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Court of Appeals No. 354245
Grant Co. Superior Court Cause No. 12-2-01681-6

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

JERRY JASMAN,

Appellant,

vs.

GRANT COUNTY, WASHINGTON; THE BOARD OF COUNTY
COMMISSIONERS FOR GRANT COUNTY, WASHINGTON; AND
RICHARD STEVENS, CAROLANN SWARTZ AND CINDY
CARTER, IN THEIR OFFICIAL CAPACITIES AS COUNTY
COMMISSIONERS FOR GRANT COUNTY, WASHINGTON,

Respondents.

REPLY BRIEF

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Appellant Jerry Jasman (“Jasman”) submits this reply to the brief filed on behalf of Respondents, Grant County, Washington, the Board of County Commissioners for Grant, County, Washington, and individual County Commissioners (collectively “Grant County” or the “County”):

I. INTRODUCTION

Pursuant to a policy and practice of defending employees who face legal action for good faith conduct within the scope of their employment, the Grant County Commissioners approved a request to pay Jasman’s attorney fees and costs for defense of the underlying quo warranto action. The Commissioners subsequently reversed their decision on grounds that they lacked authority to pay attorney fees and costs under RCW 4.96.041. This appeal asks the Court to resolve the question of whether local government entities such as Grant County have police power authority to pay their employees’ attorney fees and costs, or whether they lack such authority in the absence of express statutory authority. Jasman contends that, in order to attract, retain and protect employees, local government entities must have the latitude to pay attorney fees and costs when their employees face legal action for good faith conduct in the scope of employment. This principle is larger than, and independent of, the

merits of the underlying quo warranto action against Jasman, and vindication of this principle is necessary to ensure good government.

II. REPLY STATEMENT OF THE CASE

A. Grant County wrongly insinuates that Jasman acted in bad faith.

Grant County insinuates that Jasman has acted in bad faith. *See* Resp. Br., at 31-32. While the courts have admittedly held that a deputy coroner or investigator with authority to sign death certificates is a “public officer” subject to the prohibition of RCW 9.92.120, that was not apparent when Jasman was hired, when he signed death certificates at the direction of the elected County Coroner, or when the quo warranto action was initiated. The elected County Coroner hired Jasman because he was the best qualified person for the job in the area. CP 140. Neither the coroner nor Jasman believed the position of deputy coroner or investigator constituted public office. CP 127 & 141. Before he was hired, Jasman obtained an opinion from independent counsel, which was shared with the elected County Coroner and the County Commissioners, that he was not barred from serving as deputy coroner. CP 127, 136, 141 & 150. After he was hired, Jasman merely signed death certificates and performed other tasks assigned to him by the elected County Coroner, in good faith and within the scope of his

employment. CP 129, 143 & 148. The prosecutor in Jasman's criminal case did not claim that Jasman violated the terms of his *Alford* plea in the underlying criminal proceeding, and the quo warranto action was not filed until approximately 19 months after Jasman took the job. The prosecutor in the quo warranto action was subsequently disqualified for conflict of interest and interfering with Jasman's defense of the action. Under these circumstances, it cannot be said that Jasman acted in bad faith.

B. Grant County equivocates between Jasman's request for a court-appointed special prosecutor in the quo warranto action versus this action, which involves review of the County Commissioners' reversal of their decision to pay his attorney fees and costs.

In the quo warranto action, Jasman asked the superior court to appoint a special prosecutor pursuant to RCW 36.27.030, as the County acknowledges. However, the County incorrectly states that the appellate courts in the quo warranto action somehow addressed the alternative grounds for payment of attorney fees and costs presented in this case. *See* Resp. Br., at 6 (stating this Court "accounted for this lawsuit and the impact its ruling would have on this action when analyzing the procedural history"); *id.* at 7 (stating "[t]he Supreme Court also affirmed the trial court and Court of Appeals in denying that either Mr. Jasman or Coroner Morrison were

entitled to a special prosecutor ***or their attorney's fees in defending against the action***"; brackets & emphasis added). This equivocation forms the basis for the County's collateral estoppel argument. *See* Resp. Br., at 16 (stating the quo warranto action and this action involve "identical issues," i.e., "whether or not Grant County has a duty to indemnify Mr. Jasman in defense of the *quo warranto* action"; formatting in original). In actuality, the decisions by this Court and the Supreme Court in the quo warranto action did not address the issue presented in this case, i.e., whether the County Commissioners' reversal of their decision to pay Jasman's attorney fees and costs on grounds of a lack of express statutory authority is arbitrary, capricious or contrary to law.

