

No. 80393-5

SUPREME COURT OF THE STATE OF WASHINGTON

The Honorable Richard B. Sanders,

Petitioner,

v.

The State of Washington,

Respondent.

PETITIONER THE HONORABLE RICHARD B. SANDERS'
RESPONSE TO RESPONDENT'S STATEMENTS OF ADDITIONAL
AUTHORITIES

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SUPREME COURT
STATE OF WASHINGTON
2008 DEC 17 P 4: 08
BY RONALD J. CARPENTER
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The State of Washington ("State") filed two statements of additional authorities with this Court months after the supplemental briefing deadline. The State submitted three cases the day before oral argument and two more cases immediately thereafter. None of the cases are new authority. Pursuant to this Court's invitation in its December 12, 2008 Order, the Honorable Richard B. Sanders ("Justice Sanders") hereby responds to the State's additional authorities.

None of the five additional authorities control here. The cases do not address the Attorney General's ("AG's") duty to defend state officers. Indeed, the cases do not even discuss RCW 43.10.030(3) or the AG's pertinent duties under RCW 43.10.040. The State submits three cases related to the AG's duty to initiate litigation under provisions of .030 other than subpart (3) and two related to principles of statutory construction.

The cases interpreting the AG's duty to initiate litigation are inapposite from the relevant subsections, .030(3) and .040, which pertain to the AG's duty to defend state officials. In *Boe v. Gorton*, 88 Wn.2d 773, 775-76, 567 P.2d 197 (1977), this Court held that the AG can not be forced by writ of mandamus to initiate proceedings under .030(2) or .030(8) to recover funds disbursed under a law subsequently held unconstitutional. *Boe*, and its companion case *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977), interpreted the qualifying language found in

.030(2), “which may be necessary,” to provide the AG discretion to decide whether or not to initiate litigation.¹ *Boe*, 88 Wn.2d at 775-76. In *Boe*, this Court found nothing in .030(8)’s duty to initiate litigation as calling for less discretion than that granted to the AG in .030(2). *Id.* at 775. Collectively, *Boe* and *Berge* stand for the proposition that the AG’s duty to initiate litigation entails discretion. In fact, in another of the State’s supplemental authorities, this Court cites to *Berge* and *Boe* for the principal that “the duty imposed upon the Attorney General [is] not an absolute one to initiate litigation, but a duty to exercise discretion.” *Blue Sky Advocates v. State*, 107 Wn.2d 112, 117, 727 P.2d 644 (1986) (emphasis added).² The *Berge* line of cases do not control here where the AG’s duty is not to initiate litigation, but to defend. The duty to defend is controlled by the mandatory language of .030(3) and .040.

Moreover, the decision whether or not to initiate litigation requires an element of discretion that is lacking in the duty to defend context. Funding limitations, net monetary gain and relative chance of success are all relevant considerations in deciding whether or not to bring suit. *Id.* at

¹ Justice Sanders addressed *Berge*’s inapplicability in his briefing to the Court of Appeals. Reply Brief of Appellant the Honorable Richard B. Sanders, pp. 13-14. Justice Sanders incorporates his prior discussion and analysis of *Berge* into this response.

² The issue in *Blue Sky Advocates* was whether the AG committed malpractice when its “counsel for the environment,” appointed under RCW 80.50.080, declined to prosecute a case during an environmental administrative hearing. *Id.* at 116-17. This Court looked to *Berge* and *Boe* and held that the AG has discretion to initiate litigation under RCW 80.50.080. *Id.* at 119.

119. In contrast, the AG's duty to defend does not require similar considerations. A defense is required under .030(3) and .040 regardless of the likelihood of success or relative monetary gain, the only issue being whether the state official acted in their official capacity. The CJC found that Justice Sanders acted in his official capacity. Therefore he was entitled to a defense under .030(3) and .040.³

The State submits two cases related to principles of statutory construction, neither of which discusses .030 or .040.⁴ Nor do the cases suggest a conclusion contrary to the relief Justice Sanders seeks.

