70830-9

70830-9

NO. 70830-9-I

---

**COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I**

---

STEVEN W. HYDE and SANDRA D. BROOKE, husband and wife,

Respondents,

v.

UW PHYSICIANS,

Petitioner, and

UNIVERSITY OF WASHINGTON MEDICAL CENTER and STATE OF WASHINGTON,

Defendants



---

# PETITIONER'S REPLY BRIEF

---

Michael F. Madden, WSBA #8747
Bennett Bigelow & Leedom, P.S.
601 Union Street, Suite 1500
Seattle WA 98101
(206) 622-5511

Carol L. Moody, WSBA #11128
Fain Anderson VanDerhoef, PLLC
701 Fifth Avenue, Suite 4650
Seattle, WA 98104
(206) 749-0094

Special Assistant Attorneys General
Attorneys for Petitioner

ORIGINAL

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**Statutes**

**Constitutional Provisions**

## I. SUMMARY

The requirement to file a claim prior to suing the state for tort damages is of long-standing and well-known to the bench and bar. In this case, respondents sued the State of Washington, the University of Washington Medical Center, and UW Physicians ("UWP") based on the alleged negligence of a state employee, but failed to give the required notice. In order to avoid dismissal, they want the Court to create an exception to the claim filing requirement for suits against UWP, which is the entity responsible for billing and collecting professional fees generated by University of Washington ("UW") medical school faculty members while performing official duties as state employees. The Court should reject this invitation to create an exception to the claim filing requirement because the UW is responsible for any liability resulting from UW physicians' performance of official duties and because UWP functions as an "arm" or "instrumentality" of a state agency for purposes of RCW 4.92.110.

## II. ARGUMENT

### A. Respondents do not dispute the fundamental points leading to the conclusion that they were required to submit a tort claim before commencing suit.

The Hydes do not dispute the following propositions: (1) at the time they commenced suit, RCW 4.92.100 required a claim to be

submitted more than 60 days before commencing a tort action against the "the state;"[1] (2) they did not comply with the statute;[2] (3) their intent in commencing suit, in which they named the State of Washington, the University of Washington Medical Center, and UW Physicians as defendants, was to hold the State of Washington liable for the allegedly tortious actions of a state employee—Dr. Hillard—who was acting in the course of her official state duties;[3] (4) Dr. Hillard was a UW employee who, solely by virtue of her UW faculty appointment, also was employed by UWP;[4] (5) UWP bills and collects professional fees for services rendered by UW faculty members, and distributes the funds it collects to the UW to further the UW's educational, scientific and patient care missions, and to the faculty as statutorily authorized additional compensation for work performed as UW employees;[5] and (6) the University is financially responsible for any judgment entered against UWP as a result of Dr. Hillard's alleged negligence.[6]

---

[1] Laws of 2012, c. 250, § 1.

[2] CP 6.

[3] CP 1-3.

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

[5] CP 38-44.

[6] CP 75-76.

**B. Respondents' assertion that an entity must be created by statute in order for the notice requirement to apply is wrong.**

Respondents argue that in order to trigger RCW 4.92.100's pre-suit notice requirement for tort actions against "the state," the entity must have been specifically created by statute. Otherwise, they argue, the person or entity must be specifically identified in the notice statute itself. These arguments ignore the relevant case law, which adopts a functional approach to the issue.

Initially, it is important to note that the requirement to give notice before suing the state for tort damages is a constitutionally authorized condition on 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). These purposes will be defeated if the notice requirement can be circumvented by naming UWP, rather than the UW itself.

Further, 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 require pre-suit notice for actions against state employees.[7] Yet, this Court had no difficulty in deciding that a malpractice suit against a UW 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 Hydes offer no reason why they should be allowed to circumvent the notice requirement by the device of naming the entity that handles the billing for the UW and its employed physicians. For example, in *Kleyer v. Harborview,* 76 Wn. App. 542, 887 P.2d 468 (1995), this Court held that RCW 4.92.100's requirement to submit a claim prior to suing the state applies to claims against Harborview Medical Center,

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

notwithstanding the fact Harborview is a county-owned facility. *Kleyer* is consistent with the Supreme 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." As this Court did in *Hardesty, Hontz* applied a functional test to conclude that a suit against Harborview is "in legal effect a suit against the State."[8]

The Hydes' effort to distinguish *Good v. Associated Students of Univ. Wash.,* 86 Wn.2d 94, 542 P.2d 762 (1975) and *Woods v. Bailet*, 116 Wn. App. 658, 67 P.3d 511 (2003) is similarly unavailing. *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.

---

[8] Although the issue in *Hontz* was whether Harborview was functionally an arm of the state for purposes of 42 U.S.C. § 1983 liability, this Court has said 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).

*Id.* at 97.