C. Grant County selectively quotes Jasman's complaint.

The County incorrectly states that "Jasman's sole mechanism for relief set forth in his Complaint was based on his assertion that the Commissioners had authority and was [sic] obligated to indemnify him pursuant to RCW 4.96.041." Resp. Br., at 8 (brackets added). In support of this statement, the County selectively quotes from Jasman's complaint, highlighting references to RCW 4.96.041. *See id.* at 8-9. In actuality, Jasman's Complaint alleged claims for declaratory judgment and certiorari and included allegations that the

County Commissioners' reversal of their decision to pay his attorney fees and costs "is arbitrary, capricious and contrary to law." CP 6. The Complaint referred to RCW 4.96.041, not as the sole or exclusive basis for finding that the decision is arbitrary, capricious and contrary to law, but rather because the Commissioners' reversal was ostensibly based on that statute.¹

D. Grant County distorts a statement of counsel during oral argument in the quo warranto action.

The County incorrectly states "counsel conceded that Mr. Jasman was not entitled to indemnification in his own statements and affirmations to the Division III appellate court." Resp. Br., at 16. The quotation offered in support of this statement makes it clear that counsel contended Jasman was entitled to appointment of a special prosecutor because his ability to serve as deputy coroner or investigator with authority to sign death certificates was "very much intertwined" with the elected County Coroner's ability to run his office, and the elected County Coroner had been allowed to intervene in the case as the real party in interest. *See id.* at 17. Counsel forthrightly acknowledged that Jasman would not be entitled to appointment of a special prosecutor in his own right, absent the

¹ In his opening brief, Jasman stated that he "does not rely on this argument [i.e., RCW 4.96.041] on appeal." App. Br., at 19 n.3.

effect on the elected County Coroner's ability to run his office or his presence in the lawsuit. *See id.* The quotation serves to highlight the distinction between the issues involved in the quo warranto action and this case, and it is specious to claim that the argument in the quo warranto action is somehow contrary to the position taken in this action.

E. Grant County misconstrues Jasman's statement that court appointment of a special prosecutor in the quo warranto action would potentially moot his claim for attorney fees and costs in this action.

The County correctly states Jasman indicated that court appointment of a special prosecutor in the quo warranto action would potentially render this action moot because Jasman would not be entitled to have his attorney fees and costs paid twice. *See Resp. Br.*, at 5-6. However, the County then goes on to suggest counsel for Jasman agreed that the resolution of the quo warranto action, which denied appointment of a special counsel, actually did render this action moot. *See id.* at 18 (stating "Jasman's counsel agreed that the final decision in *Lee v. Jasman* may render this action moot"). This action is not moot precisely because appointment of a special prosecutor was denied in the quo warranto action.

III. REPLY ARGUMENT

A. The quo warranto action does not collaterally estop Jasman from bringing this action because the two actions do not involve the same issues.

Grant County contends that this action is barred by the doctrine of collateral estoppel because it involves “identical issues” to the quo warranto action. *See* Resp. Br., at 16. In support of this contention, the County characterizes the issue as “whether or not Grant County has a duty to indemnify Mr. Jasman in defense of the *quo warranto* action.” *Id.* (formatting in original). This statement phrases the issue in terms of a high level of generality to mask the differences between the quo warranto action and this action. In the quo warranto action, this Court and the Supreme Court addressed whether Jasman—along with the elected County Coroner was entitled to court appointment of a special prosecutor pursuant to RCW 36.27.020. In this action, the Court is presented with questions of whether the County Commissioners’ reversal of their decision to pay Jasman’s attorney fees and costs based on an ostensible lack of express statutory authority is arbitrary, capricious or contrary to law. Neither this Court nor the Supreme Court addressed these issues in the quo warranto action.

Because the issues presented in this action were not raised or addressed in the quo warranto action, there is no collateral estoppel. *See Dixon v. Fiat-Roosevelt Motors, Inc.*, 8 Wn. App. 689, 695, 509 P.2d 86, 91 (1973) (“Neither the doctrine of collateral estoppel nor the vouching-in doctrine can be applied to preclude litigation of issues which were previously unlitigated”); Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 833 (1985) (citing *Dixon* for the proposition that “[t]he requirement of actual litigation of an essential issue provides some assurance that the issue received the attention of the parties and the judge in the first proceeding, thereby justifying its conclusive effect in the second”; brackets added); Kathleen M. McGinnis, *Revisiting Claim and Issue Preclusion in Washington*, 90 Wash. L. Rev. 75, 89 (2015) (citing *Dixon* and Trautman for the proposition that “[a]n essential issue is likely to have received the parties' and judge's attention in the first case, justifying preclusion in the second”; brackets added). This point was made in Jasman’s opening brief and it has not been meaningfully addressed in the County’s reply. *See App. Br.*, at 17-20.

B. Grant County’s mootness argument rests upon the same unwarranted basis as its collateral estoppel argument.

Grant County argues that Jasman’s claims for declaratory judgment and certiorari are moot, based upon the same equivocation of issues that underlies the County’s collateral estoppel argument.

