendment of the United States Constitution. But the constitutionality of pre-suit notice requirements has been considered and upheld in a number of prior cases. Ms. Amo also asserts that she was ignorant of the notice of tort claim requirement prior to filing her lawsuit. But neither this Court, nor any division of the Court of Appeals, has excused a plaintiff from a notice-of-tort claim requirement on that basis.

This Court should deny review of the Court of Appeals' well-reasoned decision. That decision is not in conflict with any decision of this Court, or with any published decision of the Court of Appeals. It raises no significant constitutional question, and involves no issues of substantial public interest. As such, review is not warranted under RAP 13.4(b).

II. RESTATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals properly affirm the trial court's dismissal of Ms. Amo's tort action against Harborview and Dr. Burke, when Ms. Amo failed to file a notice of tort claim with the Washington State office of Risk Management prior to filing her action, as required by RCW 4.92.100-110?

III. RESTATEMENT OF THE CASE

The Court of Appeals decision accurately recites the facts underlying the trial court's order granting Harborview and Dr. Burke's motion for summary judgment dismissal of Ms. Amo's claims. Those facts are summarized here.

On September 15, 2015, Ms. Amo presented to Harborview's Adult Medicine and Gynecology Clinic with complaints of pelvic discomfort, and was treated by resident physician Angel Desai, MD, and attending physician Alson Burke, MD.[1] CP 157-60. At Ms. Amo's request, Dr. Burke performed a pelvic exam and a pap smear, a test involving the collection of cells from the cervix for pathologic evaluation. CP 157-58. The examination was normal, and Ms. Amo was instructed to return if her symptoms worsened or failed to improve. CP 160.

Ms. Amo and Dr. Burke exchanged correspondence regarding her

[1] Dr. Desai and Dr. Burke are employees of the University of Washington (UW) and provide medical care at Harborview, a hospital operated by the UW under a contract with King County. Both the UW and Harborview are Washington State entities. *See Hyde v. University of Washington Medical Center*, 186 Wn. App. 926, 930, 347 P.3d 918 (2015) (UW is a state agency); *Hontz v. State*, 105 Wn.2d 302, 310, 714 P.2d 1176 (1986) (Harborview is "an arm of the state").

pap smear results. CP 162, 165, 171. Ms. Amo indicated that she was still experiencing discomfort, and Dr. Burke invited Ms. Amo to schedule another appointment with her. CP 165. Ms. Amo thanked Dr. Burke, indicated that she would schedule another appointment, but did not do so and did not return to Dr. Burke for care. CP 171.

Ms. Amo later submitted a patient complaint to Harborview, raising concerns regarding several aspects of the care provided by Dr. Burke and other Harborview providers, and alleging that Dr. Burke had inappropriately inserted her finger into Ms. Amo's vagina during the course of her pelvic examination. CP 68-73. Harborview conducted an internal review of Ms. Amo's complaint and provided Ms. Amo with the number for the Department of Health, and the Joint Commission on Accreditation of Healthcare Organizations, in the event that Ms. Amo felt that her patient complaint warranted additional review. CP 75-83. At no point during any of her communications with Harborview did Ms. Amo assert any civil claim or entitlement to damages.

On September 10, 2018, almost three years following the care and treatment provided by Dr. Burke and Harborview, Ms. Amo sued Harborview and Dr. Burke, alleging medical negligence related to the care provided by Dr. Burke and other Harborview providers, and alleging that Dr. Burke sexually assaulted her during the course of her pelvic examination. CP 3-26; Slip Op. 1-2. Ms. Amo sought compensatory damages as well as damages for "mental anguish," punitive damages, and

"other expenses." CP 25-26; Slip Op. 2.

Harborview and Dr. Burke filed a Motion for Summary Judgment, requesting dismissal of Ms. Amo's claims on the basis that she had failed to comply with RCW 4.92.100-110, which requires presentation of a tort claim to the state Office of Risk Management in Olympia prior to filing a tort action against state entities and their employees. CP 32-39; 117-20; Slip Op. 2. Ms. Amo did not dispute that she had failed to file a notice of tort claim, but opposed the Motion on the basis that she was unaware of the requirement to do so. CP 40-45; 121-24; Slip Op. 2.