Campbell & Gwinn, L.L.C. adopts an approach to statutory construction whereby "the plain meaning is still derived from what the Legislature has said in its enactments, but that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provisions in question." 146 Wn.2d at 11; *see also Tingey*, 159 Wn.2d at 657-59 (stating a similar rule and then finding

³ Nor does *Young Americans for Freedom v. Gorton*, 92 Wn.2d 204, 588 P.2d 195 (1978), involve the State's duty to defend. In that case, this Court held that the AG has the authority to file amicus briefs based on in its role as legal adviser to the State and because "the constitutional and statutory provisions relating to the Attorney General and his status as attorney for the state and its departments and agencies is broad and inclusive enough to confer upon that office authority to appear as amicus curiae before the United States Supreme Court...." *Id.* at 207. While *Young Americans for Freedom* stands for the proposition that the constitution and statutes are not an exclusive list of the AG's specific duties, it does not stand for the notion that the AG may ignore a duty mandated by the plain language of a statute. Where, as here, the statute mandates the AG perform a task without any qualifying language, the AG must comply.

⁴ *Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43, P.3d 4 (2002)

the plain meaning of a term from a technical dictionary). In *Campbell & Gwinn, L.L.C.*, this Court held that a developer can not circumvent a statute mandating permits for withdrawal of groundwater by claiming multiple individual statutory exemptions based on his subdivision of a single property. 146 Wn.2d at 14. The Court examined the overall groundwater statutory scheme and determined that allowing a single developer to claim individual exemptions for multiple lots would place the statute in conflict with other groundwater statutes. *Id.* at 12-16. Accordingly, the Court used contemporaneous, related statutes to interpret the meaning of the statute.

Here, no conflict arises from reading .030(3) and .040 as imposing a mandatory duty to defend on the AG. The statute distinguishes between the AG's responsibility in initiating litigation (limiting the AG's duty to "as may be necessary") and defending state officers (imposing no similar limitation). This Court, as discussed above, has followed the legislature's intent in that regard. No internal inconsistency or conflict arises from reading the statutes in this manner. Moreover, the State's additional authorities analyze the plain meaning of previously uninterpreted terms; this Court has already held that the word "shall" in a statute imposes a mandatory duty. *Wash. State Coal. for the Homeless v. Dep't of Soc. &*

and *Tingey v. Haisch*, 159 Wn.2d 652, 152 P.2d 1020 (2007).

Health Servs., 133 Wn.2d 894, 907-08, 949 P.2d 1291 (1997).

Further, while statutes should be read in harmony to avoid conflicts, the legislative intent behind .030(3) is not ascertainable by referring to subsequently enacted statutes. The substantive text of .030(3) has been the law of Washington since before statehood. *See* Laws of Washington Territory 1888, p. 8, ch. VII, § 6. Subsequently enacted statutes such as the Ethics in Public Service Act, ch. 42.52 RCW, are irrelevant to the plain meaning of, and legislative intent behind, .030(3), which was adopted decades earlier.

The additional authorities do not change the fact that .030(3) and .040 contain a mandatory duty with no qualifying language. The plain meaning of “shall...defend” means that the AG must defend, and not merely reimburse, state officers acting in their official capacity in all legal and quasi-legal proceedings. This Court should hold that Justice Sanders was entitled to a defense.

DATED this 17th day of December, 2008.

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CERTIFICATE OF SERVICE

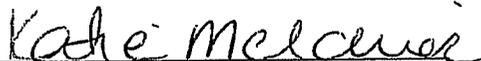
I hereby certify under penalty of perjury of the laws of the State of Washington that on this 17th day of December, 2008, I caused true and correct copies of Petitioner Richard B. Sanders' Response to Respondent's Statements of Additional Authority to be delivered to the following via the methods indicated below:

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