Specifically, the County states:

Mr. Jasman's claim for declaratory relief is moot as a) the County properly concluded that it had no duty and was not authorized to indemnify Plaintiff Jasman; b) the Supreme Court affirmed the trial and appellate courts; and c) the *quo warranto* action is now final. Mr. Jasman's counsel agreed that the final decision in *Lee v. Jasman* may render this action moot. (CP 122, ¶ 2). There is no recourse for recovery pled in Mr. Jasman's Complaint that he had not already requested in the *quo warranto* action and which would be precluded and mooted by the Supreme Court's opinion.

Resp. Br., at 18. Although this argument is phrased in terms of mootness, it mirrors the County’s collateral estoppel argument, and it should be rejected for the same reason as the collateral estoppel argument.²

Jasman's claims are not moot because the Court can grant effective relief by declaring that the County Commissioners have authority to pay his attorney fees and costs in the *quo warranto*

² One of Grant County’s headings includes the contention that Jasman’s certiorari claim is also moot, but the County provides no argument or authority regarding the alleged mootness of this claim. *See* Resp. Br., at 18-21.

action, and issuing a writ of certiorari to the Grant County Commissioners that reversal of their decision to defend him was contrary to law and/or arbitrary and capricious.

C. Declaratory judgment and certiorari should be granted because the County Commissioners' reversal of their decision to pay Jasman's attorney fees and costs is contrary to law.

In his opening brief, Jasman pointed out how county governments have police power to enact laws that do not conflict with the constitution or a state statute. *See* App. Br., at 14 (quoting Wash. Const. Art. XI, § 11, and *Detamore v. Hindley*, 83 Wash. 322, 326-27, 145 P. 462 (1915)). Jasman also relied on *Washington Public Hosp. Liability Ins. Fund v. Public Hosp. Dist. No. 1 of Clallam County*, 58 Wn. App. 896, 899, 795 P.2d 717 (1990), *rev. denied*, 116 Wn. 2d 1006 (1991), which held that local government entities have the power to indemnify employees, even in the absence of express statutory authority. *See* App. Br., at 15. In light of this undisputed police power authority, the County Commissioners acted contrary to law when they reversed their decision to pay Jasman's attorney fees and costs on grounds that they were compelled to do so in the absence of express statutory authority permitting them to take such action.

In response, Grant County argues that (1) authority to pay employees' attorney fees and costs is limited to suits for damages against the employees, and (2) Jasman was not acting within the scope of employment. Neither of these arguments has any merit, nor renders the County Commissioners' reversal of their decision to pay Jasman's attorney fees and costs legally correct.³

1. The County Commissioners' authority to pay employees' attorney fees and costs is not limited to suits for damages.

Grant County argues that the authority to pay employees' attorney fees and costs is limited to suits for damages against the employees. *See* Resp. Br., at 23-25. The County offers no authority to support this limitation on the police power, nor does it explain how this limitation is consistent with the expansive constitutional grant of authority to county governments. *See id.*

The County points out that authorities authorizing payment of attorney fees and costs involve a "loss" to the employee. *See* Resp. Br., at 24-25 (discussing 3 McQuillan Municipal Corporations § 12:173.25 (3d ed.), and *Washington Public Hosp. Liability Ins.*

³ Grant County complains that the police power was inadequately pled as a basis for declaratory judgment or certiorari. *See* Resp. Br., at 9 & 21. However, the County does not address Jasman's briefing on the point. *See* App. Br., at 21-23. In sum, police power is not a claim, but rather legal authority supporting claims for declaratory judgment and certiorari, which were adequately pled. *See id.*

Fund, supra). However, the “loss” in question usually consists of fees and costs. *See* 3 McQuillan Municipal Corporations § 12:173.25 (brackets & ellipses added).⁴ The fact that payment of attorney fees and costs will typically occur with respect to suits for damages does not justify limiting payment of attorney fees and costs to such suits.

Lastly, the County argues that *Washington Public Hosp. Liability Ins. Fund, supra*, is “outdated” because suits for damages against public hospital district employees are now subject to Ch. 4.96 RCW. *See* Resp. Br., at 25 n.4. Whether or not this is true,⁵ it is irrelevant because the change in the statute governing suits for damages does not alter the holding in *Washington Public Hosp. Liability Ins. Fund* that local government entities have common law authority to indemnify employees, even in the absence of express statutory authority. *See* 58 Wn. App. at 899. There is no contrary authority, nor is there any authority limiting indemnification to suits for damages.

⁴ The full text of a previous version of the cited section from the McQuillan treatise is in the record at CP 1359-64. The full text of the current version of the cited section is reproduced in the Appendix to this reply brief.

