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No. 32520-9-II

STATE OF WASHINGTON

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

The Honorable Richard B. Sanders,

Appellant,

v.

The State of Washington,

Respondent.

OPENING BRIEF OF APPELLANT
THE HONORABLE RICHARD B. SANDERS

PRESTON GATES & ELLIS LLP

Paul J. Lawrence, WSBA # 13557

Matthew J. Segal, WSBA # 29797

Graham M. Wilson, WSBA # 36857

Attorneys for Appellant

The Honorable Richard B. Sanders

PRESTON GATES & ELLIS LLP
925 Fourth Avenue
Suite 2900
Seattle, WA 98104-1158
(206) 623-7580

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I. INTRODUCTION

Washington law mandates that the Attorney General defend state officials acting in their official capacity in administrative proceedings and in state and federal courts. RCW 43.10.030 and .040. The law does not contain any additional qualifications or limitations, nor does it grant the Respondent, the State of Washington (the “State”) the discretion to defer its obligations.

The Appellant, the Honorable Richard B. Sanders, a Justice on the Washington Supreme Court, is facing allegations before the Commission on Judicial Conduct (the “Commission”) based on actions in his official capacity. Clerk’s Papers (“CP”) 46-48; Supplemental Clerk’s Papers (“Supp. CP”) 240-255; Supp. CP 236. Justice Sanders’ circumstances fall squarely within the plain meaning of RCW 43.10.030 and .040. Accordingly, this Court should hold that the State has a mandatory duty to provide Justice Sanders a defense, order the State to reimburse Justice Sanders’ defense

expenses incurred to date, lift the stay of the proceedings below, and award Justice Sanders attorney's fees and expenses incurred in compelling the State to honor its plain statutory obligation.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in its statutory interpretation of RCW 43.10.030 and 43.10.040. The court should have ruled that the State is obligated timely to provide Justice Sanders a defense before the Commission and the Supreme Court.
2. The trial court erred in denying Justice Sanders' Motion for Summary Judgment. There is not "a material issue of fact whether Justice Sanders committed willful misfeasance of public office during his visit to McNeil Island", because misfeasance is not the statutory standard and,

regardless, Justice Sanders did not commit misfeasance as a matter of law.

3. The trial court erred in granting the State's Motion for a Stay of the Proceedings.

B. Issues Pertaining to Assignments of Error

1. Under the plain language of RCW 43.10.030 and .040, must the State defend a state officer before the Commission and the Supreme Court when the relevant allegations arise from the officer's official capacity? "Construction of a statute is a question of law which is reviewed de novo." *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 515, 910 P.2d 462 (1996) (citing *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994)). (Assignment of Error # 1).
2. Is the State required to provide state officials acting in their official capacity a defense at the outset of proceedings, rather than a reimbursement

at the conclusion of the underlying action? This is a question of statutory interpretation and, therefore, reviewed de novo. *See* Issue # 1, *supra*. (Assignments of Error #s 1 and 2).

3. Even assuming misfeasance were a relevant standard under the defense statute, should the trial court have, nonetheless, concluded that Justice Sanders did not commit misfeasance as a matter of law? An appellate court evaluates summary judgment rulings de novo. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). (Assignments of Error #s 1 and 2).

4. Is a stay of the proceedings improper when it prevents a state official from receiving a defense that the State is obligated to provide? A trial court's ruling to stay a trial or action is reviewed for an abuse of discretion. *Lloyd v. Superior Court for Walla Walla*, 42 Wn.2d 908, 909, 259 P.2d 369

(1953); *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 348, 16 P.3d 45 (2001). A trial court abuses its discretion if its ruling is manifestly unreasonable, based on untenable grounds or reasons, or if the trial court applied the wrong legal standard to the evidence. *Wash. State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993); *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000).

(Assignment of Error # 3).

5. If the State wrongfully refuses to defend a state official, is the State liable for attorney fees that the official incurs in pursuing a defense? “An award of attorney fees is proper when ‘permitted by contract, statute or some recognized ground in equity.’” *Panorama Village Condo. Ass’n Bd. Of Directors v. Allstate Ins. Co.*, 144 Wn.2d 130, 143, 26 P.3d 910 (2001) (quoting *McGreevy v. Oregon*

Mut. Ins. Co., 128 Wn.2d 26, 35 n. 8, 904 P.2d 731 (1995)). (Assignments of Error #s 1 - 3).

III. STATEMENT OF THE CASE

In 1996, in proceedings pre-dating those before this Court, the Commission alleged that Justice Sanders had violated several provisions of the Code of Judicial Conduct. CP 31. Justice Sanders requested that the State provide him a defense before the Commission proceedings under RCW 43.10.030, 43.10.040, and/or any other relevant provision of law. *Id.* The State refused to do so. *Id.* Justice Sanders was eventually absolved of all allegations. *See In re Sanders*, 135 Wn.2d 175, 955 P.2d 369 (1998). Nonetheless, he was compelled to bring suit in order to force the State to honor its statutory obligations. *Id.* The Honorable Richard D. Hicks, of the Thurston County Superior Court, ruled that, excluding instances of malfeasance, misfeasance or bad faith, the State is required to provide judges a defense before the Commission when the action concerns official capacity activity. *Sanders v.*

State of Washington, (Thurston County Superior Court No. 99-2-02349-5). CP 81-96. Judge Hicks found that, as a matter of law, Justice Sanders was acting in his official capacity, and had committed neither malfeasance nor misfeasance. *Id.* Judge Hicks also awarded Justice Sanders attorney's fees and expenses for both defending himself before the Commission and for bringing his suit against the State. *Id.*

