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

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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

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PETITIONER'S BRIEF

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**ORIGINAL**

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## I. INTRODUCTION

This is a tort action in which the plaintiffs allege that a University of Washington (“UW”) medical school faculty member’s negligence caused them injury. They sued the State of Washington, the University of Washington Medical Center and UW Physicians (“UWP”).<sup>1</sup> Plaintiffs did not comply with RCW 4.92.100-110 by submitting a notice of tort claim before they commenced their action. Defendants moved for summary judgment on this basis. The superior court granted the motion as to the State and the UW Medical Center, but decided the requirement to submit a tort claim did not apply to suits based on the same acts when UWP is named as defendant.

This Court granted UWP’s motion for discretionary review. The single issue presented is whether plaintiffs, who sued the State of Washington for medical negligence allegedly committed by a University of Washington faculty member but who failed to submit a statutorily-required notice of claim before doing so, may avoid dismissal by naming UWP as a defendant. UWP is a Washington not-for-profit corporation established and operated exclusively for the benefit of the UW. Under the direction and oversight of the UW, it bills and collects professional fees

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<sup>1</sup> UW Physicians is the d/b/a for The Association of University Physicians, a Washington not-for-profit corporation established and controlled by the University of Washington.

for UW School of Medicine faculty engaged in assigned clinical duties on behalf of the UW. Its funds are used exclusively in furtherance of the UW School of Medicine's educational, scientific, and charitable missions. Based on these undisputed facts, UWP's dismissal was required under *Hardesty v. Stenchever*, 82 Wn. App. 253, 917 P.2d 577 (1996) and *Woods v. Bailet*, 116 Wn. App. 658, 67 P.3d 511 (2003).

## **II. ASSIGNMENT OF ERROR**

The superior court erred when it denied UWP's motion for summary judgment dismissal, as reflected in its orders on July 25 and August 13, 2013, which denied UWP's motion for summary judgment and its motion for reconsideration. CP 79 and 92.<sup>2</sup>

## **III. ISSUE**

Can medical negligence plaintiffs who assert claims based on official conduct of physicians who are employees and agents of the UW circumvent the claim filing requirements of RCW 4.92.100 by suing UWP, a not-for-profit corporation organized by the UW, which operates with direction and oversight from the UW, exclusively in furtherance of the UW's public mission?

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<sup>2</sup> The Clerk's Papers are cited herein as "CP \_\_\_."

#### IV. 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,<sup>3</sup> and UWP, alleging injuries as a result of medical care delivered by Dr. Virany Hillard on or about August 28, 2009. CP 1-3. Dr. Hillard, a neurosurgeon, was at the time a full-time UW School of Medicine faculty member and a UWP member. CP 21-32. Plaintiffs did not comply with RCW 4.92.100 by submitting a tort claim prior to commencing their action. CP 6.

##### A. Summary Judgment Motion

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

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<sup>3</sup> UW 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). 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.

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 will pass to the UW. *Id.*

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. Many of their significant actions require the dean's concurrence. *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. UWP faculty members are prohibited from practicing at any site unless approved by the dean. CP 71. All billing for their services is performed by UWP and the payments received are its property. CP 60.

UWP does not operate any healthcare facilities independent of UW. Instead, UWP provides medical services to patients at hospitals owned or managed by the UW and other practice sites approved by the dean. CP 66-77. All records of care provided by its members at UW facilities are maintained by and are property of the UW. CP 73. 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.

Subject to the dean's control, UWP's revenues are used, in part, to provide 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.<sup>4</sup>

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<sup>4</sup> 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

UWP's net revenues 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.

**C. The Superior Court's Rulings**

The trial court initially entered an order on July 25, 2013, 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. 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.

**D. RAP 2.3(b)(4) Stipulation**

The parties subsequently stipulated under RAP 2.3(b)(4) that whether medical negligence plaintiffs must comply with RCW 4.92.100-110 prior to commencing actions against UWP is a controlling question of law as to which there is substantial ground for difference of opinion and

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or other state agencies pursuant to an agreement with the state employee's agency.

that, given the dispositive nature of the question, immediate review is likely to advance ultimate termination of the litigation. UWP timely filed a notice and motion for discretionary review. CP 97-110. Review was granted by ruling entered on December 16, 2013.