⁵ It is unclear whether the change in Ch. 4.96 RCW would apply to *Washington Public Hosp. Liability Ins. Fund* in any event because the case involved a suit by the hospital district against its own employee. *See* 58 Wn. App. at 897.

2. Jasman was acting within the scope of employment because he was performing tasks at the request of the elected County Coroner and reasonably believed that he had authority to do so until the courts determined otherwise.

Grant County next argues that the County Commissioners did not have authority to pay Jasman's attorney fees and costs on grounds that he was acting outside the scope of employment. *See Resp. Br.*, at 26. However, the County simply assumes, without establishing, that Jasman was acting outside the scope of employment simply because the courts later determined that he was precluded from serving as a deputy coroner by his criminal conviction. *See id.*

In actuality, Jasman was acting within the scope of employment. Scope of employment is defined as follows:

An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.

Restatement (Third) of Agency § 7.07(2) (2006); *Melin-Schilling v. Imm*, 149 Wn. App. 588, 592, 205 P.3d 905, 908 (citing this Restatement provision as consistent with Washington law), *rev. denied*, 167 Wn. 2d 1002 (2009). At all times relevant to the quo warranto action, Jasman was acting within the scope of employment

within the meaning of this definition. He was performing work assigned by the elected County Coroner and was subject to his control. He reasonably believed that he was legally entitled to perform this work, in accordance with the advice he received from counsel, until the courts determined otherwise.⁶

D. Declaratory judgment and certiorari should be granted because the County Commissioners' reversal of their decision to pay Jasman's attorney fees and costs is arbitrary and capricious.

In his opening brief, as an additional and alternative basis for relief, Jasman pointed out that Grant County had a policy and practice of paying attorney fees and costs for its employees, as evidenced by the initial decision to pay his attorney fees and costs, and that it therefore acted arbitrarily and capriciously in reversing its decision. *See App. Br.*, at 15-17. While Jasman was denied the opportunity to conduct discovery regarding the County's policy and practice of paying attorney fees and costs, he nonetheless pointed to the example of the then-County Prosecutor, D. Angus Lee. The County paid Mr. Lee's attorney fees and costs to defend bar disciplinary proceedings. *See id.* at 16-17.

⁶ As noted in his opening brief, Jasman resigned from his position as deputy coroner and did not sign death certificates pending the outcome of the quo warranto action. *See App. Br.*, at 7.

In response, the County does not deny its policy and practice of paying employees' attorney fees and costs, and it acknowledges paying Mr. Lee's attorney fees and costs. The County argues that its action cannot be considered arbitrary and capricious because Jasman had no "right to indemnification" of attorney fees and costs. *See* Resp. Br., at 19. However, if the County pays attorney fees and costs for other employees, but not Jasman, the decision is arbitrary and capricious unless a legitimate reason can be articulated. The only reason that has been articulated to date is that the County is prohibited from paying attorney fees and costs in the absence of express statutory authority. That reason is legally unsound, as argued above, rendering the reversal of the County Commissioners' decision arbitrary and capricious. In this sense, Jasman does have a right to indemnification of attorney fees and costs.

The County then attempts to distinguish payment of attorney fees and costs for Mr. Lee from this action. Specially, the County states that it has authority to pay attorney fees and costs for defense of bar disciplinary proceedings against a prosecutor under RCW 36.32.200, as interpreted in *State ex rel. Banks v. Drummond*, 187 Wn. 2d 157, 176-77, 385 P.3d 769 (2016). *See* Resp. Br., at 26-27. However, *Banks* held that county commissioners do not have

statutory authority to hire special counsel over the objection of an able and willing prosecuting attorney. *See* 187 Wn. 2d at 161 & 176-77. The statute being interpreted in *Banks* expressly prohibited the commissioners from “employ[ing] or contract[ing] with any attorney or counsel to perform any duty which any prosecuting attorney is authorized or required by law to perform[.]” RCW 36.32.200 (brackets added). The *Banks* decision addresses the commissioners’ ability to hire counsel to advise or represent them in matters otherwise within the scope of the prosecuting attorney’s duties. It does not address payment of attorney fees and costs to defend the prosecuting attorney in bar disciplinary proceedings. Defense of bar disciplinary proceedings against the prosecuting attorney him- or herself is not within the scope of the prosecuting attorney’s duties. *See* RCW 36.27.020 (delineating duties of prosecuting attorney). In fact, bar disciplinary proceedings against a prosecutor are analogous to the quo warranto proceedings in this case because admission to practice as an attorney in the courts of this state is necessary for the prosecuting attorney to remain eligible for office. *See* RCW 36.27.010. There is no meaningful distinction between payment of attorney fees and costs to defend Mr. Lee’s eligibility for office and payment of such fees and costs to defend Jasman’s

eligibility for office. This is especially so where the elected County Coroner, who is accountable to the voters of the County, believed it was in their best interests to have Jasman serve as deputy coroner.