Justice Sanders is currently involved in a similar controversy. More than two and a half years ago, the Commission informed Justice Sanders that it would commence initial proceedings against him in relation to two complaints, only one of which it ultimately pursued. CP 46-48. The Commission filed a Statement of Charges alleging that Justice Sanders engaged in *ex parte* communications during a tour of the Special Commitment Center at McNeil Island (the "SCC") and thereby violated the Code of Judicial Conduct, Canons 1, 2(A), and 3(A)(4) (the "Canons"). CP 58-65. The Commission did not allege that Justice Sanders intentionally violated the

Canons. *Id.*

Justice Sanders once again requested that the Attorney General's office provide him with a defense before the Commission pursuant to RCW 43.10.030, RCW 43.10.040, and any other relevant provision of law. CP 50-51. Despite Judge Hicks' previous ruling, the Attorney General again refused to provide Justice Sanders a defense. CP 53-56. Accordingly, Justice Sanders was forced to retain private counsel at his own expense. CP 33.

Justice Sanders answered the Commission's Statement of Charges by denying that his activity at the SCC violated the Canons. CP 69. Judges often tour correctional facilities. CP 11. Justice Sanders was acting in his official capacity when he visited the SCC and, accordingly, received Mandatory Continuing Judicial Education (MCJE) credit for his time. CP 78-79. Justice Sanders also took precautions to assure that any communication with residents of the SCC would be proper, and that such communications would not involve the circumstances

of any resident's legal case; he also realized if that such circumstances accidentally arose, that he might have to recuse himself. CP 59. In fact, Justice Sanders did recuse himself upon subsequently learning that he had interacted with a resident with a case pending before the Washington Supreme Court. CP 11.

In April 2004, as the Commission commenced formal proceedings, Justice Sanders initiated the present case seeking, once again, to require the State to fulfill its statutory duty to provide him a defense. CP 4-8. The parties filed cross-motions for summary judgment. CP 31-41, 101-14. Like Judge Hicks, the trial court ruled that "RCW 43.10.030 requires the Attorney General to defend state officials acting in their official capacity in, inter alia, administrative proceedings, including proceedings before the Commission on Judicial Conduct, except in the case of misfeasance or malfeasance." CP 168. The trial court also ruled that Justice Sanders was acting in his official capacity and, that, as a matter of law, Justice Sanders committed no acts

of malfeasance. CP 168. The court further ruled that “not every violation of the Code of Judicial Conduct constitutes misfeasance” and that “misfeasance depends on a finding of a willful violation of the Code.” *Id.* (Emphasis added). Yet, the court denied the cross-motions for summary judgment, finding that a material issue of fact existed as to whether Justice Sanders committed misfeasance. *Id.* The court determined that whether Justice Sanders committed a willful violation amounting to misfeasance had to be “resolved at the administrative level before the Judicial Conduct Commission” before the court could determine whether the State owed Justice Sanders a defense. *Id.*

On November 18, 2004, Justice Sanders filed a Notice of Discretionary Review appealing the trial court’s Order Denying Cross-Motions for Summary Judgment. CP 170-174. This Court granted review on January 12, 2005. Supp. CP 192-95.

Then, on March 22, 2005, the Commission found that Justice Sanders had not engaged in any prohibited *ex parte*

contact. Supp. CP 232. The Commission exonerated Justice Sanders from all allegations under Canon 3(A)(4) of the Code of Judicial Conduct concerning diligent and impartial judicial performance, and found only a violation of the more hortatory Canons 1 and 2(A). Supp. CP 232-34. The Commission also concurred with the trial court's finding that all of the allegations at issue occurred in Justice Sanders' official capacity. Supp. CP 236. There was no finding of any misfeasance, malfeasance, or intent to violate the Canons or any another provision of law. Supp. CP 231-35.

While the Decision exonerated him of the more definite accusations, Justice Sanders filed a Notice of Contest with the Supreme Court of Washington on June 27, 2005 to appeal the Commission's findings regarding Canons 1 and 2(A). Supp. CP 240-255.

Based on the recent Commission findings, Justice Sanders also filed a Motion to Stay or Voluntarily Dismiss Appeal with this Court in order to "allow the parties to place

the results of the [Commission's] determinations in the record and finalize resolution of the case at the trial court level.”

Supp. CP 116. Even accepting the trial court's gloss on the statute, because the Commission's decision did not indicate any misfeasance, the trial court should have been able to resolve this dispute. CP 168; Supp. CP 57. This Court agreed with Justice Sanders and granted his motion to stay appellate proceedings. Supp. CP 123.

Following remand, Justice Sanders' attorneys attempted to engage in limited discovery in order to complete the record and prepare for the trial court to issue a final decision. Supp. CP 149-64. The State moved to quash all of Justice Sanders' discovery requests. Supp. CP 3-53. While largely denying the State's motion to quash, the trial court also suggested that it was disinclined to consider further dispositive motions until the resolution of Justice Sanders' appeal of the Commission's decision. Supp. CP 370.

On October 14, 2005, the State filed a motion with the

trial court to stay proceedings. Supp. CP 385-98. Justice Sanders opposed the stay because it would interfere with his right to finally resolve this case and receive an actual defense during his appeal of the Commission's decision. Supp. CP 399-409. The trial court nonetheless granted the State's motion, and stayed proceedings below in their entirety. Supp. CP 635-36. In other words, despite the issuance of the Commission's decision, the trial court still refused to decide the merits of this case.

