

34130-1-II
32520-9-II
Supreme Court No. 80393-5

**SUPREME COURT
OF THE STATE OF WASHINGTON**

HONORABLE RICHARD B. SANDERS,

Plaintiff/Petitioner,

vs.

STATE OF WASHINGTON,

Defendant/Respondent.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2008 DEC -9 P 3: 53
BY RONALD R. CARPENTER
CLERK

RESPONDENT'S STATEMENT OF ADDITIONAL AUTHORITIES

Timothy G. Leyh, WSBA #14853
Randall T. Thomsen, WSBA #25310
Special Assistant Attorneys General for Respondent
State of Washington

DANIELSON HARRIGAN LEYH &
TOLLEFSON LLP
999 THIRD AVENUE, 44th FLOOR
SEATTLE, WA 98104
(206) 623-1700

**FILED AS
ATTACHMENT TO EMAIL**

Pursuant to RAP 10.8, respondent State of Washington (“the State”) identifies the following additional authorities:

- *Boe v. State*, 88 Wn.2d 773, 567 P.2d 197 (1977);
- *Blue Sky Advocates v. State of Washington*, 107 Wn.2d 112, 7272 P.2d 644 (1986); and
- *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 588 P.2d 195 (1978).

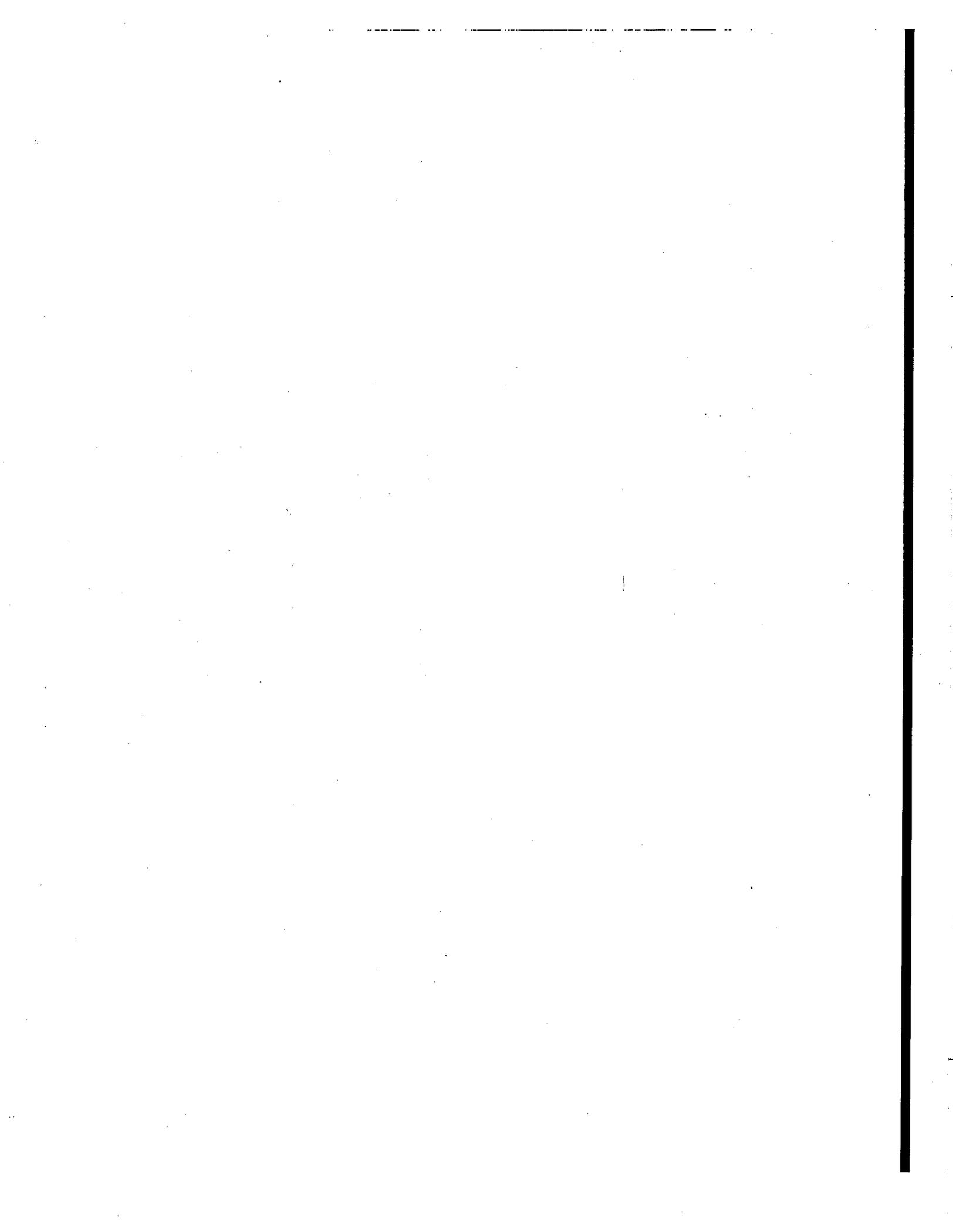
A copy of the authorities are attached to this Statement. The State offers the additional authority for all of the issues in the pending appeals.

DATED this 9th day of December, 2008.

DANIELSON HARRIGAN LEYH & TOLLEFSON LLP

By 

Timothy G. Leyh, WSBA #14853
Randall Thomsen, WSBA #25310
Special Assistant Attorney General for Respondent
State of Washington



LEXSEE 88 WN.2D 773

Albert E. Boe, Petitioner, v. Slade Gorton, as Attorney General, Respondent

No. 44428

SUPREME COURT OF WASHINGTON

88 Wn.2d 773; 567 P.2d 197; 1977 Wash. LEXIS 805

July 7, 1977

SUMMARY:

[**1] **Nature of Action:** A taxpayer filed this original application for mandamus to compel the Attorney General to recover funds expended as tuition supplements to students attending private colleges and universities. The funds in question were expended pursuant to legislation subsequently held [**2] invalid by the Supreme Court.

Supreme Court: The application for a writ is *denied*, the court holding that mandamus does not lie to compel discretionary acts and that the Attorney General has no mandatory duty in this instance.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] **Mandamus -- Public Officers -- Discretionary Duties** Mandamus will not lie to compel a public officer to perform a discretionary act unless the decision not to act was arbitrary or capricious. A decision is not arbitrary or capricious when reached honestly upon due consideration, and room exists for a difference of opinion.

[2] **Attorney General -- Duties -- Statutory Provisions -- Representation of State Officers** RCW 43.10.030(2) and (8), which provide for the Attorney General to bring legal actions on behalf of state officers and to enforce the proper application of appropriated funds, do not establish mandatory duties, but rather only a duty to exercise discretion.

COUNSEL: James J. Caplinger and Carroll, Rindal, Caplinger & Kennedy, for petitioner.

Slade Gorton, Attorney General, and Philip H. Austin, Deputy, for respondent.

JUDGES: En Banc. Brachtenbach, J. Stafford, Utter, Horowitz, and Dolliver, JJ., concur. Hamilton, J. (dissenting). Wright, C.J., and Rosellini, J., concur with Hamilton, J. Hicks, J., did not participate in the disposition of this case.

OPINION BY: BRACHTENBACH

OPINION

[*774] [**198] Petitioner, an individual taxpayer, seeks a writ of mandamus to compel the Attorney General to recover funds disbursed pursuant to Laws of 1971, 1st Ex. Sess., ch. 56. The writ is denied.