E. The Court should decline to impose sanctions because Jasman’s appeal is well-grounded in law and fact.

Grant County requests sanctions in the form of an award of attorney fees and costs pursuant to RAP 18.9(a). Resp. Br., at 31. RAP 18.9(a) provides in pertinent part:

The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or authorized transcriptionist preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

The County contends that this “lawsuit and appeal” are “frivolous, meritless, and moot.” As an initial matter, the rule is limited to “appeal” and does not contemplate sanctions for superior court proceedings or even a prior appeal. In this case, the County did not request and the superior court did impose sanctions on Jasman, nor were sanctions requested or imposed in the appeal of the quo warranto action. Moreover, an appellant is not subject to sanctions merely because an appeal proves to be “meritless” in the sense that the judgment is ultimately affirmed.

In any event, sanctions should be denied. With respect to the legal basis of Jasman's appeal, given the expansive, constitutionally-based police power of local government entities, the Grant County Commissioners' erred when they reversed the decision to pay Jasman's attorney fees and costs on grounds that they lacked the power to do so in the absence of express statutory authorization. The County has identified no contrary authority whatsoever that would render Jasman's appeal "meritless," let alone directly controlling contrary authority that would render Jasman's appeal "frivolous."

With respect to the factual basis of Jasman's appeal, there can be no legitimate dispute that Jasman was acting within the scope of his employment and performing the tasks assigned by the elected County Coroner when the quo warranto action was filed against him. He had a good faith belief that he was entitled to serve as deputy coroner, as confirmed by an opinion that he obtained from counsel beforehand. The County Commissioners initially approved a request for payment of attorney fees and costs submitted on his behalf, in accordance with County policy and practice, only reversing their decision after the then-County Prosecutor interfered with his defense. Far from being sanctionable, the appeal is meritorious and

Jasman should finally receive reimbursement for his attorney fees and costs.

IV. CONCLUSION

Jasman asks the Court to reverse the decision of the superior court dismissing this action, enter declaratory judgment that the Grant County Commissioners had authority to defend him in the quo warranto action, and issue a writ of certiorari to the Grant County Commissioners that reversal of their decision to defend him was contrary to law. In the alternative, Jasman asks the Court to reverse the decision of the superior court denying his motion for a continuance pursuant to CR 56(f) to conduct discovery regarding the County's defense of other employees in similar circumstances.

Respectfully submitted this 16th day of April, 2018.

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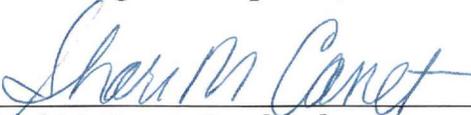
CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

Michael E. McFarland, Jr.
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Signed at Moses Lake, Washington on April 16, 2018.



Shari M. Canet, Paralegal

APPENDIX

3 McQuillan Mun. Corp. § 12:173.25 (3d ed.)A-1
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3 McQuillin Mun. Corp. § 12:173.25 (3d ed.)

McQuillin The Law of Municipal Corporations July 2017 Update
Chapter 12. Elections, Offices and Officers, Employees and Agents and Municipal Departments
IX. Powers and Functions of Officers and Miscellaneous Matters

§ 12:173.25. Reimbursing or indemnifying officer

West's Key Number Digest

- West's Key Number Digest, Municipal Corporations 163
- West's Key Number Digest, Officers and Public Corporations 94

Legal Encyclopedias

- Am. Jur. 2d, Public Officers and Employees § 396

Where a municipal officer incurs a loss in the discharge of an official duty in a matter in which the corporation has an interest, and in the discharge of a duty imposed or authorized by law, and in good faith, the municipal corporation has the power to appropriate funds to reimburse that officer, unless expressly forbidden.¹ Usually this involves indemnification of employees for legal fees incurred in defending against actions that are based upon acts the employee committed within the scope of employment.² Indeed, most cities have indemnification statutes which state that a municipality will not be required to reimburse a municipal officer if the officer is acting outside the scope of employment.³ And, although reimbursement for expenses incurred in civil actions is sometimes denied,⁴ it has been held to be legal for a municipality to appropriate a reasonable amount of its funds to employ counsel to defend its police officers in actions for false imprisonment⁵ and other actions.⁶ However, in many jurisdictions statutes requiring municipalities to defend public officers or employees against claims or demands in civil actions, suits or proceedings, covers only the defense of tort actions, not other complaints.⁷ Where permitted by statute, a municipality may voluntarily agree to indemnify an employee for tort judgments in excess of applicable statutory limits on municipal liability.⁸ That such provisions by local government are in the public interest in that they serve to better enable recruitment and retention of qualified public employees is undoubted.⁹

Mayor was required to repay \$5,951.96 in expenditures made on city credit card; mayor failed to comply with statute governing credit cards for travel expenses, which required him to furnish receipts for use of such cards each month to municipal clerk, and statute governing unlawful expenditures liability provided for liability for causing any public funds to be expended contrary to or without complying with any state statute.¹⁰

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Footnotes

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Cal.