## V. ARGUMENT

### A. **Compliance with RCW 4.92.100-110 was required at the time this action was commenced.**

Ever since it first waived the state's tort immunity, the Legislature has required that a notice of claim be submitted prior to commencing an action for damages against the state.<sup>5</sup> Since 1989, RCW 4.92.100-110 has required presentation of a claim at least sixty days prior to commencing an action for tort damages against the state.<sup>6</sup>

In 2009, in order to eliminate a seeming redundancy, the Legislature amended RCW 4.92.100 to provide that, in lieu of the claim-filing requirements found in Ch. 4.92, medical negligence plaintiffs were required to follow the notice of intent requirement found in former RCW 7.70.100(1), which imposed a ninety-day pre-suit notice requirement. Laws of 2009, c. 433, § 1. The 2012 Legislature repealed the 2009

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<sup>5</sup> Laws of 1963, c. 159, § 3.

<sup>6</sup> Laws of 1989, c. 419, § 13.

amendments, thereby reinstating the requirement to file a claim under RCW 4.92.100, effective June 7, 2012.<sup>7</sup>

In addition, even without the 2012 amendment to RCW 4.92.100, plaintiffs' action would be subject to dismissal under *McDevitt v. Harborview Medical Center*, 179 Wn.2d 59, 316 P.3d 469 (Nov. 14, 2013), which holds, as to cases commenced after December 27, 2012 (the date of the initial decision in that case<sup>8</sup>) and before July 28, 2013 (the effective date of the repeal of RCW 7.70.100(1)<sup>9</sup>), that medical negligence plaintiffs were required to comply with former RCW 7.70.100(1), which required 90 days notice of intent to sue in medical negligence cases.

*McDevitt* is of particular interest because involved a situation almost exactly like this one, where the plaintiff sued Harborview Medical Center, the University of Washington "d/b/a UW Medicine/Physicians," and the State of Washington for alleged negligence by UWP members practicing at a hospital operated by the UW. 179 Wn.2d at 59.

**B. RCW 4.92.100-110 apply to persons and entities for whose tortious acts the state is financially responsible.**

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<sup>7</sup> Laws of 2012, c. 250, § 1.

<sup>8</sup> 291 P.3d 876 (2012).

<sup>9</sup> Laws of 2013, c. 82.

RCW 4.92.110 applies to tort actions, “against the state, or against any state officer, employee, or volunteer, acting in such capacity.” Failure to file a claim mandates dismissal. *Medina v. Public Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303, 316, 53 P.3d 993 (2002).

Multiple decisions of this Court 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. In *Kleyer v. Harborview Medical Center*, 76 Wn. App. 542, 887 P.2d 468 (1995), RCW 4.92.110 was applied to an action against Harborview Medical Center, which is a county-owned hospital<sup>10</sup> operated by the UW under a contract with King County. *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.<sup>11</sup>

Similarly, at a time when RCW 4.92.110 expressly applied only to actions “against the state,” and did not mention suits against state officers

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<sup>10</sup> King County established Harborview pursuant to RCW 36.62.010, *et seq.*

<sup>11</sup> This Court has also said that Eleventh Amendment immunity analysis is applicable when determining whether a tort claim must be filed. *Jones v. University of Washington*, 62 Wn. App. 653, 663, 814 P.2d 1236 (1991).

and employees, etc.,<sup>12</sup> this Court 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 “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).

Pointing out the contradiction inherent in plaintiff’s attempt to make an independent claim against the UW doctor, this Court stated, “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.” *Id.* at 261. The same is true of plaintiffs’ attempt to hold the State and UW liable here; they would not have sued the State, the UW and UWP for the same alleged acts and omissions if they did not expect the State to be financially responsible for those claims.

Equally to the point, *Woods v. Bailet*, 116 Wn. App. 658, 67 P.3d 511 (2003), extended *Hardesty* to physicians employed by a “public corporation” created by the City of Seattle under RCW 35.21.730. That statute provides in pertinent part:

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<sup>12</sup> Those terms were added by Laws of 1986, c. 82, § 2.

In order to improve the administration of authorized federal grants or programs, to improve governmental efficiency and services, or to improve the general living conditions in the urban areas of the state, any city, town, or county may by lawfully adopted ordinance or resolution:

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(5) Create public corporations, commissions, and authorities to: Administer and execute federal grants or programs; receive and administer private funds, goods, or services for any lawful public purpose; and perform any lawful public purpose or public function. The ordinance or resolution shall limit the liability of such public corporations, commissions, and authorities to the assets and properties of such public corporation, commission, or authority in order to prevent recourse to such cities, towns, or counties or their assets or credit.