In *Weiss v. O'Brien*, consolidated with *Weiss v. Bruno*, 82 Wn.2d 199, 509 P.2d 973 (1973), we held Laws of 1971, 1st Ex. Sess., ch. 56 to be unconstitutional. The statute provided for a tuition supplement to students attending private institutions of higher education in this state. Prior to the statute being held unconstitutional, and in fact before commencement of the suit challenging the act, the State had disbursed \$ 845,455 to 8,514 students at 10 colleges and universities under the plan.

In the [**3] present action, petitioner seeks to compel the Attorney General to institute legal actions to recover funds disbursed under the statute before the *Weiss* decision. Specifically he asks that we direct the Attorney General to sue the 10 recipient colleges and universities. The main thrust of petitioner's argument is that the Attorney General is under a mandatory, nondiscretionary duty to seek recovery of state funds applied in violation of the state constitution.

[1] We start with the general rule concerning mandamus.

Mandamus will not lie to compel the performance of acts or *duties* which call for the exercise of discretion on the part

88 Wn.2d 773, *, 567 P.2d 197, **;
1977 Wash. LEXIS 805, ***

of public officers. *Stoor v. Seattle*, 44 Wn.(2d) 405, 410, 267 P.(2d) 902 (1954), and cases cited. Where courts do interfere, it is upon the theory that the action [*775] is so arbitrary and capricious as to evidence a total failure to exercise discretion, and therefore the act of the officer is invalid. *Stoor v. Seattle*, *supra*.

Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of facts or circumstances. *Where there is room for [***4] two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. In re Buffelen Lbr. & Mfg. Co.*, 32 Wn.(2d) 205, 208, 201 P.(2d) 194 (1948), and case cited.

(Italics ours.) *Lillions v. Gibbs*, 47 Wn.2d 629, 633, 289 P.2d 203 (1955). Thus, the first issue is whether the Attorney General is subject to a mandatory and purely ministerial duty to seek recovery of the funds, or whether instead he is vested with discretion in regard to the matter.

[2] Petitioner argues that RCW 43.10.030(2) and (8) impose upon the Attorney General an absolute duty to recover the funds. But in *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977), we held that RCW 43.10.030(2) only imposes upon the Attorney General a duty to exercise discretion.

1 "The attorney general shall:

". . .

"(2) Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer;

". . .

"(8) Enforce the proper application of funds appropriated for the public institutions of the state, and prosecute corporations for failure or refusal to make the reports required by law;" RCW 43.10.030(2) and (8).

[***5] RCW 43.10.030(8) is of no additional help to petitioner. There is nothing in this subsection which suggests that the "duty" imposed upon the Attorney General is any different from that imposed on him by subsection (2), that is, to exercise his discretion.

The only case cited by petitioner to support his argument that RCW 43.10.030 imposes a nondiscretionary duty on the Attorney General is *State ex rel. O'Connell v. Yelle*, 51 Wn.2d 620, [*776] 320 P.2d 1086 (1958). This case is not supportive of petitioner's argument. There the court was not directly concerned with the Attorney General's duty to bring the suit and did not discuss RCW 43.10.030. The court simply indicated that the Attorney General had the power to bring the suit that was there before the court.

We hold that RCW 43.10.030(2) and (8) only impose upon the Attorney General the "duty" to exercise discretion.

Therefore, under *Lillions v. Gibbs*, *supra*, the court should not issue the writ of mandamus unless the Attorney General's decision not to institute actions to recover the funds was arbitrary and capricious. On this question, we note that petitioner did not even allege nor do we find that the Attorney General's decision was arbitrary and capricious.

The Attorney General argues that no challenge had been made before the funds were paid out. He points out that he was faced with several alternatives: first, to sue the 8,514 students for \$ 100 each; second, to sue the colleges and universities; or, third, to sue the disbursing official, the State Treasurer. The Attorney General urges the impracticability of the first choice and the potential legal obstacles involved in the second and third alternatives. In view of these uncertainties, he decided to not expend the effort and expense of a recovery suit. In the language of *Lillions v. Gibbs*, *supra*, there was room for two opinions and we should not substitute our judgment for that of the Attorney General.

The final issue is petitioner's request for attorney fees.

This is an original mandamus action filed in this court on August 31, 1976. Therefore the Rules of Appellate Procedure, effective July 31, 1976, are applicable. Rule 16.2(g) provides that in such actions, costs are determined and awarded as provided in Title 14 of the rules. Under rule 14.2, the party must substantially prevail to be awarded costs. Obviously, the [***7] petitioner does not prevail in the instant proceeding.

[*777] Specifically, petitioner requests "reasonable attorney fees." Even if he had prevailed, he would generally be entitled only to statutory attorney fees. RAP 14.3(a). However, petitioner argues that under the "common fund" theory of *Weiss v. Bruno*, 83 Wn.2d 911, 523 P.2d 915 (1974), he is entitled to reasonable attorney fees if he prevails. Even if the common fund theory is otherwise applicable, petitioner does not meet the first requirement, that he be successful in the proceeding.

88 Wn.2d 773, *, 567 P.2d 197, **;
1977 Wash. LEXIS 805, ***

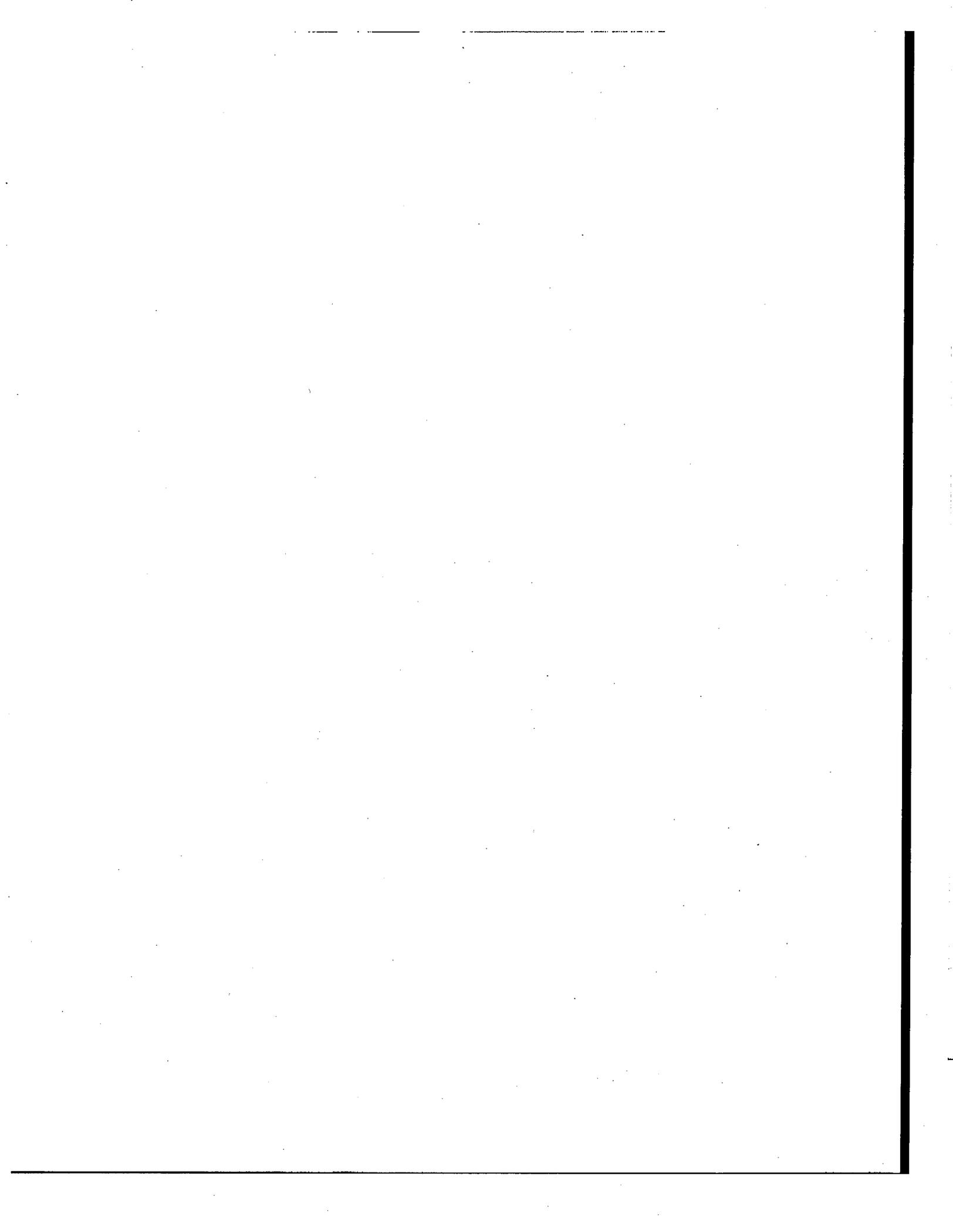
The writ is denied.