San Diego Police Officers Assn. v. City of San Diego, 29 Cal. App. 4th 1736, 35 Cal. Rptr. 2d 253 (4th Dist. 1994); City of Roseville v. Tulley, 55 Cal. App. 2d 601, 131 P.2d 395 (3d Dist. 1942) (for expenditures made in attending meeting for public interest or welfare of city)

Colo.

Frick v. Abell, 198 Colo. 508, 602 P.2d 852 (1979) (indemnification of municipal police officers for exemplary damage awards as matter of both statewide and local concern)

Conn.

City of Norwich v. Silverberg, 200 Conn. 367, 511 A.2d 336 (1986) (construing statute to find no indemnity to officers where municipality itself sues); Hotchkiss v. Plunkett, 60 Conn. 230, 22 A. 535 (1891); Gregory v. City of Bridgeport, 41 Conn. 76, 1874 WL 1564 (1874)

Fla.

Lomelo v. City of Sunrise, 423 So. 2d 974 (Fla. 4th DCA 1982)

Ill.

Karas v. Snell, 11 Ill. 2d 233, 142 N.E.2d 46 (1957) (police officer acting without willful misconduct); Carver v. Sheriff of La Salle County, 203 Ill. 2d 497, 272 Ill. Dec. 312, 787 N.E.2d 127, 91 Fair Empl. Prac. Cas. (BNA) 29 (2003); People v. Wilkinson, 285 Ill. App. 3d 727, 221 Ill. Dec. 1, 674 N.E.2d 794 (3d Dist. 1996) (Public officials exceeded lawful authority in accepting public funds for reimbursement of legal fees where they failed to seek court appointment of private counsel to act as special assistant state's attorney.)

Ind.

Cullen v. Town of Carthage, 103 Ind. 196, 2 N.E. 571 (1885)

Ky.

McWhorter v. City of Richmond, 514 S.W.2d 678 (Ky. 1974) (lump sum monthly payments to mayor to cover automobile and entertainment expense as recoverable)

Mass.

Filippone v. Mayor of Newton, 392 Mass. 622, 467 N.E.2d 182 (1984); Fortin v. Mayor of Chicopee, 325 Mass. 214, 89 N.E.2d 760 (1950) (indemnification of firefighters or police officers); Bancroft v. Inhabitants of Lynnfield, 35 Mass. 566, 18 Pick. 566, 1836 WL 2520 (1836); Nelson v. Inhabitants of Milford, 24 Mass. 18, 7 Pick. 18, 1828 WL 1768 (1828)

Minn.

Kelley v. City of St. Paul, 285 N.W.2d 671 (Minn. 1979) (finding that payment of judgment fitting and proper as not necessary)

N.H.

Pike v. Middleton, 12 N.H. 278, 1841 WL 1930 (1841)

N.J.

McCurrie v. Town of Kearny, 174 N.J. 523, 809 A.2d 789 (2002); Barnert v. City of Paterson, 48 N.J.L. 395, 6 A. 15 (N.J. Sup. Ct. 1886); Bradley v. Council of Town of Hammonton, 38 N.J.L. 430, 1876 WL 8432 (N.J. Sup. Ct. 1876); Lewis v. Board of Chosen Freeholders of Hudson County, 37 N.J.L. 254, 1874 WL 7443 (N.J. Sup. Ct. 1874)

N.Y.

Sniffen v. City of New York, 6 N.Y. Super. Ct. 193 (1850); Cunningham v. Aetna Cas. & Sur. Co., 125 A.D.2d 950, 510 N.Y.S.2d 347 (4th Dep't 1986)

N.C.

Roper v. Town of Laurinburg, 90 N.C. 427, 1884 WL 1847 (1884)

Pa.

In re Olyphant Borough Treasurer's Account, 8 Del. Co. 53, 6 Lack. L.N. 206 (Pa. C.P. 1900)

R.I.

Plantations Indus. Supply v. Leonelli, 118 R.I. 513, 374 A.2d 1031 (1977) (citing this treatise); Sherman v. Carr, 8 R.I. 431, 1867 WL 2087 (1867)

Tenn.

City of Chattanooga v. Harris, 223 Tenn. 51, 442 S.W.2d 602 (1969) (statute requiring indemnification of firefighters and police officers)

Utah

Acor v. Salt Lake City School Dist., 2011 UT 8, 247 P.3d 404, 264 Ed. Law Rep. 884 (Utah 2011)

Wash.