Justice Sanders timely filed a notice of discretionary review. Supp. CP 637-40. Justice Sanders then moved this Court to lift its prior stay and amend the prior scope of the appeal to include review of the trial court's subsequent order. *See* RAP 5.3(h). Justice Sanders argued that it was necessary to resume this appeal and review the stay because RCW 43.10.030 and .040 create a right to a defense before the Commission, not just a possible reimbursement after the conclusion of all proceedings. This Court agreed.

In its order granting and expanding the scope of review, this Court stated that, “[t]o delay further this court’s consideration of [whether RCW 43.10.030 and .040 confer a right to a defense by the State during a Commission proceeding], until after all Commission and appellate proceedings are concluded, would in effect convert RCW 43.10.030 and .040 into a right to reimbursement.” Ruling Lifting Stay and Extending Review, at 4-5.

Currently, Justice Sanders continues to expend funds for personal counsel, both in his appeal of the Commission’s decision, and in this case. Oral arguments on the Commission appeal took place on March 29, 2006. Based on the common length of attorney and judicial disciplinary appeals, Justice Sanders could be waiting for a ruling from the Supreme Court until well into 2007.¹ Furthermore, the Supreme Court’s

¹ See, e.g., *In re Disciplinary Proceeding Against Poole*, 156 Wn.2d 196, 125 P.3d 954 (2006) (argued May 10, 2005; decided January 5, 2006); *In re Disciplinary Proceeding Against Christopher*, 153 Wn.2d 669, 105 P.3d 976 (2005) (argued June 29, 2004; decided February 3, 2005); *In re Disciplinary Proceedings Against Cohen*, 150 Wn.2d 744, 82 P.3d 224

decision may not mark the end of the underlying case.² Absent any action by this Court, Justice Sanders could continue to face the financial burden of providing his own defense for years to come.

IV. ARGUMENT

A. **The State is Required to Provide Justice Sanders a Defense under the Plain Language of RCW 43.10.030 and .040.**

1. *Justice Sanders' claim for a defense satisfies all of the requirements of Washington's public defense statute.*

The Washington Constitution provides that, “the attorney general shall be the legal adviser of state officers, and shall perform such other duties as may be prescribed by law.” Const. art. 3 §21 (emphasis added). The Legislature implemented this broad Constitutional mandate, in part, through RCW 43.10.030 and 43.10.040. RCW 43.10.030 states that “The Attorney general shall: ... Defend all actions and proceedings against any

(2004) (argued February 11, 2003; decided January 15, 2004).

² For example, because of the Constitutional issues at play here, the underlying case could also proceed to the United States Supreme Court.

state officer or employee acting in his or her official capacity, in any of the courts of this state or the United States.” (Emphasis added). RCW 43.10.040 extends this duty to administrative proceedings:

The attorney general shall also represent the state and all officials ... of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings (Emphasis added).

The State Legislature has spoken unequivocally: the Attorney General must provide all state officers acting in their official capacity a defense before any administrative body and in state and federal court.

There is no contention that Justice Sanders is anything but a state official, officer, and employee. *See City of Bellevue v. Hellenthal*, 144 Wn.2d 425, 440, 28 P.3d 744 (2001) (Johnson, J., dissenting) (noting that “the only state official present ... was the trial judge.”).

Justice Sanders was also acting in his official capacity during his visit to the SCC. After a full formal hearing on the

matter, the Commission determined that all of the activity at the SCC “took place in the Justice’s official capacity.” Supp. CP 236. The trial court also ruled that “Justice Sanders was acting in his official capacity when he visited the special offender unit at McNeil Island.” CP 168.³

Furthermore, in Justice Sanders’ previous litigation with the State, Judge Hicks made clear that an individual’s conduct which gives rise to an alleged ethical violation because the person is a judge, activity that would not constitute wrongdoing if committed by a private citizen, must be conduct within a judge’s official capacity. CP 88-89. An allegation of inappropriate *ex parte* contact is qualitatively different than

³ The underlying facts support the holdings of the Commission and the trial court. Justice Sanders made his visit to the SCC as a Justice of the Washington State Supreme Court. He discussed plans for the tour with other Justices and clerks at en banc Supreme Court meetings. Supp. CP 227-28. He corresponded with Dr. Mark J. Seling, Superintendent of the SCC, on Supreme Court letterhead before the tour. CP 63-64. Justice Sanders wanted to tour the SCC “to gain a better understanding and appreciation of the facility and how it works” for judicial purposes. *Id.* Taking institutional tours is common for judges and recognized as appropriate by the Commission. CP 36. Accordingly, Justice Sanders received MJCE credit for his visit. CP 78-79.

being charged with misconduct that a private citizen could commit, like assault, for example. If not for his position on the court, Justice Sanders' contact with residents of the SCC could not support ethical, civil, or criminal charges of any kind. The allegations of the Commission relate only to conduct within Justice Sanders' official capacity.