Hamilton, J. (dissenting)

DISSENT BY: HAMILTON

I dissent, essentially for the reasons stated in subdivision II of my dissent in *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977).

DISSENT



LEXSEE

Blue Sky Advocates, a non-profit corporation, Appellant, v. The State of Washington, Respondent

No. 52433-5

SUPREME COURT OF WASHINGTON

107 Wn.2d 112; 727 P.2d 644; 1986 Wash. LEXIS 1278

October 30, 1986, Filed

October 30, 1986, Filed

SUBSEQUENT HISTORY: [***1] Reconsideration Denied December 9, 1986.

SUMMARY:

Nature of Action: After appearing at administrative hearings and obtaining a reduction in the permissible level of emissions from a proposed power plant, a non-profit corporation sought reimbursement of its attorney fees and other expenses from the State.

Superior Court: The Superior Court for Thurston County, No. 83-2-00974-7, Daniel J. Berschauer, J., granted a summary judgment in favor of the State on May 14, 1985.

Supreme Court: Holding that an assistant attorney general had not abused his discretion in representing the public interest in the site evaluation process and that the private attorney general doctrine does not apply in Washington, the court *affirms* the judgment.

HEADNOTES**WASHINGTON OFFICIAL REPORTS HEADNOTES**

[1] **Attorney General -- Utility Services -- Site of Energy Facility -- Counsel for Environment -- Nature of Duty** The duty of an assistant attorney general appointed to be the counsel for the environment pursuant to RCW 80.50.080 is limited to the proper exercise of discretion in representing the public interest in proceedings involving the location of energy facilities. Under this statute, the assistant attorney general does not have a duty to exercise the reasonable care required of a privately retained attorney.

[2] **Cost -- Attorney Fees -- Private Attorney General -- Validity** The private attorney general doctrine,

whereby a court can award attorney fees to a private individual [***2] who successfully pursues an action benefiting the public, does not apply in this jurisdiction.

COUNSEL: *Mansfield, Reinbold & Gardner* and *Rodney M. Reinbold*, for appellant.

Kenneth O. Eikenberry, Attorney General, and *Shirley W. Battan*, Assistant, for respondent.

JUDGES: En Banc. Durham, J. Dolliver, C.J., Brachtenbach, Andersen, and Callow, JJ., and Cunningham, J. Pro Tem., concur. Dore, Pearson, and Goodloe, JJ., dissent by separate opinion; Uter, J., did not participate in the disposition of this case.

OPINION BY: DURHAM**OPINION**

[*113] [**644] Blue Sky Advocates (Blue Sky), a nonprofit corporation, characterizing this as an action against the Attorney General, claims that either a malpractice claim or the private [**645] attorney general doctrine entitles it to attorney fees and other expenses of its involvement in Energy Facility Site Evaluation Counsel (EFSEC) hearings. The trial court dismissed [***3] Blue Sky's action on summary judgment. We affirm the trial court and hold that RCW 80.50.080 does not contemplate malpractice suits against the Attorney General. We also reject the private attorney general doctrine.

Washington Water Power Company initiated proceedings before EFSEC by filing an application for site certification for a proposed 2,200-megawatt coal-fired electrical generating facility at Creston in Lincoln County (the Creston project). Pursuant to RCW 80.50.080, the Attorney General appointed an assistant attorney general as "counsel for the environment". In the

107 Wn.2d 112, *, 727 P.2d 644, **;
1986 Wash. LEXIS 1278, ***

fall of 1980, counsel for the environment investigated the potential environmental impact of the Creston project. He visited the proposed site with government officials, reconnoitered the area, and contacted possible expert witnesses regarding the potential impact of the Creston project. He identified several issues, consulted with officials of the Environmental Protection Agency, and obtained expert witness referrals from the staff and faculty at two state universities. He also consulted with government officials and area residents in Lewis County regarding [*114] a similar coal-fired electrical [***4] generating facility undertaken by Washington Water Power Company in the Centralia area.

In October 1980, EFSEC conducted zoning hearings and open public meetings throughout Eastern Washington. Counsel for the environment attended each zoning hearing and objected to proposed findings of consistency and compliance with the land use plans and zoning ordinances in Lincoln County. The open public meetings were well attended. Counsel for the environment explained his role at each meeting and solicited comments from the public. Only two people voiced concerns to him. One of them was a local wheat farmer, who explained that he was one of a number of wheat farmers in the area who were concerned about the Creston project. Counsel for the environment explained that his role was to represent the state-wide public and its interest in the environment, an interest that might differ from that of a special interest group with specific concerns. He suggested that Lincoln County wheat farmers intervene separately in the EFSEC proceedings if they had specific concerns about impacts on wheat. Blue Sky was subsequently formed by Lincoln County wheat farmers and citizens concerned about damage to [***5] wheat crops from air pollution.

Counsel for the environment was never contacted by Blue Sky at any of the public meetings. After the public meetings, he consulted with the Monsanto Research Corporation of Dayton, Ohio, an independent scientific facility, and obtained its opinion that if the Creston project was built to the specifications in the Washington Water Power Company's application, environmental damage would be greatly ameliorated or eliminated. He then consulted with his superior in the Attorney General's office to determine if he should participate in the adversarial phase of the EFSEC proceedings. They apparently decided that the Attorney General's office was not in a position to fund environmental studies and that instead they would rely upon the Department of Ecology, Department of Fisheries, [*115] and Department of Game to take positions on environmental issues in the proceedings. Their decision was based in part upon the lack of opposition expressed in the public meetings. Counsel for the environment decided to take a position

tentatively approving the Creston project and to simply monitor the subsequent adversarial hearings.

Counsel for the environment [***6] attended only a few of the numerous adversarial hearings. He reviewed the prefiled pleadings and direct testimony and was in contact with other assistant attorneys general representing the other state agencies participating in the hearings. He did argue against the proposed transmission line corridor and was ultimately successful.

[**646] At the close of the hearings, Blue Sky petitioned EFSEC to intervene. EFSEC denied its petition. Counsel for the environment was first contacted by Blue Sky's counsel at or after the close of the final adversarial EFSEC hearing. He advised Blue Sky's counsel that he would support a motion by Blue Sky for reconsideration of the denial of its petition for intervention.

Blue Sky's motion for reconsideration was denied by EFSEC at a hearing in January 1982. Blue Sky filed a petition for review in February 1982 in Thurston County Superior Court. In June 1982, the trial judge issued a memorandum opinion holding that EFSEC's denial of the petition for intervention was clearly erroneous.