Washington Hosp. Liability Ins. Fund v. Public Hosp. Dist. No. 1 of Clallam County, 58 Wash. App. 896, 795 P.2d 717 (Div. 2 1990) (citing this treatise) (Municipalities have common-law authority to indemnify their officers for loss incurred in the good-faith discharge of their duties.)

W. Va.

State ex rel. Hicks v. Bailey, 227 W. Va. 448, 711 S.E.2d 270 (2011) (In order to justify indemnification of attorney fees from public funds, the underlying action must arise from the discharge of an official duty in which the government has an interest, the officer must have acted in good faith, and the agency seeking to indemnify the officer must have either the express or implied power to do so.)

Wis.

Page v. Milwaukee County, 230 Wis. 331, 283 N.W. 833 (1939) (expenses of judge in defending title to office); Curry v. City of Portage, 195 Wis. 35, 217 N.W. 705 (1928) (statute authorizing municipal corporation to reimburse officer for expenses incurred in legal proceeding against him as valid)

Tort liability of public officers generally, see §§ 12:173.71 et seq.; liability of municipality under federal civil rights statutes, see § 12:173.73; municipal liability for police and firefighter acts generally, see § 45:22; municipal liability for failure to provide police or fire protection, see § 53:186; individual liability of police officers and firefighters, see §§ 45:20 et seq.; and §§ 53:79 et seq. as to particular acts of police and firefighters.

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Cal.

San Diego Police Officers Assn. v. City of San Diego, 29 Cal. App. 4th 1736, 35 Cal. Rptr. 2d 253 (4th Dist. 1994)

Fla.

Leon County v. Stephen S. Dobson, III, P.A., 957 So. 2d 12 (Fla. 1st DCA 2007) (County commissioner was entitled to reimbursement of legal fees incurred in successfully defending against criminal charges that arose out of commissioner's participation in association of counties and, thus, out of or in connection with the performance of his duties as county commissioner, under common law principle of reimbursement of fees to public officials under certain circumstances.); Maloy v. Board of County Com'rs of Leon County, 946 So. 2d 1260 (Fla. 1st DCA 2007) (Public officials seeking entitlement to reimbursement of attorney fees must meet a two-prong test: the litigation must: (1) arise out of or in connection with the performance of their official duties; and (2) serve a public purpose.)

N.J.

McCurrie v. Town of Kearny, 174 N.J. 523, 809 A.2d 789 (2002)

N.M.

Risk Management Div., Dept. of Finance and Administration, State v. McBrayer, 129 N.M. 778, 2000-NMCA-104, 14 P.3d 43, 149 Ed. Law Rep. 619 (Ct. App. 2000) (question of fact as to whether criminal acts where within tort claims act right to indemnification)

Utah

Acor v. Salt Lake City School Dist., 2011 UT 8, 247 P.3d 404, 264 Ed. Law Rep. 884 (Utah 2011)

W. Va.

State ex rel. Hicks v. Bailey, 227 W. Va. 448, 711 S.E.2d 270 (2011) (In order to justify indemnification of attorney fees from public funds, the underlying action must arise from the discharge of an official duty in which the government has an interest, the officer must have acted in good faith, and the agency seeking to indemnify the officer must have either the express or implied power to do so.)

Wis.

Crawford v. City of Ashland, 134 Wis. 2d 369, 396 N.W.2d 781 (Ct. App. 1986)

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Police officers generally, see §§ 45:1 et seq.

Cal.

Farmers Ins. Group v. County of Santa Clara, 11 Cal. 4th 992, 47 Cal. Rptr. 2d 478, 906 P.2d 440, 69 Fair Empl. Prac. Cas. (BNA) 1120, 11 I.E.R. Cas. (BNA) 1256 (1995); San Diego Police Officers Assn. v. City of San Diego, 29 Cal. App. 4th 1736, 35 Cal. Rptr. 2d 253 (4th Dist. 1994)

Fla.

Maloy v. Board of County Com'rs of Leon County, 946 So. 2d 1260 (Fla. 1st DCA 2007) (County commissioner's conduct giving rise to ethics complaint, when he had consensual affairs with two women both in and out of office, did not serve a public purpose, as required to entitle commissioner to taxpayer funded representation in defending against the charges; although commissioner was cleared of the alleged misconduct, his underlying activity did not serve the public interest.)

W. Va.

State ex rel. Hicks v. Bailey, 227 W. Va. 448, 711 S.E.2d 270 (2011) (In order to justify indemnification of attorney fees from public funds, the underlying action must arise from the discharge of an official duty in which the government has an interest, the officer must have acted in good faith, and the agency seeking to indemnify the officer must have either the express or implied power to do so.)