Following a hearing on the Motion, the trial court granted Harborview and Dr. Burke's Motion, dismissing Ms. Amo's claims with prejudice. CP 125; 136-37; Slip Op. 2.

Ms. Amo appealed, and the Court of Appeals affirmed in an unpublished decision. Slip Op. 1, 8. The Court of Appeals rejected Ms. Amo's argument that her unawareness of RCW 4.92.100-110, and her communications with Harborview regarding her patient complaint, excused her lack of compliance with chapter 4.92 RCW. Slip Op. 4-8.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Ms. Amo's Claims are Tort Claims.

As a threshold matter, Ms. Amo's claims against Harborview and Dr. Burke sound in tort and are thus subject to the claim-filing requirements of RCW 4.92.100-110.

To the extent that Ms. Amo alleges that Harborview providers were

negligent with respect to their care and treatment of her, Ms. Amo's claims are governed by RCW 7.70 *et seq*. RCW 7.70.010; *Branom v. State,* 94 Wn. App. 964, 968-69, 974 P.2d 335, *review denied* 138 Wn.2d 1023, 989 P.2d 1136 (1999) (whenever an injury occurs as a result of health care, the action for damages for that injury is governed exclusively by RCW 7.70 *et seq*., "regardless of how the action is characterized."). Pursuant to RCW 7.70.030, a plaintiff seeking damages for an injury occurring as a result of healthcare must establish one of three propositions: (1) the injury resulted from a failure to follow the accepted standard of care; (2) the health care provider promised the patient that the injury would not occur; or (3) the injury resulted from health care to which the patient did not consent.

Claims asserted pursuant to RCW 7.70.030, including those based on allegations of substandard care, sound in tort. *See Mohr v. Grantham*, 172 Wn.2d 844, 850, 262 P.3d 490 (2011) ("The medical malpractice statute requires the same elements of proof as traditional tort elements of proof: duty, breach, injury, and proximate cause."). This is true not only for claims arising out of negligence, but for those arising out of intentional conduct as well. *See Bundrick v. Stewart*, 128 Wn. App. 11, 17, 114 P.3d 1024 (2005) (referring to and discussing the application of medical battery as an intentional tort); *Honegger v. Yoke's Washington Foods, Inc.*, 83 Wn. App. 293, 297, 921 P.2d 1080 (1996) (assault and battery are intentional torts).

B. The Court of Appeals correctly held that compliance with RCW 4.92.100-110 is required for tort claims against state entities and employees.

By enacting chapter 4.92 RCW, the legislature abrogated sovereign immunity and established procedures for bringing tort claims against the State and its employees. The provisions of the statute preclude tort claims against State entities and their employees unless the plaintiff first files a tort claim with the State of Washington's Office of Risk Management at least 60 days before commencing the action:

> 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.

RCW 4.92.100(1).

> 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.

RCW 4.92.110.

RCW 4.92.100-110 specifically requires that all claims for damages must be presented to the state Office of Risk Management, Department of Enterprise Services, on the standard tort claim form that is maintained by that office. RCW 4.92.100. RCW 4.92.100 also sets forth the content requirements of that claim. The mandatory tort claim form, along with instructions for completing and filing the form, are readily available at the

Office of Risk Management website.[2]

Among the purposes of claim filing statutes like RCW 4.92.100-110, is to "allow government entities time to investigate, evaluate and settle claims before they are sued." *Renner v. City of Marysville*, 168 Wn.2d 540, 545, 230 P.3d 569 (2010) (quoting *Medina v. Public Utilities Dist. No. 1 of Benton County,* 147 Wn.2d 303, 310, 53 P.3d 993 (2002)). Claim filing requirements preserve public funds by allowing government entities time to "investigate claims without incurring litigation expenses and to foster inexpensive settlements." *Johnston v. City of Seattle,* 95 Wn. App. 770, 774, 976 P.2d 1269 (1999).