The EFSEC reopened the adversarial hearings in July 1982 and granted Blue Sky intervenor status on the issues of sulfur dioxide and acid rain effects on crop [***7] yields. Additional testimony was taken from Blue Sky's expert witnesses.¹ EFSEC then amended its recommendation. Blue Sky succeeded in obtaining a reduction in sulfur dioxide emissions from the proposed Creston project. Order 645 of EFSEC's findings and conclusions reflected changes due to Blue Sky's intervention as follows: "Emissions controlled [*116] within these limits will reduce total SO₂ emissions to the atmosphere by as much as one-third over the Applicant's proposal, in a given year."

1 Counsel for the environment obtained partial funding from the Office of the Attorney General for two of Blue Sky's witnesses.

Blue Sky raised and spent \$ 58,027.05. It paid \$ 6,849 in attorney fees. Its attorney claims he is still owed \$ 24,265.42 in attorney fees and expenses. Two other attorneys are owed \$ 1,600 and \$ 3,945.79.

Blue Sky sued the State² in Thurston County Superior Court for \$ 70,000 as reimbursement for the monies spent in the EFSEC proceedings.³ The State moved to dismiss the [***8] complaint for failure to state a claim upon which relief can be granted, pursuant to *CR 12(b)(6)*. Blue Sky then moved for summary judgment based on the complaint and an affidavit submitted by the attorney for Blue Sky. The State filed an affidavit of counsel for the environment. The trial court treated the

107 Wn.2d 112, *, 727 P.2d 644, **;
1986 Wash. LEXIS 1278, ***

State's CR 12(b)(6) motion to dismiss as a motion for summary judgment, having considered matters outside the pleadings. It denied Blue Sky's motion and granted the State's motion to dismiss. Blue Sky appealed. The Court of Appeals certified the case to this court.

2 Only the State was named as a defendant in the complaint and amended complaint. Nevertheless, Blue Sky characterizes this as an action against the Attorney General.

3 Blue Sky is apparently suing for fund raising and organizational expenses in addition to the attorney fees enumerated above.

Malpractice Claim

Blue Sky bases its action first upon a malpractice theory. Pursuant to RCW 80.50.080, the Attorney General appointed counsel [***9] for the environment to participate in the Creston project hearings before EF-SEC. The full text of the statute reads:

After the council has received a site application, the attorney general shall appoint an assistant attorney general as a counsel for the environment. The counsel for the environment shall represent the public and its interest in protecting the quality of the environment. Costs incurred by the counsel for the environment in the performance of [*117] these duties shall be charged to the office of the attorney general, and shall not be a charge against the appropriation to the energy facility site evaluation council. He shall be accorded all the rights, privileges and responsibilities of an attorney representing a party in a formal action. This section shall not be construed to prevent any person from being heard or represented by counsel in accordance with the other provisions of this chapter.

RCW 80.50.080. Blue sky claims that this statute establishes both a duty and a standard of care which make the Attorney General liable to Blue Sky in malpractice.

[**647] This court has not previously addressed the nature of the Attorney General's duty [***10] in this context. Two decisions are, however, instructive. See *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977); *Boe v. Gorton*, 88 Wn.2d 773, 567 P.2d 197 (1977). In those cases, taxpayers sued the Attorney General for refusing to file lawsuits to recover state funds disbursed as tuition supplements to students attending private colleges and universities. After the tuition supplements had

been paid, this court had held in *Weiss v. Bruno*, 82 Wn.2d 199, 509 P.2d 973 (1973) that the legislation authorizing the supplements was unconstitutional.

In *Berge v. Gorton*, the court analyzed the Attorney General's duty pursuant to a different statute than the one at issue here. RCW 43.10.030(2) ' designated the Attorney General as responsible for bringing actions on behalf of state officers, departments, and agencies. The court held that the duty imposed upon the Attorney General was not an absolute one to initiate litigation, but a duty to exercise discretion. *Berge*, at 761-62. Suits against the Attorney General for failure to file lawsuits must, therefore, claim an abuse of discretion. *Berge*, at 762. An action is an abuse of discretion if it is "arbitrary and [***11] capricious, that is, 'wilful and unreasoning action, action without consideration and [*118] in disregard of the facts and circumstances . . ." *Berge*, at 762 (quoting *In re Buffelen Lumber & Mfg. Co.*, 32 Wn.2d 205, 209, 201 P.2d 194 (1948)). *Buffelen Lumber* also held: "Action is not arbitrary or capricious when exercised honestly and upon due consideration where there is room for two opinions, however much it may be believed that an erroneous conclusion was reached." *Buffelen Lumber*, at 209 (quoting *Sweitzer v. Industrial Ins. Comm'n*, 116 Wash. 398, 401, 199 P. 724 (1921)).

4 "The attorney general shall:

"...

"(2) Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer;" RCW 43.10.030(2).

Boe v. Gorton, *supra*, involved the same issues as *Berge* but was brought as an application for a writ of mandamus. The court denied the writ, citing *Berge*, because the act the petitioner [***12] sought to compel was discretionary. *Boe*, at 774-75. *Accord*, *Young Ams. for Freedom v. Gorton*, 91 Wn.2d 204, 206-10, 588 P.2d 195 (1978) (constitution and statutes vest Attorney General with reasonable degree of discretion as official legal advisor; filing of amicus curiae briefs authorized).

Blue Sky argues that RCW 80.50.080 places the duties of counsel for the environment on a higher level than the Attorney General's other duties such as filing lawsuits. It points to the mandatory appointment of counsel for the environment as support for this proposition. Blue Sky also argues that the standard of care of counsel for the environment is prescribed by the statutory language reading: "He shall be accorded all the rights, privileges and responsibilities of an attorney representing a party in a formal action." RCW 80.50.080.

I07 Wn.2d 112, *, 727 P.2d 644, **;
1986 Wash. LEXIS 1278, ***

Blue Sky alleges in its complaint that the Attorney General did not provide counsel for the environment with adequate funding to represent the public and its interest in protecting the environment. Counsel for the environment attended only 4 out of 40 days of adversarial hearings. At those hearings, he argued against the proposed transmission line corridors. [***13] Blue Sky's complaint claims that an attorney exercising reasonable care in representing a party in a formal action would have investigated environmental impact, consulted expert witnesses, appeared at the hearings, [*119] made oral arguments, cross-examined expert witnesses, and taken other action.

In *Berge v. Gorton*, at 764, this court held that in making a discretionary decision to file lawsuits, the Attorney General may consider the net monetary gain from the suits as well as [**648] their possible success. Thus, the Attorney General may take funding considerations into account in making discretionary decisions.

[1] The legislative history of RCW 80.50.080 does not shed any light on the nature of the duty of counsel for the environment. The 1970 law was amended in 1977, however, to delete a requirement that counsel for the environment represent the public interest in protecting the quality of the environment "for the duration of the certification proceedings, until such time as the certification is issued or denied". Laws of 1970, 1st Ex. Sess., ch. 45, § 8, p. 319 (amended by Laws of 1977, 1st Ex. Sess., ch. 371, § 6, p. 1700). A duty to exercise the standard [***14] of care of a privately retained attorney is inconsistent with the discretion recognized by this change to terminate involvement in EFSEC hearings before final action is taken.

Blue Sky does not allege that counsel for the environment failed altogether to become involved in the hearings. Counsel for the environment made a conscientious effort to determine an environmentally advisable position on the Creston project and he solicited public input at the public meetings. He and his superiors made a reasoned decision that monitoring the adversarial hearings was sufficient and that advocacy was required on the transmission line corridor issue only.

RCW 80.50.080 must be interpreted as according the Attorney General discretion in the exercise of his duties as counsel for the environment. There is no evidence from either the language of the statute or its legislative history that the Legislature intended to impose a different standard than the abuse of discretion standard for reviewing acts of the Attorney General. The Attorney General here followed the statute explicitly.