Finally, the State does not dispute that RCW 43.10.030 and .040 apply to proceedings before the Commission as well as in state and federal court. Supp. CP 385-86. Both the trial court in this case, and Judge Hicks in Justice Sanders' earlier suit, held that the statutes apply to actions before the Commission. CP 168; CP 89.⁴ The reference in RCW 43.10.030 to "any courts of this State or the United States" covers Justice Sanders' current and future appeals of the Commission's decision, while the phrase "all administrative tribunals or bodies of any nature, in all legal or quasi legal

⁴ Judge Tabor stated that "if [Justice Sanders] has a right to defense [sic] under .030, it's extended to administrative tribunals under .040 by the term 'also.' What else could that mean." CP 89.

matters, hearings, or proceedings” extends this obligation to the Commission proceedings.

As Justice Sanders is a state official, toured the SCC in his official capacity, and is subject to administrative and court proceedings, the State is obligated to provide him a defense.

2. *The plain meaning of RCW 43.10.030 and .040 precludes the State’s interpretations of the law.*

The State has tried to evade its duty to defend Justice Sanders by (i) arguing that the statutes contains some implicit limitation based on malfeasance or misfeasance, (ii) attempting to redefine “defend” as “reimburse,” and (iii) asserting that it has the discretion to elect when it defends a state official. None of these arguments are sustainable under RCW 43.10.030 and .040.

The starting point of any statutory interpretation is “the statute’s plain language and ordinary meaning.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *Nat’l Elec. Contractors Ass’n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481

(1999)). Given the plain meaning of the statutes at issue, no judicial “construction” is required. *Davis v. State ex rel. Dept. of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999) (“In judicial interpretation of statutes, the first rule is the court should assume that the legislature means exactly what it says. Plain words do not require construction.”) (quoting *State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995)).

Under the plain meaning of RCW 43.10.030 and .040, there are no qualifications of the State’s duty to defend state officials acting in their official capacity. The statutes contain no limitation of the State’s obligation based on alleged malfeasance, misfeasance, or bad faith. These words do not appear anywhere in the statute. While Justice Sanders did not commit any malfeasance or misfeasance during his visit to the SCC, this is not the issue under the plain meaning of the law. Furthermore, there is no requirement that a judge be exonerated in order to obtain a defense, or that the State face potential financial liability from the underlying action, for example. *Id.*

The state legislature has spoken. It would be improper for the courts to manufacture and insert any limitation on the State's defense obligation into the statutes. *See Wash. State Coal. for the Homeless v. Dept. of Social and Health Serv.*, 133 Wn.2d 894, 904, 949 P.2d 1291 (1997) (“An unambiguous statute is not subject to judicial construction, and we will not add language to a clear statute even if we believe the Legislature intended something else but failed to express it adequately.”). A court “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language. We assume that the legislature ‘means exactly what it says.’” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) (quoting *Davis*, 137 Wn.2d at 957).

In addition to advocating non-statutory exceptions to its statutory duty to defend Justice Sanders, the State has also sought to delay its obligations until proceedings before the Commission and the Washington Supreme Court are ultimately concluded. Supp. CP 385-86. But, the plain language of RCW

43.10.030 and .040 requires the State to defend and represent state officials, not repay their legal fees after the fact.

To “defend” necessarily involves action during underlying proceedings. *Cf. Petersen-Gonzales v. Garcia*, 120 Wn. App. 624, 631, 86 P.3d 210 (2004) (recognizing that the ordinary meaning of “defend” is “to deny or oppose the right of plaintiff in regard to (a suit or a wrong charged): controvert: oppose, resist <--a claim at law>: contest <--a suit>” and that the unambiguous meaning of “the ‘right to defend’” encompasses “the right to participate at trial.”). The statutes require the State to take responsibility for Justice Sanders’ representation from the outset of the proceedings and then continue to do so until the underlying matter is finally resolved.

The California Court of Appeals recently discussed the meaning of “defend” as opposed to “reimburse.” *Crawford v. Weather Shield MFG., INC*, 136 Cal. App. 4th 304, 38 Cal. Rptr.3d 787, 805-8 (Cal. Ct. App. 2006).⁵ The Court held that

⁵ The California Supreme Court granted review of this case on May 24,

the “ordinary plain meaning of the word ‘defend’” means “the rendering of a service, viz., the mounting and funding of a defense in order to avoid or at least minimize liability.” *Id.* at 806 (citing *Buss v. Superior Court*, 16 Cal. 4th 35, 46, 939 P.2d 766, 65 Cal. Rptr.2d 366 (Cal. 1997)). The defendant in *Crawford*, like the State here, argued that its duty to defend could not be established until after certain factual findings had been made regarding the plaintiff. *Id.* The court held, however, that the only way to construe “defend” in that manner, “other than just ignoring the term and, in effect, reading the word ‘defend’ out of the contract--would be to write the word ‘defend’ out of the contract and substitute ‘reimburse attorney fees if and only after negligence has been established.’” *Id.* at 806-7.

Crawford correctly recognized the significant difference between providing a “defense,” which is “rendering of a service *at the time*—the emphasis is on the present tense,” as opposed

2006 (See Cal. Rules of Court, 976, 977 and 979).

to a “reimbursement,” which, “by contrast, involves an element of retrospection,” as follows:

It should be immediately apparent that the right to receive a defense is not equal to the right to receive reimbursement and cannot be equated with it. There is a distinct benefit in not having to pony up money immediately. Such a benefit is most acutely felt when an answer to a complaint is due in civil court and a lawyer must be found and paid to draft and file it. At the very least the benefit of a defense is the time value of money, but it also involves elements of convenience (such as not having to keep funds on hand earmarked for legal costs) and focus (not having to worry about the selection of legal counsel when one is sued).