This Court reasoned that the entity—the Pacific Hospital Preservation and Development Authority—served a public function by providing health care for the general welfare and that, for purposes of applying *Hardesty*, a corporation created by a city was indistinguishable from a state hospital. *Id.* at 666. It so held even though the City provided no funds to PacMed. *Id.*

**C. Analogous cases treat certain corporations as governmental instrumentalities.**

Cases involving other types of governmental immunities illustrate the circumstances when corporations will be treated as instrumentalities of government. *Lebron v. Nat'l R.R. 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).

Our Supreme Court applied a similar analysis in *Good v. Associated Students of University of Washington*, 86 Wn.2d 94, 97, 542 P.2d 762 (1975), in which it held that a non-profit corporation established by the UW to provide certain services and to serve as the student governance organization was an “arm and agency of the university and thus the state.” The court looked to several factors, including the right of ultimate control by the UW, the connection between the ASUW’s mission

and that of the UW itself, and legislative recognition of its existence. *Id.* at 98-99.<sup>13</sup>

Under the Federal Tort Claim Act, pre-suit notice is required with respect to “corporations primarily acting as instrumentalities or agencies of the United States.” 28 U.S.C. § 2671. Under this provision, federal courts hold that, although no single factor will determine whether the test is met, the relevant considerations are the mission of the corporation, ownership, control, structure of the entity, and its funding. *See Mendrala v. Crown Mortg. Co.*, 955 F.2d 1132, 1139 (7th Cir. 1992).

**D. UWP is an instrumentality of the UW for professional liability purposes.**

Under any of the several tests utilized by this and other courts to determine whether an entity is an arm of the state for purposes of applying pre-suit notice requirements or for analogous purposes, UWP should be considered an instrumentality of the UW. Under the *Hardesty* test, it is undisputed that the UW bears financial responsibility for official acts of UWP physicians, because they are UW’s agents. It is equally clear that

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<sup>13</sup> In its initial order denying summary judgment, the superior court commented that ASUW was a “municipal corporation.” It is not. ASUW, like UWP, is a Washington not-for-profit corporation organized under RCW. Ch. 24.03. *See* [http://www.sos.wa.gov/corps/search\\_detail.aspx?ubi=601861466](http://www.sos.wa.gov/corps/search_detail.aspx?ubi=601861466). In contrast, municipal corporations “are created by the Legislature.” *Granite Falls Library Capital Facility Area v. Taxpayers of Granite Falls Library Capital Facility Area*, 134 Wn.2d 825, 834, 953 P.2d 1150 (1998).

UW bears financial responsibility for professional liability claims against UWP itself. CP 75-76. Indeed, there is no other established mechanism for payment of such claims other than through the UW's self-funded liability coverage program.

Further, it is undisputed that UWP is an entity organized and entirely dominated by the UW, governed by individuals who are UW faculty members or community members appointed by the dean of the School of Medicine, and that their authority is subject to direction by the dean. Further, it is undisputed that UWP operates exclusively in furtherance of the UW School of Medicine's educational, scientific and charitable functions and its revenue is devoted exclusively to those purposes. In this regard, UWP allows the UW to offer competitive compensation to medical school faculty, which the Legislature has recognized as an exception to the Executive Conflict of Interest Act. It also generates significant funding to support basic and clinical research, provides educational opportunities for students and post-graduate trainees, and support for charity care provided by the UW.

## **VI. CONCLUSION**

UWP members, acting in their official capacity as UW faculty members, provide services at all University-owned and operated hospitals, as well as other facilities to which they are assigned by the UW. The

decision below, which allows plaintiffs' to circumvent RCW 4.92.100 by suing UWP, defeats the Legislature's purpose in requiring pre-suit notice in cases against state agencies; and deprives the UW of an opportunity to gather and preserve evidence, evaluate its liability, and settle if appropriate. *Medina v. Public Utility Dist. No. 1 of Benton County*, 147 Wn.2d at 310. For this reason, the Court should reverse the superior court, and remand with instructions to enter judgment in favor of UWP.

Respectfully submitted this 3rd day of March, 2014

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**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 3<sup>rd</sup> day of March, 2014, at Seattle, Washington.

  
\_\_\_\_\_  
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