[*120] Summary judgment may be granted where "the pleadings, depositions, answers to interrogatories, and [***15] admissions on file, together with the affida-

vits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). Blue Sky does not allege facts from which reasonable persons could reach the conclusion that the Attorney General abused his discretion; therefore, summary judgment was properly granted. *Turngren v. King Cy.*, 104 Wn.2d 293, 312, 705 P.2d 258 (1985).

Private Attorney General Doctrine

Blue Sky claims, alternately, that it should be awarded its attorney fees, as well as other expenses, because it is eligible under the private attorney general doctrine. This doctrine, however, has not been adopted in this state. The latest decision of this court to consider the private attorney general doctrine was *Miotke v. Spokane*, 101 Wn.2d 307, 678 P.2d 803 (1984).

Miotke was a public nuisance action brought by landowners along the Spokane River against the City of Spokane and the State Department of Ecology for an injunction and damages. Raw sewage was being discharged into the river. This court affirmed an award of damages [***16] based upon the City's violation of a waste discharge permit.

In *Miotke*, three Justices argued for adoption of the private attorney general doctrine and for affirming an award of attorney fees for the injunctive phase of the trial under that theory. Two Justices concurred that attorney fees should be awarded, but under an eminent domain theory. That concurring opinion did not mention the private attorney general doctrine. Four Justices dissented on the award of attorney fees, specifically rejecting the private attorney general doctrine.

Because there was no constitutional majority on the issue in *Miotke*, the private attorney general doctrine was not approved in that opinion. This court had unanimously [*121] rejected the doctrine prior to *Miotke* in *Swift v. Island Cy.*, 87 Wn.2d 348, 552 P.2d 175 (1976).

[**649] [2] The private attorney general doctrine as set out by the *Miotke* plurality was criticized in a dissent as without sufficient guidelines and too undefined. *Miotke*, at 342-43 (Dolliver, J., dissenting in part). The criteria for the doctrine suggested by the *Miotke* plurality also fail to serve the purpose of the private attorney general [***17] doctrine, which is to encourage private individuals to pursue legal remedies which will benefit the public. Note, *Implementing the Incentive Purpose of the Private Attorney General Exception -- Miotke v. City of Spokane*, 101 Wn.2d 307, 678 P.2d 803 (1984), 60 Wash. L. Rev. 489, 489-90, 496-99 (1985).

We note that only California and Idaho have adopted the private attorney general doctrine. ⁵ The United States

107 Wn.2d 112, *, 727 P.2d 644, **;
1986 Wash. LEXIS 1278, ***

Supreme Court rejected the doctrine in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975). In *Alyeska Pipeline*, the Court found that it was for Congress, not the judiciary, to fashion exceptions to the "American Rule" that the prevailing litigant is ordinarily not entitled to collect attorney fees from the loser. It cited numerous statutes enacted by Congress which allow courts discretion in specific cases to award attorney fees. As stated in *Alyeska Pipeline*:

[C]ourts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party . . . or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases [***18] but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases.

Alyeska Pipeline, at 269. We are convinced of the wisdom of this reasoning for our state system and adopt it. Accord, [*122] *Hamer v. Kirk*, 64 Ill. 2d 434, 441-42, 356 N.E.2d 524 (1976). We reject the private attorney general doctrine.

5 California adopted the private attorney general doctrine in *Serrano v. Priest*, 20 Cal. 3d 25, 42-48, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977). The holding was codified by the California Legislature. Cal. Civ. Proc. Code § 1021.5 (West 1980). Idaho adopted the doctrine in *Hellar v. Cenarrusa*, 106 Idaho 571, 577-78, 682 P.2d 524 (1984). The California and Idaho versions both differ from the formulation of the doctrine stated by the *Miotke* plurality.

The Legislature has directed the Law Revision Commission to study the advisability of enacting the private attorney general doctrine and to report its findings and recommendations, [***19] including proposed legislation. Laws of 1983, ch. 127, § 2, p. 619. ⁶ It would be especially inappropriate for us to adopt the doctrine when the Legislature is deliberating it.

6 We are unable to locate any report of the Law Revision Commission or any subsequently proposed legislation.

Where there is no contractual or statutory basis for an award of attorney fees, the traditional equitable grounds for an award of fees are available. For discussions of these, see *Miotke*, at 338-40, and *PUD 1 v. Kottsick*, 86 Wn.2d 388, 545 P.2d 1 (1976).

In summary, we affirm the trial court's dismissal of this case. RCW 80.50.080 imposes a duty on counsel for the environment to exercise discretion. The private attorney general doctrine does not apply in Washington.

DISSENT BY: DORE

DISSENT

Dore, J. (dissenting)

I believe the private attorney general doctrine should be followed in this state and that the appellant, Blue Sky Advocates, should recover its attorney fees from the State. I therefore dissent.

The American [***20] Rule

In all other common law jurisdictions, the award of attorney fees depends on the outcome of the case. *Fee Shifting and the [**650] Implementation of Public Policy*, 47 Law & Contemp. Probs. 187, 188 (1984). In the United States, however, absent some statutory, equitable or contractual exception, each party must pay for his or her legal fees, regardless of the result of the case. This practice dates back before the 19th century. See *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, [*123] 1 L. Ed. 613 (1796); *Hauenstein v. Lynham*, 100 U.S. 483, 25 L. Ed. 628 (1879). This facet of our legal system is so entrenched, and yet so unique, that it is referred to throughout all common law jurisdictions as the "American rule."

The United States Supreme Court explained the justification for the American rule in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 18 L. Ed. 2d 475, 87 S. Ct. 1404 (1967). First, litigation is inherently a risky proposition, and a party should not be penalized for merely participating in a lawsuit. Second, the poor would be unduly discouraged from pursuing their legal rights if they feared that losing the case would [***21] also cost them their opponents' legal fees. Finally, the cost of proving the amount of legal fees would pose an undue burden on judicial administration. *Fleischmann*, at 718.

The State of Washington has always followed the American rule. See *Lovell v. House of the Good Shepherd*, 14 Wash. 211, 44 P. 253 (1896); *State ex rel. Macri v. Bremerton*, 8 Wn.2d 93, 111 P.2d 612 (1941). Nevertheless, this rule is not absolute. Certain statutes allow for attorney fees (e.g., RCW 19.86, Consumer Protection Act), and this court has created exceptions to the American rule when overriding considerations of justice compel such a result. The majority recognizes the inherent power of this court to award attorney fees to a party involved in a lawsuit. The majority specifically states, referring to *PUD 1 v. Kottsick*, 86 Wn.2d 388, 545 P.2d 1 (1976), that "the traditional equitable grounds for an award of fees are available." Majority, at 122.

107 Wn.2d 112, *, 727 P.2d 644, **;
1986 Wash. LEXIS 1278, ***

The *Kottisick* opinion describes the current equitable exceptions to the American rule. The first such exception has been referred to as the "common fund" rule. If a litigant succeeds in preserving or creating a common fund of money [***22] for the benefit of others as well as himself, the litigant may be entitled to receive his or her attorney fees from that fund. See *Peoples Nat'l Bank v. Jarvis*, 58 Wn.2d 627, 364 P.2d 436 (1961). This rule was first announced in [*124] Washington in 1911 in the case of *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578, 112 P. 647 (1911).

We recently expanded the "common fund" theory so that a litigant need not create or protect a specific monetary fund. If the litigant confers a substantial benefit on an ascertainable class, then fees may be awarded. *Grein v. Cavano*, 61 Wn.2d 498, 379 P.2d 209 (1963). I would note in passing that this decision was not based solely on "traditional equitable grounds," but instead represented an extension of the common fund principle by use of our inherent equitable powers.