Id. at 807. Here, Justice Sanders has had to “pony up” for his own defense, find his own counsel, and manage his own case.

CP 33. The State has not satisfied its obligations under RCW 43.10.030 and .040.

Finally, Washington’s public defense law does not grant the State the discretion to decline to defend state officials.

RCW 43.10.030 and .040 both employ the term “shall,”

preserving the language of the Constitution, and creating a

mandatory duty. *Coal. for the Homeless*, 133 Wn.2d at 907

(recognizing that “[b]y using the words ‘shall’ [the statute] imposes a mandatory duty” upon on an administrative agency); *State v. Reier*, 127 Wn. App. 753, 757, 112 P.3d 566 (2005) (holding that “‘should’ is a directive term, with a different meaning from ‘shall,’ which is a mandatory term.”). Under the plain meaning of the word “shall,” the State cannot adopt any policy that would negate its statutory responsibility. *See Coal. for the Homeless*, 133 Wn.2d at 914 (upholding an order requiring the Department of Social and Health Services to implement a comprehensive and coordinated plan for caring for homeless children when the department “was not acting within the terms and duties delegated to it by [the statute],” including the word “shall.”); *Tiger Oil Corp. v. Dep’t of Licensing*, 88 Wn. App. 925, 931-35, 946 P.2d 1235 (1997) (refusing to defer to a department’s discretion regarding statutory interpretation because to do so would allow the department to avoid a “mandatory duty” created by the word “shall.”)

In sum, the State cannot manufacture limitations on its

statutory duties, defer its obligations, or adopt any policy that would preclude defending Justice Sanders in the underlying proceedings.

3. *Defending state officials at the beginning of proceedings serves important public policy goals.*

Public policy concerns also support a plain language application of RCW 43.10.030 and .040. Public defense statutes exist so that qualified candidates are not deterred from public service. *Filippone v. Mayor of Newton*, 329 Mass. 622, 629, 467 N.E.2d 182 (Mass. 1984). Protecting state officials from liability and the burden of potential lawsuits also ensures that, once in office, officials will not be paralyzed by the threat of a lawsuit, but speak and act freely in order to accomplish their duties to the best of their ability. *Cf. Musso-Escude v. Edwards*, 101 Wn. App. 560, 568, 4 P.3d 151 (2000) (“Common law immunity is usually afforded to government officials for public policy reasons, including the injustice of finding liability against an official who is charged by law to

exercise discretion and a concern that the threat of liability would damper an official's desire to perform his or her duties zealously.”). Statutes like RCW 43.10.030 and .040 also serve to save “imperfect and therefore, fallible public employees from the potentially ruinous legal consequences following from unintentional lapses in the daily discharge of their duties.” *Mathis v. State of New York*, 140 Misc.2d 333, 342, 531 N.Y.S.2d 680 (N.Y. Sup. Ct. 1988).

Here, Washington benefits from encouraging the best, most qualified candidates to seek a position on the Supreme Court. It is also to the advantage of the State to have its judges strive to educate themselves in order to make informed decisions, e.g., to visit state institutions. Providing judges a defense serves both of these goals.

Furthermore, all of the public policy goals served by RCW 43.10.030 and .040 would be seriously undermined by reading the term “defend” as “reimburse at the ultimate conclusion of the proceedings.” As stated by the Supreme

Judicial Court of Massachusetts in regard to that state's public defense statute:

As a matter of policy, public indemnification of public officials serves in part to encourage public service. Judgments against such public officials in actions for civil rights or intentional torts could cause financial ruin. This policy would be defeated if the legal expense of civil rights litigation were to be borne personally throughout years of pretrial activity, trial, and appeal, and only later, if at all, reimbursed.

Filippone, 329 Mass. at 629. Forcing judges to bear the substantial costs of defending themselves before the Commission for a period of many years would equally discourage qualified candidates from seeking judicial office. Moreover, if the State is permitted to wait and decide whether it is obligated to provide state officials with a legal defense, it would be free to arbitrarily supply or delay the defense of particular state officials at will.⁶ If a state official is unable to personally provide for an adequate defense, he may be more

⁶ Justice Sanders sought to evaluate, through discovery, the State's policies and practices for determining when to provide state officials with a defense but this effort was frustrated by the trial court's stay of the

likely to face liability. The State would thereby be allowed to invoke a self-fulfilling prophecy to disclaim its defense obligations.

The plain language of RCW 43.10.030 and .040, as well as public policy concerns, require the State to provide Justice Sanders a defense now, not a possible reimbursement at some unknown future date.

B. Even if the State is Excused from Defending State Officials Who Committed Malfeasance or Misfeasance, Justice Sanders Committed Neither.

Even if RCW 43.10.030 and .040 are construed to include an exception for malfeasance and/or misfeasance, the State must still provide Justice Sanders a defense. As a matter of law, Justice Sanders did not commit either malfeasance or misfeasance during his visit to the SCC.

First, malfeasance is not an issue here. As the trial court properly ruled, “[t]he allegations of the Judicial Conduct Commission do not include any allegation of malfeasance.” CP

proceedings. Supp. CP 61.