The requirement that a claimant file her tort claim in accordance with RCW 4.92.100-.110 is strictly enforced. *Levy v. State,* 91 Wn. App. 934, 942, 957 P.2d 1272 (1998); *Kleyer v. Harborview Medical Ctr.,* 76 Wn. App. 542, 545-46, 887 P.2d 468 (1995). As the Court of Appeals correctly noted in its opinion here, "[t]he law is well settled that dismissal of the case is proper when the plaintiff does not comply with the statutorily mandated claim filing procedure." *See* Slip Op. 5. Case law supporting this proposition is in accord. *See Medina,* 147 Wn.2d at 316; *Hyde v. University of Washington Medical Center,* 186 Wn. App. 926, 929, 347 P.3d 918 (2015); *Oda v. State*, 111 Wn. App. 79, 87, 44 P.3d 8 (2002); *Levy,* 91 Wn. App. at 941-42; *Mercer v. State,* 48 Wn. App. 496, 498, 739 P.2d 703 (1987).

[2] *See* https://des.wa.gov/services/risk-management/file-claim.

Claim filing requirements have consistently withstood constitutional scrutiny, despite the additional procedural burdens that they place on plaintiffs. In *McDevitt v. Harborview Medical Center*, 179 Wn.2d 59, 316 P.3d 469 (2013), the Court held that the 90-day pre-suit notice requirement of former RCW 7.70.100(1) did not violate equal protection and noted that "[t]his court has historically recognized that the legislature has the constitutionally sanctioned power to alter the common law doctrine of sovereign immunity." *Id.* at 64. In *Woods v. Bailett*, 116 Wn. App 658, 67 P.3d 511 (2003), this court rejected a due process challenge to former RCW 4.96.020, the claim filing statute applicable to municipalities. Woods argued that she was not on sufficient notice of where or how to file a claim. In rejecting that argument the court reasoned that:

> Requiring claims to be filed with the "governing body" is not so vague that it violates due process. In imposes an additional burden on the plaintiffs in that it requires them to determine the governing body of a particular entity but that is not such a barrier to relief that it violates fundamental fairness.

Id. at 667-68. The court in *Woods* further reasoned that a plaintiff exercising due diligence would have discovered that the claim filing statute applied to the defendant, a physician employed by a "quasi-municipal" corporation created by the City of the Seattle. *Id.* at 668-69; *see also Hyde*, 186 Wn. App. at 936 (RCW 4.92 does not violate privileges and immunities clause so long as the entity to which it applies is an instrumentality of the state).

C. The Court of Appeals correctly held that compliance with RCW 4.92.100-110 was required for Ms. Amo's tort claims against Harborview and Dr. Burke.

Because Ms. Amo's claims are tort claims, brought against a state entity and its employee, she was required to comply with the tort filing provision of chapter 4.92 RCW prior to filing her lawsuit.

In *Kleyer,* 76 Wn. App. at 547-49, the court specifically held that a patient who brought suit against Harborview was required by RCW 4.92.l10 to file a claim at the Office of Risk Management in Olympia before commencing his lawsuit. *Kleyer* followed *Hontz v. State,* 105 Wn.2d 302, 714 P.2d 1176 (1986), which held that Harborview is "an arm of the state," rather than a municipal entity, for purposes of determining whether it was subject to suit under 42 U.S.C. § 1983.

By its plain language, RCW 4.92.110 applies as well to claims against employees of state entities, acting in that capacity. Multiple appellate decisions also recognize that claim-filing requirements imposed by the Legislature as a condition of its waiver of tort immunity apply to persons and entities for whose acts the state is financially responsible. For instance, even when RCW 4.92.110 expressly applied only to actions "against the state," and did not mention suits against state officers and employees,[3] the Court of Appeals reversed a Superior Court order denying summary judgment to a UW physician, holding that compliance with RCW 4.92.100 was required, not only because the acts and omissions at issue

[3] Those terms were added by Laws of 1986, c. 82, § 2.

"were performed within the scope of his official duties at the UW," but because "[t]he suit … exposes state funds to liability, making this precisely the type of case to which RCW 4.92 applies." *Hardesty v. Stenchever,* 82 Wn. App. 253, 260-261, 917 P.2d 577 (1996). This principle was recently reiterated in *Hyde,* 186 Wn. App. at 930 ("[T]ort claim notice requirements for state entities extend to those who function on behalf of the state, especially if the activity exposes state funds to liability.").