Scarcely 10 years ago we again allowed attorney fees in a case which did not fit within the narrow constraints of the "common fund" doctrine. In *Weiss v. Bruno*, 83 Wn.2d 911, 523 P.2d 915 (1974), petitioners received attorney fees for their successful suit preventing the unconstitutional disbursement of state funds to private school students. The Attorney [***23] General's office, the State Treasurer, and the Superintendent of Public Instruction favored the unconstitutional delegation of funds, but the petitioners successfully brought an action saving the State millions of dollars. See *Weiss v. Bruno*, 82 Wn.2d 199, 509 P.2d 973 (1973). Our reason for allowing attorney fees was based on this court's inherent equitable powers. Furthermore, that inherent power to award fees was not bound by tradition. We specifically held that in regard to our inherent power to grant attorney fees "we are at liberty to set the boundaries of the exercise of that power." 83 Wn.2d at 914.

[**651] I therefore believe that the majority errs when it refuses to extend our inherent power to award fees based on the notion that only traditional exceptions to the American rule are permitted. Our decisions in *Grein* and *Weiss* clearly indicate that we would allow exceptions when equity required it, and a wholesale denial of the private attorney general doctrine on the basis that it represents a further exception to the American rule is therefore inappropriate and at odds with prior case law.

[*125] The Private Attorney General Doctrine

In *Weiss*, [***24] this court granted attorney fees to successful individuals who, at great cost to themselves, saved the citizens of this state millions of dollars. In the case before us, this court refuses to grant attorney fees to

the successful association which, at great cost to itself, saved the citizens of this state from excessive amounts of air pollution. I do not see any justification whatsoever for this dichotomy. I have no doubt that had this case concerned the citizens' pocketbooks, instead of their lungs, attorney fees would have been granted. Because there is no identifiable cash with which to pay the appellant for its laudable actions, this court will give it nothing at all. With such logic, it is little wonder that public interest lawsuits are brought so infrequently.

In *Miotke v. Spokane*, 101 Wn.2d 307, 678 P.2d 803 (1984), the lead opinion urged use of the private attorney general doctrine whenever three conditions were met: (1) the plaintiffs incur considerable economic expense, (2) the suit is aimed at an important legislative or constitutional policy, and (3) a large class of people benefit from the suit. These conditions, despite the majority's protestations to the contrary, [***25] would fulfill the purpose of the private attorney general doctrine. Individuals would be encouraged to pursue legal remedies which would benefit the public.

The majority has asserted that these criteria are too vague and undefined. Majority, at 121. I disagree. By limiting the doctrine to those cases involving plaintiffs who incur a large economic burden, sufficient guidance is given to the courts. The plaintiffs not only must spend a great deal of money without hope of being reimbursed by virtue of their success (an event particularly likely in equity cases), but also the likelihood of action by public officials must be minimal. Otherwise, the plaintiffs need not incur the expense of litigation for the public good, as instead those duly authorized public officials will absorb the cost.

The second and third conditions would also carefully define the situations in which this doctrine may be applied. [*126] The second condition, that the suit be aimed at an important public policy, is the same condition implicitly inherent in our decision in *Weiss*. We held that the improper disbursement of large amounts of money in derogation of the constitution consisted of a sufficiently [***26] important public policy. *Accord*, *Serrano v. Priest*, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977). In *Miotke*, the lead opinion of this court held that the protection of the environment by preventing the discharge of raw sewage into the Spokane River clearly met the requirement of an important public policy. Protection of the State's environment, like protection of the State's funds, would qualify as protection of an important public policy. These criteria are sufficiently definite and narrow to limit the application of the private attorney general doctrine. Only a case designed to benefit large segments of the population, aimed at important legislative or constitutional provisions would qualify.

107 Wn.2d 112, *, 727 P.2d 644, **;
1986 Wash. LEXIS 1278, ***

Finally, the majority concludes that it would be improper for this court to adopt the doctrine when the Legislature is deliberating it. Majority, at 122. The majority cites Laws of 1983, ch. 127, § 2, p. 619 which states:

The law revision commission shall conduct a study to analyze and evaluate the issues involved in enacting legislation to allow attorneys' fees to a prevailing party who acts as a private attorney general. The commission shall report its findings [***27] [**652] and recommendations, including proposed legislation, to the legislature prior to January 1, 1984.

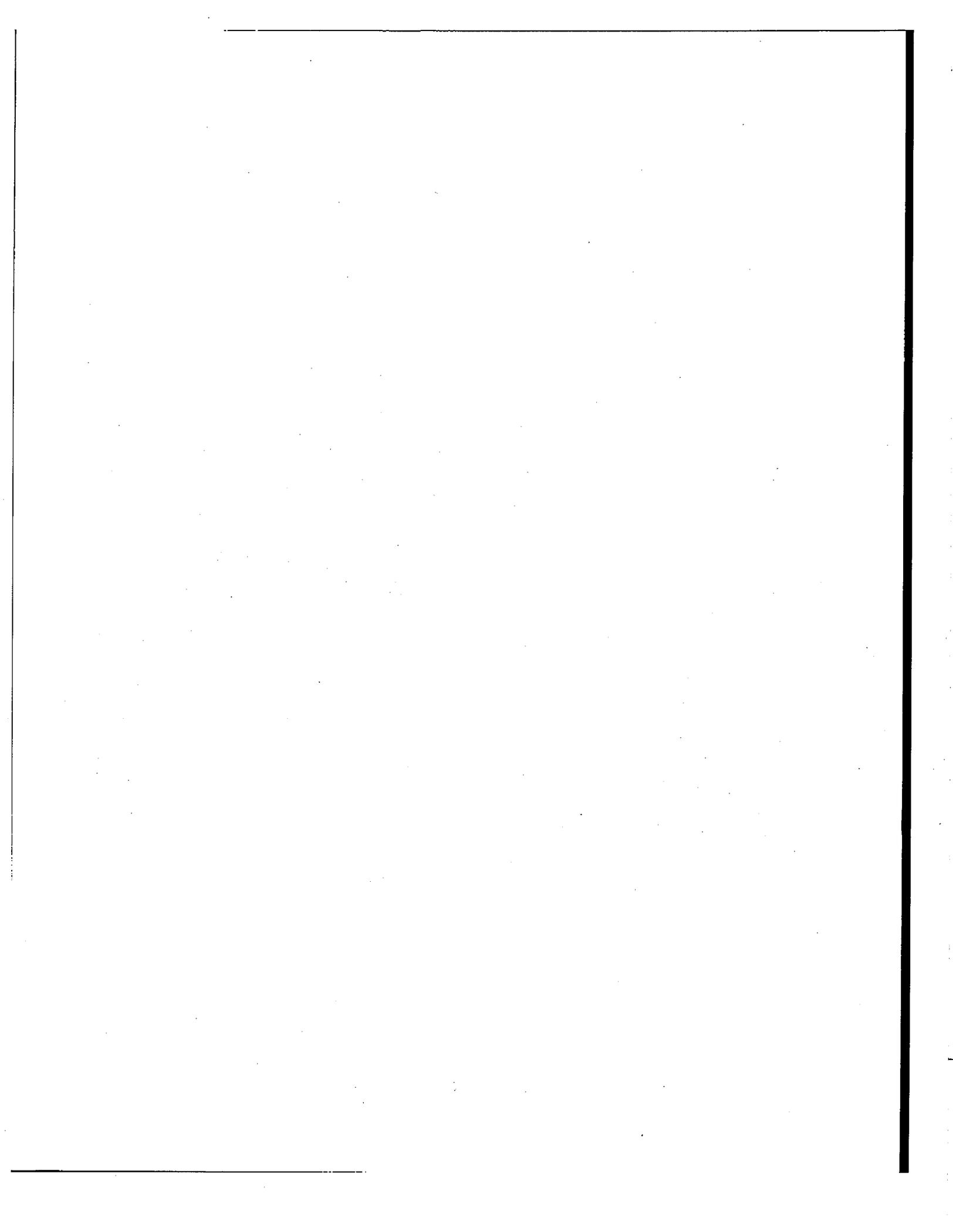
No such report was prepared. As the Legislature has not taken further action after this 1983 statute, I would decline to accept the majority's assertion that the Legislature is still in fact deliberating this subject.