168. The State does not assert otherwise.⁷

Any allegations of misfeasance are similarly misplaced. The trial court ruled that “[a] finding of misfeasance depends on a finding of a willful violation of the Code.” CP 173 (emphasis added). While the definition of “misfeasance” under Washington’s recall statute, RCW 29A.56.110, is not directly applicable to this case, a recent decision under that statute also recognized that “misfeasance” includes an intentionality requirement. In *In re Recall of Carkeek*, a county drain commissioner was alleged to have violated a citizen’s constitutional rights to free speech, the Open Public Meetings Act, and the Anti-Harassment Act. 156 Wn.2d 469, 472, 128 P.3d 1231 (2006). The Supreme Court of Washington held that

⁷ The trial court ruled that “malfeasance” is not an issue here because “malfeasance” is “an unlawful act that would be in common terms a crime.” Supp. CP 308. A judge does not face any criminal penalties for violating the Canons. DRJ 10, 12. Furthermore, there is no basis for arguing that Justice Sanders’ alleged *ex parte* contact could constitute an unlawful act under any other area of law. The Commission’s allegations do not concern activity, such as accepting a bribe or committing an assault, which would be in any way criminal in nature.

the charges could not support a recall petition because there was no prima facie showing of “misfeasance.” *Id.* at 473.

Specifically, the Court ruled that to constitute a prima facie showing of misfeasance, ““on the whole, the facts must indicate an intention to violate the law.”” *Id.* (citing *In re Recall of Feetham*, 149 Wn.2d 860, 865, 72 P.3d 741 (2003)) (emphasis added).

Justice Sanders did not intentionally or willfully violate any of the Canons of the Code of Judicial Conduct. Supp. CP 232-35. To the contrary, the Commission referred to Justice Sanders’ behavior as constituting a “lapse[]” in “judgment,” and states that he “should have realized that it was likely that he might interact with a litigant in [the *Thorell*] case” and that “the Respondent’s failure to exercise good judgment resulted in the ethical violations cited above.” Supp. CP 233, 235 (emphasis added). This is not the language of intentional wrongdoing.

In fact, Justice Sanders made serious efforts to avoid any impropriety: he informed the director of the SCC that he could

not talk to the residents about the legal circumstances of their cases, repeated this limitation to the residents themselves at several points during his tour, and wrote to the director that “if there are any particular legal problems, however, they must be dealt with fairly and impartially in the context of appropriate litigation upon which this tour shall and must have no influence whatsoever.” Supp. CP 229. When Justice Sanders discovered that he had communicated with an individual with a case pending before the Supreme Court, he recused himself from that case. Supp. CP 231. As Justice Sanders in no way intended to violate the Code of Judicial Conduct, he could not have committed misfeasance.

While both the trial court and the recall cases have ruled that “misfeasance” necessarily involves an element of intent, the State argued below that any violation of the Canons is an act of “misfeasance.” CP 157. The trial court properly rejected this argument, stating “[n]ot every violation of the Code of Judicial constitutes misfeasance.” CP 168. Indeed, to adopt the

State's understanding of the term "misfeasance," would be to create an exception that overwhelms the rule. As the term "misfeasance" does not appear in the statute, to hold that a finding of misfeasance would negate the State's duty to defend state officials and that every violation of the Canons would constitute misfeasance, would eviscerate the plain purpose of RCW 43.10.040.

Thus, even if this Court chooses to craft a limitation on the State's statutory duty, it should still not relieve the State from defending Justice Sanders against allegations of unintentional transgressions.

C. If Justice Sanders Has a Potential Claim to a Defense under RCW 43.10.030 and .040 the State must Defend Him before the Commission and the Supreme Court.

In moving the trial court for a stay of the proceedings, the State claimed that there are two unresolved issues pertaining to Justice Sanders' right to a defense: "official capacity" and "misfeasance." Supp. CP 386. According to the State, the existence of these unresolved issues relieves them of any

current duty to defend or reimburse Justice Sanders. The State's interpretation of its statutory requirements, however, turns the statutes at issue on their heads. Analogous to an insurance policy's duty to defend, when unresolved issues exist, the State must defend. Only when it is clear that the state official was not acting in his official capacity or otherwise would not be entitled to a defense under any circumstances, can the State refuse to defend. The existence of unresolved issues supports Justice Sanders' right to a defense now, rather than at the conclusion of his case.

In that the State is responsible for the defense of state officials, its "role can be analogized generally to the role of a private insurer from whom the insured demands a defense." *Frontier Ins. Co., v. State of New York*, 662 N.E.2d 251, 253, 87 N.Y.2d 864, 638 N.Y.S.2d 933 (1995) (holding that, under New York's Public Officers Law § 17(2)(a), the same precedent that governs an insurer's duty to defend its insured applies to the Attorney General's obligation to defend state officers). *See*

also, *O'Brien v. Spitzer*, 24 A.D.3d 9, 14, 802 N.Y.S.2d 737 (N.Y. App. Div. 2005); *Lo Russo v. N.Y. State Office of Court Admin.*, 229 A.D.2d 995, 995, 645 N.Y.S.2d 209 (N.Y. App. Div. 1996); *Mathis*, 531 N.Y.S.2d at 683-84 (holding that the “Attorney General’s role is similar to that of an insurance company which must decide if a defense is owed under its policy.”).⁸ The Court of Appeals of Oregon has also applied insurance case law to a state’s obligation to defend its officers. *See Eugene Police Employees’ Assoc. v. City of Eugene*, 157 Or. App. 341, 344, 972 P.2d 1191 (1998) (applying the distinction between the duty to indemnify and defend in insurance case law to the city’s obligation to defend city employees).⁹

⁸ Similar to Washington’s statutes, New York’s Public Officers Law §17(2)(a) directs the Attorney General to provide a defense for any state employee in “any civil action or proceeding in any state or federal court arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties.”