Here, both because Dr. Burke was acting in her capacity as a Harborview physician in providing the care at issue, and because the claims against her expose the state to liability, the tort claim filing requirements of RCW 4.92.100-110 apply as to Ms. Amo's claims against Dr. Burke.[4]

D. The Court of Appeals correctly held that Ms. Amo's failure to comply with RCW 4.92.100-110 bars her suit.

It is undisputed that Ms. Amo failed to comply with chapter 4.92 RCW prior to filing her tort action against Harborview and Dr. Burke. The trial court and the Court of Appeals appropriately concluded that such

[4] In a footnote to its opinion the Court of Appeals noted that "To the extent Amo alleged that Dr. Burke committed sexual assault, an act outside the scope of her employment, the claim filing requirements of chapter 4.92 RCW do not appear to apply." Slip Op. at 8 n. 6 (citing *Jones v. University of Washington*, 62 Wn. App. 653, 664, 814 P.2d 1236 (1991); *Boss v. City of Spokane*, 63 Wn.2d 305, 387 P.2d 67 (1963)). Assuming (without conceding) the accuracy of this analysis, Ms. Amo's intentional tort claim was nevertheless appropriately dismissed. As the Court of Appeals correctly reasoned, "the trial court sill properly dismissed this claim because the applicable two-year statute of limitations had already expired when she filed her complaint." Slip Op. at 8n. 6 (citing RCW 4.16.100 (two-year limitations period for claims of assault and battery); *see also Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994) (a trial court's decision may be affirmed on any basis supported by the record)). In her petition for review, Ms. Amo appears to reference, without citation the statute of limitations that applies to prosecutions for criminal offenses. Pet. at 3, n.1; appendix 1; *see* RCW 9A.04.080. This statute is inapposite with respect to the civil claims brought by Ms. Amo here.

failure barred Ms. Amo's suit, and mandated dismissal. RCW 4.92.100-110. The Court of Appeals opinion is in accord with prior precedent, it raises no significant constitutional question, and it involves no issue of substantial public interest. As such, Ms. Amo is unable to establish that review by this Court is warranted under any of the elements of RAP 13.4.

In arguing that this Court should accept review, Ms. Amo cites without analysis to the Fourteenth amendment of the United States Constitution. However, as discussed above, our courts have consistently upheld the constitutionality of notice of tort claim statutes, including under the equal protection, privileges and immunity, and due process clauses of the Fourteenth amendment. *See McDevitt,* 179 Wn.2d at 64 (former RCW 7.70.100(1) did not violate equal protection); *Hyde,* 186 Wn. App. at 936 (RCW 4.92 does not violate privileges and immunities); *Woods,* 116 Wn. App at 667-68 (RCW 4.96.020, the claim filing statute applicable to municipalities, did not violate due process);

Ms. Amo also contends that she was simply unaware of the requirements of RCW 4.92.100-110 and, therefore, they should not apply to her. However, Washington courts have never excused a plaintiff from the requirements of RCW 4.92.100-110 on this basis. To the contrary, courts have routinely held that the filing requirements are strictly construed regardless of the circumstances giving rise to a plaintiff's noncompliance. In *Kleyer,* for example, the court affirmed dismissal of plaintiff's claim when he filed his notice of tort claim with the UW risk management

department, and not the office of risk management in Olympia. 76 Wn. App. at 548 (the court "must give full effect to the plain language of the statute, even when its results may seem unduly harsh."). Indeed, the purpose of the notice of claims statute would be defeated if any plaintiff could simply plead ignorance to avoid its application to her claims.

Ms. Amo also contends that Harborview itself should have made her aware of the requirements of RCW 4.92.100-110. But Ms. Amo has cited no authority suggesting that Harborview was obligated to undertake affirmative action on her behalf to ensure that she satisfied the requirements of RCW 4.92. Courts of this state have not imposed any such obligation and, in fact, have concluded that no such obligation exists. *See., e.g., Hardesty,* 82 Wn. App. at 258-59 (UW was not estopped from asserting that plaintiff failed to file a claim with the office of risk management in Olympia, even if no one at the UW informed her of the requirement to file such a claim).