Conclusion

The appellant in this case should receive its attorney fees pursuant to the private attorney general doctrine. It has incurred a substantial economic burden from its actions, and because of the equitable nature of its suit, it could not hope to recover its fees by an award of damages. Furthermore, [*127] the state agencies responsible for protecting the environment from noxious air pollution, the Department of Ecology and the Attorney General's office, would not and did not attempt to shoulder the burden of the appellant by seeking to prevent the excess pollution.

Secondly, protection of the environment from significant quantities of air pollution is a benefit accruing to all people of this state. Securing the atmosphere from this pollution confers as great a benefit to the public as saving the taxpayers' funds. Finally, every person [***28] in the state should benefit by the actions of petitioners. Environmental protection, by its very nature, improves the lives of all citizens of this state, and not merely a discrete, isolated group of people.

I would adopt the private attorney general doctrine in this case and award the petitioner its attorney fees.



LEXSEE

Young Americans for Freedom, et al, Appellants, v. Slade Gorton, as Attorney General, et al, Respondents

No. 45295

SUPREME COURT OF WASHINGTON

91 Wn.2d 204; 588 P.2d 195; 1978 Wash. LEXIS 1164

December 21, 1978

SUMMARY:

Nature of Action: An organization and certain of its members sought damages from the Attorney General for filing an amicus curiae brief in the United States Supreme Court advocating a position inconsistent with that of the organization. Seeking damages for the use of public funds was justified on the basis of the issue being one in which the State had no interest.

Superior Court: The Superior Court for King County, No. 836540, Horton Smith, J., on December 28, 1977, granted a summary judgment in favor of the defendants.

Supreme Court: Holding that the filing of an amicus curiae brief on an issue before the United States Supreme Court was within the discretionary powers of the Attorney General on a matter of public interest to the State or a state agency, and finding that supporting such activity did not interfere with a taxpayer's right to associate, the court *affirms* the summary judgment.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] **Amicus Curiae -- Attorney General -- Powers and Duties -- Amicus Curiae Brief -- U.S. Supreme Court.** The constitutional and statutory establishment of the Attorney General as the legal adviser of state officers and legal representative of agencies of the state (*Const. art. 3, § 21; RCW 43.10.030-.040*) are broad and inclusive enactments which vest the Attorney General with a reasonable degree of discretion as to the manner of representation. The utilization of an amicus curiae brief by the Attorney General on behalf of a state agency or body regarding an issue before the United States Supreme Court is within such discretionary powers.

[2] **Amicus Curiae--Attorney General--Powers and Duties--Amicus Curiae Brief--Sufficiency of State Interest.** An issue before a federal court which will substantially affect programs at state institutions is an issue of sufficient public interest to the State to justify the filing of an amicus curiae brief by the state's legal representative, the Attorney General.

[3] **Taxation -- Characterization -- Organizational Dues.** The exaction of taxes from the public is generally not the equivalent of paying dues, fees, or assessments to an organization.

[4] **Constitutional Law -- Right To Associate -- Citizenship-- Effect.** The voluntary assumption of citizenship in a political subdivision is not the equivalent of compulsory membership in an association. Citizenship does not include a veto power over the actions of public officers nor interfere with anyone's right to associate or not associate with others.

COUNSEL: [***1] *Richard B. Sanders*, for appellants.

Slade Gorton, Attorney General, and *Wayne L. Williams, Assistant*, for respondents.

JUDGES: En Banc. Hamilton, J. Wright, C.J., Stafford, Utter, Brachtenbach, Horowitz, Dolliver, and Hicks, JJ., and Ryan, J. Pro Tem., concur. Rosellini, J., did not participate in the disposition of this case.

OPINION BY: HAMILTON

OPINION

[*205] [**196] This is an appeal from a summary judgment dismissing plaintiffs' (appellants') action for damages against the defendants (respondents), Slade Gorton (State Attorney General) and James B. Wilson (Senior Assistant Attorney General), individually. The

91 Wn.2d 204, *, 588 P.2d 195, **,
1978 Wash. LEXIS 1164, ***

action arises out of the official filing by defendant, on behalf of the State of Washington and the University of Washington, of an amicus curiae brief in the United States Supreme Court in [*206] the case of *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978).

We affirm the judgment of dismissal.

Plaintiffs, in substance, alleged in their complaint that defendants, acting without authority and at public expense, caused the amicus curiae brief to be filed in which it was urged that the [***2] decision of the California Supreme Court in the *Bakke* case be reversed. Plaintiffs claimed that the brief purported to assert a viewpoint on behalf of all citizens of the state and that the views expressed therein were abhorrent to them as taxpaying state citizens. Plaintiffs thus sought damages for abridgment of their constitutional rights by the use of state funds and prestige to advocate views inconsistent with theirs, when the State was neither a party to nor had an interest in the litigation.

[**197] On appeal, plaintiffs argue two issues. First, they contend the Attorney General is without constitutional or statutory authority to file the subject brief in a case in which neither the State of Washington nor any of its officers, departments, or employees have a cognizable interest. Second, they assert that if there be such authority, then such authority abridges their rights of free expression under the *first amendment to the United States Constitution*¹ by forcing them, as state citizens, to morally and financially underwrite the advocacy of doctrines with which they disagree.

1 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." *U.S. Const. amend. 1.*

[***3] In support of their first contention, plaintiffs assert that the powers of the Attorney General are specifically and exclusively defined by *Const. art. 3, § 21, RCW 43.10.030* and *.040*, which respectively provide, in pertinent part:

The attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law.

Const. art. 3, § 21.

[*207] The attorney general shall:

(1) Appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested;

(2) Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer;

RCW 43.10.030.

The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts . . . in all legal or quasi legal matters, hearings, or proceedings, . .

RCW 43.10.040.

In addition, *RCW 28B.10.050* provides generally that the boards of [***4] regents or trustees of the state universities and colleges shall determine the entrance requirements for their respective institutions, and *RCW 28B.10.510* establishes the Attorney General as the legal adviser to such boards.

[1] In our opinion this compendium of 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 in cases which may directly or indirectly impact upon state functions or administrative procedures and operations. Certainly, in the instant case, as we shall point out, the overall concern of the State in its higher educational institutions combined with the particular concern of the graduate departments of the University of Washington in minority admissions programs was sufficiently vital to justify official action by the Attorney General in his status as "legal adviser" to state officials and agencies.²

2 We conceive the phrase "legal adviser" in the context of the Attorney General's status in state government contemplates something more than a mere passive role in the formulation and implementation of state governmental policies and practices.