⁹ The Oregon statute states in part, “The governing body of any public body shall defend, save harmless and indemnify any of its officers, employees and agent, whether elective or appointive, against any tort claim or demand, whether groundless or otherwise, arising out of alleged

Just like a private insurer managing the claim of an insured, the State's duty to defend should be "based on the potential for liability" and "arise[] at the time an action is first brought." *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002) (emphasis added); *see also Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998) ("The duty to defend arises whenever a lawsuit is filed against the insured alleging facts and circumstances arguably covered by the policy."). If, when Justice Sanders first requested that the State provide him a defense, the State's obligation was "unclear under Washington law, under Truck Insurance Exchange, there was a duty to defend at that time." *Allstate Ins. Co. v. Bowen*, 121 Wn. App. 879, 885, 91 P.3d 897 (2004). "Only if the alleged claim is clearly not covered by the

act or omission occurring in the performance of duty." Or. Rev. Stat. § 30.285. This statute applies only to tort claims and not ethics charges. *City of Tualatin v. City-County Insurance Services Trust*, 894 P.2d 1158 (Or. 1995). This limitation is based upon on the explicit reference to "tort claims" in the statute. *Id.* at 1160-61. The plain language of RCW 43.10.030 and .040 is significantly broader, and in no way limited to tort actions.

policy is the insurer not obligated to defend.” *Allstate*, 121 Wn. App. at 883. Accordingly, “the Attorney General’s denial of a defense is the equivalent of deciding as a matter of law that under no circumstance” could Justice Sanders have a right to state representation. *Mathis*, 531 N.Y.S.2d at 684. Unless Justice Sanders clearly fails to satisfy the requirements of RCW 43.10.030 and .040 as a matter of law, the State must provide him a defense.

Under the plain language of RCW 43.10.030 and .040, whether an official was acting in his official capacity is the only substantive question regarding his eligibility for a state defense. The trial court and the Commission both found that Justice Sanders was acting in his official capacity when he visited the SCC. CP 168; Supp. CP 236. These decisions illustrate that, at a minimum, Justice Sanders was “arguably” acting within his official capacity. As Justice Sanders’ claim for a defense at least potentially satisfies the “official capacity” requirement, the State must provide him a defense. *Cf. Mathis*, 531 N.Y.S.2d at

684 (holding that the attorney general must defend the state official because it was not impossible for a jury to find that he was acting within the scope of his employment, a specific requirement of the New York statute).

Alternatively assuming for argument only that committing “misfeasance” could in some circumstances defer or terminate the need for a defense under RCW 43.10.030 and .040, the allegations against Justice Sanders did not allege a type of potential misfeasance that could support the outright denial of his right to a defense. The trial court’s denial of the cross-motions for summary judgment illustrates that, at a minimum, a reasonable finder of fact could determine that Justice Sanders’ alleged violation of the Canons was unintentional. CP 168. This open question regarding misfeasance was the only reason why the trial court did not immediately order the State to defend Justice Sanders. CP 168. Because there was not an unequivocal allegation of misfeasance, i.e. an intentional violation of the Canons, Justice

Sanders' claim for a defense satisfied all of the requirements of RCW 43.10.030 and .040—even under the State's interpretation of the law. Just like an insurer, the State should have provided Justice Sanders a defense when the Commission first issued its Statement of Charges and Justice Sanders made his request to the Attorney General.

D. The Trial Court's Order Granting a Stay of the Proceedings was an Abuse of Discretion because it, in effect, Converts Justice Sanders' Right to a Defense into a Right to Reimbursement and Because it Relies on the Wrong Legal Standard.

The trial court stayed the underlying proceedings “in all respects until final resolution” of Justice Sanders' appeal of the Commission's decision. Supp. CP 636. Yet, RCW 43.10.030 and .040 obligate the State to defend Justice Sanders during Commission proceedings and any subsequent appeal. As noted by this Court in its Ruling Lifting Stay and Extending Review, the stay “would in effect convert RCW 43.10.030 and 43.10.040 into a right to reimbursement.” Thus, the trial court's procedural ruling incorrectly decides the substantive

question at the very heart of this lawsuit.

Additionally, the trial court granted a stay of proceedings under the mistaken assumption that there was a material issue of fact. Supp. CP 370. The State's duty to defend state officials is not limited by alleged misfeasance.¹⁰ Nor did Justice Sanders commit any act of misfeasance as a matter of law.¹¹ Furthermore, if Justice Sanders has even a potential claim under RCW 43.10.030 and .040, then the State is required to defend Justice Sanders from the outset of Commission proceedings.¹² There is thus no need to wait for any additional factual rulings.

Finally, in granting the stay of the proceedings, the trial court incorrectly relied on *King v. Olympic Pipeline Company*, 104 Wn. App. 338, 16 P.3d 45 (2001). Supp. CP 635-36. Although the *King* decision discusses the general applicability of its analysis, that analysis was fundamentally concerned with

¹⁰ See *supra* Section IV(A).

¹¹ See *supra* Section IV(B).

¹² See *supra* Section IV(C).