Even assuming that particular circumstances may give rise to an obligation to inform a plaintiff of the claim filing requirements, nothing in the record supports the imposition of such an obligation here. Ms. Amo did not assert a civil legal claim in her communications with Dr. Burke or Harborview, did not state any intent to sue Harborview or Dr. Burke during those communications, and did not ask about the pre-suit filing requirements of RCW 4.92. *See* CP 68-72. Harborview is not required to intuit an individual's intent to file a lawsuit against it.

Even if Harborview had been made aware of, or hypothesized, Ms. Amo's intention, it was nevertheless Ms. Amo's obligation, not that of Harborview, to determine the procedural requirements for any legal suit against it and its employee. Those requirements are publicly available and easily ascertainable with the exercise of due diligence. *See Renner v. City of Marysville,* 145 Wn. App. 443, 451, 187 P.3d 281 (2008) (with respect to 4.96 RCW regarding notice of claims against municipalities, the plaintiff was "equally as able" as the defendant City "to read the statute and understand what information he had to provide."); *cf. In re Connick,* 144 Wn.2d 442, 455, 298 P.3d 729 (2001) (a litigant appearing *pro se* is bound by the same rules of conduct and procedure as an attorney).

Ms. Amo also appears to argue that Harborview misled her by indicating that it was reviewing her concerns and by directing her to the Department of Health (DOH) and the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), rather than the Office of Risk Management in Olympia. Pet. at 19-20. But her argument fails to distinguish between patient complaints that may give rise to internal review and physician discipline, and legal tort claims for monetary damages. Harborview conducted an internal review and responded to Ms. Amo's patient complaint regarding physician conduct, determined if that complaint warranted personnel action, and appropriately directed Ms. Amo to the organizations responsible for oversight of physician discipline and hospital accreditation should she wish her patient complaints to be further reviewed

by an outside agency. None of these acts were misleading.

Ms. Amo has presented no evidence that she interpreted (reasonably or otherwise) Harborview's reference to those agencies to suggest that complaints directed to them satisfied the requirements of RCW 4.92.100-110, that she ever in fact lodged complaints with those agencies, or that Harborview's references to those agencies dissuaded her from filing the statutorily mandated tort claim form with the Office of Risk Management before filing her lawsuit. To the contrary, Ms. Amo represents that she was never aware of the requirements of RCW 4.92.100-110 prior to filing her lawsuit and receiving defendants' motion to dismiss. As such, Harborview's reference to the DOH and the JCAHO did not and could not have caused Ms. Amo to forgo the notice claim requirements of RCW 4.92.100-110.

As the Court of Appeal correctly reasoned:

> There was nothing misleading about Harborview's course of action in conducting an internal investigation and referring Amo to the entity that sets standards and accredits healthcare organizations or the entity that oversees physician licensing in Washington and accepts consumer complaints against licensed physicians. There is no authority for the proposition that Harborview as required to assume that Amo intended to pursue litigation or that it was obligated to take affirmative steps to ensure her compliance with the statutory prerequisites for filings suit. Indeed, we have rejected similar arguments in cases involving more compelling facts.

Slip Op. at 7, citing *Jones*, 62 Wn. App. at 662 (affirming dismissal of plaintiff's claims when plaintiff failed to file his notice of claim until after the lawsuit was filed, but before the expiration of the statute of limitation);

Kleyer, 76 Wn. App. at 544; *Hardesty*, 82 Wn. App. at 258-59.

V. CONCLUSION

This Court should deny Ms. Amo's petition for review. The Court of Appeals' well-reasoned decision is not in conflict with any decision of this Court, or with any published decision of the Court of Appeals. It raises no significant constitutional question and, in fact, the constitutionality of notice of tort claim requirements has been routinely affirmed by our courts. Ms. Amo has also identified no issue of substantial public interest. As such, review is not warranted under RAP 13.4(b).

Respectfully submitted this 17th day of June, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing in Supreme Court Cause No. 98548-1 upon the following parties electronically and via US Regular Mail:

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DATED this 17th day of June, 2020.

Linnea Butler
Legal Assistant to Rhianna Fronapfel

BENNETT BIGELOW & LEEDOM

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