U.S.

Mercurio v. City of New York, 758 F.2d 862 (2d Cir. 1985) (applying New York law)

Cal.

Farmers Ins. Group v. County of Santa Clara, 11 Cal. 4th 992, 47 Cal. Rptr. 2d 478, 906 P.2d 440, 69 Fair Empl. Prac. Cas. (BNA) 1120, 11 I.E.R. Cas. (BNA) 1256 (1995); San Diego Police Officers Assn. v. City of San Diego, 29 Cal. App. 4th 1736, 35 Cal. Rptr. 2d 253 (4th Dist. 1994)

Conn.

Pope v. Town of Watertown, 136 Conn. 437, 72 A.2d 235 (1950) (justice of peace and grand juror charged with false imprisonment)

Idaho

City of Nampa v. Kibler, 62 Idaho 511, 113 P.2d 411 (1941) (police officer charged with batteries)

N.H.

Gilbert v. City of Berlin, 76 N.H. 470, 84 A. 235 (1912) (police officer's expenses to prevent removal, they being state officers)

N.Y.

Mercurio v. City of New York, 758 F.2d 862 (2d Cir. 1985); Williams v. City of New York, 64 N.Y.2d 800, 486 N.Y.S.2d 918, 476 N.E.2d 317 (1985); Mollnow v. Rafter, 89 Misc. 495, 152 N.Y.S. 110 (Sup 1915) (involving judgment against police officer for assault in making arrest); Corning v. Village of Laurel Hollow, 48 N.Y.2d 348, 422 N.Y.S.2d 932, 398 N.E.2d 537 (1979) (Former high-ranking officials of village were not entitled to reimbursement from village of their costs, disbursements and legal fees incurred in successful defense to civil rights action brought against them as result of acts performed in their official capacity for reason that (1) defending oneself against charges of misconduct at one's own expense is risk traditionally associated with acceptance of public office, (2) constitution prevents compensating person who performs act which government had no duty to undertake, and (3) possibility of extravagance or collusion require that, absent extraordinary circumstances, retainer of an attorney be authorized by statute or appropriate resolution.)

Ohio

Buckeye Union Ins. Co. v. Arlington Bd. of Edn., 93 Ohio App. 3d 285, 638 N.E.2d 170, 93 Ed. Law Rep. 289 (3d Dist. Hancock County 1994)

Or.

Burt v. Blumenauer, 84 Or. App. 144, 733 P.2d 462 (1987), opinion modified on reconsideration, 87 Or. App. 263, 742 P.2d 626 (1987) (unlawfully expending county funds not tort action for purposes of indemnification)

N.C.

Roper v. Town of Laurinburg, 90 N.C. 427, 1884 WL 1847 (1884)

Cal.

San Diego Police Officers Assn. v. City of San Diego, 29 Cal. App. 4th 1736, 35 Cal. Rptr. 2d 253 (4th Dist. 1994)

N.J.

Durkin v. Thomas, 77 N.J. Super. 311, 186 A.2d 316 (Law Div. 1962) (litigation arising out of inadvertent discharge of service revolver by off-duty patrol officer)

Wash.

LaMon v. City of Westport, 22 Wash. App. 215, 588 P.2d 1205 (Div. 2 1978) (legal fees incurred by police chief in civil rights action)

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Mass.

Triplett v. Town of Oxford, 439 Mass. 720, 791 N.E.2d 310 (2003) (no right to reimbursement for attorney's fees in successfully defending against criminal indictments and charges)

Neb.

Guenzel-Handlos v. County of Lancaster, 265 Neb. 125, 655 N.W.2d 384 (2003)

N.J.

Kress v. LaVilla, 335 N.J. Super. 400, 762 A.2d 682 (App. Div. 2000) (Town did not have a moral obligation to indemnify former mayor for legal fees he incurred in defending against criminal charges arising from his dismissal of special police officers for their failure to support certain candidates in election.)

Or.

City of Tualatin v. City-County Ins. Services Trust, 321 Or. 164, 894 P.2d 1158 (1995)

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Minn.

Kelley v. City of St. Paul, 285 N.W.2d 671 (Minn. 1979)

N.J.

McCurrie v. Town of Kearny, 174 N.J. 523, 809 A.2d 789 (2002)

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Md.

Bradshaw v. Prince George's County, 284 Md. 294, 396 A.2d 255 (1979) (holding modified by, James v. Prince George's County, 288 Md. 315, 418 A.2d 1173 (1980)); Duncan v. Koustenis, 260 Md. 98, 271 A.2d 547 (1970); Arrington v. Moore, 31 Md. App. 448, 358 A.2d 909 (1976)

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Miss.

Davis v. State ex rel. Hood, 2015 WL 8096688 (Miss. Ct. App. 2015)

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