“[w]hether to stay civil proceedings to protect a party’s Fifth Amendment rights when parallel criminal proceedings are pending” *King*, 104 Wn. App. at 345. Most of the factors set out for consideration in *King* also relate to criminal proceedings.¹³ There are no parallel criminal proceedings or Fifth Amendment rights at issue here. The trial court’s reliance on *King* is also misplaced because *King* expressly distinguished its holding from “the context of a request to stay the entire civil proceedings or all discovery.” *Id.* As the trial court granted the motion to stay this case in its entirety “under the factors

¹³ The court in *King* outlined the following factors for consideration: “In considering a stay request, federal courts begin by considering the extent to which a defendant’s Fifth Amendment rights are implicated. Other factors the courts have identified and considered include the following: similarities between the civil and criminal cases; status of the criminal case; the interest of the plaintiffs in proceeding expeditiously with litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; the burden which any particular aspect of the proceedings may impose on defendants; the convenience of the court in the management of its cases, and the efficient use of judicial resources; the interests of persons not parties to the civil litigation; and the interest of the public in the pending civil and criminal litigation. *King*, 104 Wn. App. at 352-53 (emphasis added).

described in *King*,” the ruling relied on the wrong legal standard.

The stay of proceedings was based on an abuse of discretion and it should therefore be lifted. If this case must be remanded, proceedings before the trial court should resume.

E. Justice Sanders Should Be Awarded the Attorney’s Fees and Expenses he Has Incurred Compelling the State to Honor it’s Obligations to Provide him a Defense, Including Fees and Expenses on Appeal.

In Justice Sanders’ previous suit against the State, Judge Hicks awarded him the attorney’s fees and expenses incurred in enforcing the State’s statutory duty to provide a defense. CP 81-83. Here, Justice Sanders has had to once again engage in costly litigation to compel the State to fulfill the exact same statutory obligation. As in the previous proceedings, and in order to preserve the intent of RCW 43.10.030 and .040, this Court should award Justice Sanders the attorney’s fees and expenses he has incurred in claiming his right to a defense, including fees and expenses on appeal.

RAP 18.1(a) authorizes an award of attorney's fees if "applicable law grants to a party the right to recover reasonable attorney fees or expenses." In *Olympic Steamship Company, Inc., v. Centennial Insurance Company*, the Washington Supreme Court held that, as a matter of public policy, a party has a right to "recoup attorney fees which it incurs because an insurer refuses to defend or pay the justified action or claim of the insured." 117 Wn.2d 37, 52, 811 P.2d 673 (1991) (emphasis added); see also *Panorama Village* 144 Wn.2d at 143-44; *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 959, 948 P.2d 1264 (1997). As discussed above, as it has a duty to defend Justice Sanders, the State takes on the role of an insurer. *Frontier*, 662 N.E.2d at 253; *O'Brien*, 802 N.Y.S.2d at 742; *Lo Russo*, 645 N.Y.S.2d at 210; *Mathis*, 531 N.Y.S.2d at 683; *Eugene Police Employees*, 972 P.2d at 1193. Accordingly, the same policy concerns held to justify an award of attorney's fees in *Olympic Steamship* also apply here.

Like an insurance contract, the purpose of RCW

43.10.030 and .040 is to provide “protection from expenses arising from litigation” not to create “vexatious, time consuming, expensive litigation with [an] insurer.” *Olympic Steamship*, 117 Wn.2d at 52 (citations omitted). RCW 43.10.030 and .040 would be meaningless if state officials had to engage in costly and burdensome litigation with the State in an attempt to avoid costly and burdensome litigation in administrative proceedings. Awarding Justice Sanders his attorney fees here preserves the value of a State defense.

Furthermore, “allowing an award of attorney fees will encourage the prompt payment of claims.” *Olympic Steamship*, 117 Wn.2d at 52. Justice Sanders has been forced to sue the State in pursuit of his right to a defense for a second time, even after Judge Hicks’ prior ruling. The State must be pushed to satisfy its statutory duties in the future. Not every official who is owed a defense will be willing (or able) to enter into a long legal battle with the State to claim it. Justice Sanders should be awarded his attorney’s fees in this proceeding so that the State

will not be able to evade its obligations.

V. CONCLUSION

As Justice Sanders is a state official and all of the charges brought by the Commission concern actions taken in his official capacity, the State is required to immediately provide him a defense under RCW 43.10.030 and .040. This Court should, therefore, reverse the trial court, grant summary judgment to Justice Sanders, and reimburse Justice Sanders' defense fees and expenses incurred to date. Should this Court hold that remand is necessary, the stay of the proceedings should also be reversed. Finally, Justice Sanders should be awarded his

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attorney's fees and expenses incurred in compelling the State to fulfill its statutory duty.

DATED this 30th day of May, 2006.

Respectfully submitted,

PRESTON GATES & ELLIS LLP

By 

Paul J. Lawrence, WSBA # 13557

Matthew J. Segal, WSBA # 29797

Graham M. Wilson, WSBA # 36857

Attorneys for Appellant

The Honorable Richard B. Sanders

I hereby certify under penalty of perjury of the laws of the State of Washington that on the 30th day of May, 2006, I caused true and correct copies of the Brief of Appellant to be delivered to the following:

Peter R. Jarvis Esq.
Hinshaw & Culbertson
1000 SW Broadway, Suite
1950
Portland, OR 97205-3078
Phone: (503) 243-3243
Via U.S. Mail

Mr. Timothy G. Leyh
Mr. Randall Thompson
Danielson Harrigan Leyh &
Tollefson LLP
999 3rd Avenue
Suite 4400
Seattle, WA 98104-4017
Phone: (206) 623-1700
Via U.S. Mail

Dated this 30th day of May, 2006.



Sheri Herndon

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