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 recognized, if not authorized, its operation by adoption of an exception to the single pay-check rule in RCW 42.52.110. The Hyde's argue, nonetheless, that these circumstances are not sufficient justification for application of pre-suit notice requirements. But, that is exactly what this Court did in *Kleyer,* where it applied those requirements to a suit against Harborview Medical Center.

Regarding *Woods,* this Court there interpreted the phrase "local government entity" in RCW 4.96.020 to include a public corporation ("PacMed") established under RCW 35.21.270, notwithstanding the fact RCW 4.96.020 did not specify claims must be submitted before suing "public corporations" or their employees.[9] The Hydes argue, notwithstanding the very similar purposes of PacMed and UWP, the absence of a specific statutory authorization for UWP's creation by the UW distinguishes *Wood.*

---

[9] *Woods v. Bailet,* 116 Wn. App. at 664.

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 by statute specifically. 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.[10] Although such contracts are authorized by statute,[11] 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.

**C. Article 1, § 12 does not apply.**

Without citing any authority,[12] the Hydes suggest that, if interpreted to apply to a corporation, RCW 4.92.110 would be unconstitutional under Art. I, § 12 of the state constitution. The Hydes fail to acknowledge that pre-suit notice of claim requirements for suits against the state are constitutionally authorized by Art. II, § 26 of the state

---

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

[11] RCW 36.62.290.

[12] For this reason alone, the Court should not consider the constitutional argument. *See State v. Gonzales-Morales*, 91 Wn. App. 420, 429, 958 P.2d 339 (1998) *aff'd*, 138 Wn. 2d 374, 979 P.2d 826 (1999) ("we need not consider "naked castings into the constitutional sea"), citing *State v. Linden,* 89 Wn.App. 184, 197, 947 P.2d 1284 (1997) quoting *In re Rosier,* 105 Wash.2d 606, 616, 717 P.2d 1353 (1986)).

constitution. They also fail to acknowledge that our Supreme Court has repeatedly and recently upheld reasonable notice of claim requirements against Art. 1, § 12 challenges, including in cases exactly like this where the UW and UWP were sued for medical negligence.[13] If, as is undisputed, UWP is an instrumentality created by and under the ultimate control of a state agency, the Legislature is authorized by Art. II, § 26 to impose a notice requirement and Art. I, § 10 is no impediment to it doing so, any more than it was in *Hardesty,* where "state" was interpreted to include an individual, or in *Kleyer,* where "state" was interpreted to include a county-owned hospital for which the UW had contractually assumed responsibility.

**D. The UW is financially responsible for the UWP physician's alleged negligence.**

One of the touchstones for determining whether governmental immunity applies is whether the suit seeks to impose liability which must be paid from public funds. *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S. Ct. 1347, 1356 (1974).

> (W)hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.'

---

[13] *See McDevitt v. Harbor View Med. Ctr.*, 179 Wn. 2d 59, 66, 316 P.3d 469, 472 (2013) and cases cited therein.

*Id.* quoting *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464, 65 S.Ct. 347, 350 (1945).

> Washington law is consistent. As stated in *Hardesty,*
>
> > The suit [against a UW physician] exposes state funds to liability, making this precisely the type of case to which RCW 4.92 applies. If, as Hardesty argues, Stenchever 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.
>
> 82 Wash. App. at 261

Here, the Hydes indisputably sought to hold the UW liable for the official acts of Dr. Hillard. It is also undisputed that the UW is required to satisfy that liability, even if it is nominally imposed on UWP.[14] The only reason the Hydes are now contending they can proceed against UWP independently is because they failed to comply with the long-standing requirement to give notice prior to suing the state for tort damages.

## III. CONCLUSION

Allowing medical negligence suits against UWP without prior notice would effectively thwart the intent of the Legislature with respect tort actions involving allegations of negligence by several thousand UW physicians. This Court should reject respondents' attempt to create such a

---

[14] CP 75-76.

loophole and enforce the long-standing rule regarding conditions precedent to state liability.

Respectfully submitted this 26 day of June, 2014

BENNETT BIGELOW & LEEDOM, P.S.

By: _____
Michael Madden, WSBA #8747

FAIN ANDERSON VANDERHOEF, PLLC

Carol L. Moody, WSBA #11128

Special Assistant Attorneys General
Attorneys for Petitioner

## 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:

| | | |
|---|---|---|
| Carl A. Taylor Lopez, WSBA #6215<br>Lopez & Fantel<br>2292 W. Commodore Way, Ste 200<br>Seattle, WA 98199<br>Fax: 206-322-1979<br><br>email: clopez@lopezfantel.com<br><br>Attorneys for Plaintiff | ☒<br>☐<br>☐<br>☐ | Hand Delivered<br>Facsimile<br>U.S. Mail<br>Email |

Dated this 26th day of June, 2014, at Seattle, Washington.

Gerri Downs
Legal Assistant

{1408.00118/M1046065.DOC; 2}