[***5] [*208] In carrying out his function as a legal adviser, defendants utilized a device, *i.e.*, the filing of an amicus curiae brief, which has been known in English common law since the middle of the 14th century. *See*

91 Wn.2d 204, *, 588 P.2d 195, **;
1978 Wash. LEXIS 1164, ***

E. Beckwith & R. Sobernheim, *Amicus Curiae -- Minister of Justice*, 17 Fordham L. Rev. 38, 40 (1948). While the literal meaning and true status of an amicus curiae may import the interposition of a disinterested bystander to aid and advise the court on the law to the end that justice may be attained, the ordinary utilization of the device both in practice and in conformity with court rule does not preclude interested persons, whether attorneys or laymen, from seeking to undertake the role. See *United* [***198] *States Supreme Court Rule 42(3) and (4)*, 28 U.S.C.A.,³ and *RAP 10.6(b)*.⁴

3 "3. When consent to the filing of a brief of an *amicus curiae* is refused by a party to the case, a motion for leave to file may timely be presented to the court. It shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case; and it shall in no event exceed five printed pages in length. A party served with such motion may seasonably file an objection concisely stating the reasons for withholding consent.

"4. Consent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented for the United States sponsored by the Solicitor General; for any agency of the United States authorized by law to appear in its own behalf, sponsored by its appropriate legal representative; for a State, Territory, or Commonwealth sponsored by its attorney general; or for a political subdivision of a State, Territory, or Commonwealth sponsored by the authorized law officer thereof." *U.S. Sup. Ct. Rule 42(3) and (4)*, 28 U.S.C.A.

[***6]

4 "(b) **Motion.** A motion to file an amicus curiae brief must include a statement of (1) applicant's interest and the person or group applicant represents, (2) applicant's familiarity with the issues involved in the review and with the scope of the argument presented or to be presented by the parties, (3) specific issues to which the amicus curiae brief will be directed, and (4) applicant's reason for believing that additional argument is necessary on these specific issues. The brief of amicus curiae may be filed with the motion." *RAP 10.6(b)*.

Since the constitutional and statutory provisions hereinabove alluded to vest the Attorney General with a reasonable degree of discretion as an official legal adviser and *RCW 43.10.040* specifically authorizes that elected official "to represent the State . . . in the courts . . .

in all legal [*209] and quasi legal matters," we find no reason to presume that the constitutional framers or the legislature intended to deny the Attorney General the power to represent the State or its agencies in the time-honored capacity [***7] of amicus curiae.

Our view in this respect is consistent with *State v. Taylor*, 58 Wn.2d 252, 362 P.2d 247, 86 A.L.R.2d 1365 (1961), upon which plaintiffs seek to rely. In *Taylor* we held that *RCW 43.10.030(1)*, as it then read,⁵ authorized the Attorney General to enforce charitable trusts by way of an accounting action, although the statutes did not embody a clear command to the Attorney General to do so. We reasoned that "inasmuch as the proper management of charitable trusts is a matter of public concern, this is a case in which the state is interested." *Taylor, supra* at 256. We therefore concluded that the Attorney General was permitted, by an action for accounting, to enforce a charitable trust without express statutory authorization. One limitation was placed upon the Attorney General's power: If he were to bring an action, it must be one cognizable at common law or a statutory cause of action.

5 "The attorney general shall:

"(1) Appear for and represent the state before the courts in all cases in which the state is interested; . . ." *RCW 43.10.030(1)*.

[***8] The general rule of *Taylor* is applicable here. In this case, the Attorney General has taken an action which is not specifically authorized by the pertinent constitutional and statutory provisions. However, as we have noted, the applicable provisions are couched in language broad enough, in our view, to include the filing of an amicus curiae brief under appropriate circumstances. In *Taylor* we rejected the requirement of express statutory authorization, and we decline to declare such a requirement now. Furthermore, the Attorney General's action in this case comports with the limitation set out in *Taylor*, since the filing of an amicus curiae brief is cognizable both at common law and by authorized court rule.

[*210] Our decision also accords with our rulings in *Boe v. Gorton*, 88 Wn.2d 773, 567 P.2d 197 (1977), and *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977), in which we held that the Attorney General may exercise broad discretion in the exercise of his duties. We therefore decline to adopt the restrictive approach urged by plaintiffs.

Plaintiffs next contend that even if the Attorney General were authorized to file an [***9] [**199] amicus curiae brief, he had no authority to do so in this particular case because the State has no legally cognizable interest in the litigation.⁶ Plaintiffs contend that the

91 Wn.2d 204, *; 588 P.2d 195, **;
1978 Wash. LEXIS 1164, ***

only interest expressed in the amicus curiae brief was the personal interest of the defendants. Assuming, arguendo, the State must have a "cognizable interest" in the litigation, as espoused by plaintiffs, a review of the issues before the United States Supreme Court in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978), and the interest of this state expressed in the amicus curiae brief, satisfies us that the State had an adequate interest in the outcome of the *Bakke* litigation which was sufficient to justify the Attorney General's filing of the amicus curiae brief.

6 Plaintiffs equate a "cognizable interest" to that interest necessary to permit a party to intervene in a pending suit, or to the interest standing required to initiate or defend an action as a party. We are unable to accept or adopt this analogy in the context of amicus curiae appearances.

[***10] The *Bakke* case involved an action for declaratory and injunctive relief against the Regents of the University of California by a white male who had been denied admission to the medical school at the University of California at Davis. The plaintiff in *Bakke* challenged the medical school's special admissions program under which only disadvantaged members of minority races were considered for 16 of the 100 places in each year's class. Members of any race could seek to qualify under the school's general admissions program for the other 84 places in the class. The plaintiff had been denied admission to the school under the general admissions program, even though applicants with [*211] substantially lower entrance examination scores had been admitted under the special admissions program. The Supreme Court of California, in essence, held that the program violated the constitutional rights of nonminority applicants because it afforded preference on the basis of race to persons who, by the University's own standards, were not as qualified for the study of medicine as nonminority applicants. [***11] *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976).

The United States Supreme Court granted review of the case. *Regents of the Univ. of Cal. v. Bakke*, 429 U.S. 1090, 51 L. Ed. 2d 535, 97 S. Ct. 1098 (1977). In the statement of interest included in the amicus curiae brief, defendants explained the interest of the State of Washington and the University of Washington in the *Bakke* litigation. The defendants correctly asserted that the state operated a system of higher education which included two universities, four colleges, and twenty-eight community colleges. Each school and college endeavored to increase the numbers of underrepresented minorities among its students by various admissions programs. While the several programs did not correspond in all respects with the challenged program and formula of the

University of California, each program, nevertheless, gave favorable consideration in one form or another to the ethnic backgrounds of applicants when determining who could be admitted into the number of places available.

We note that one such admissions program at the University of Washington was [***12] subject to legal challenge by a caucasian applicant whose application to the law school was rejected. *DeFunis v. Odegaard*, 82 Wn.2d 11, 507 P.2d 1169 (1973), vacated as moot, 416 U.S. 312, 40 L. Ed. 2d 164, 94 S. Ct. 1704 (1974), *aff'd on rehearing*, 84 Wn.2d 617, 529 P.2d 438 (1974). The trial court in that case held that the plaintiff had been discriminated against on the basis of race. However, this court reversed, stating:

[*212] [T]he state has an overriding interest in promoting integration in public education. In light of the serious underrepresentation of minority groups in the law schools, and considering that minority groups participate on an equal basis in the tax support of the law school, we find the state interest in eliminating racial imbalance within public legal education to be compelling.

[**200] (Italics ours.) *DeFunis v. Odegaard*, 82 Wn.2d 11, 33, 507 P.2d 1169 (1973).

The United States Supreme Court granted certiorari, *DeFunis v. Odegaard*, 414 U.S. 1038, 38 L. Ed. 2d 329, 94 S. Ct. 538 (1973), but subsequently declared the case moot and [***13] declined to decide the constitutional issue. *DeFunis v. Odegaard*, 416 U.S. 312, 40 L. Ed. 2d 164, 94 S. Ct. 1704 (1974). Upon remand, a plurality of this court reaffirmed its previous judgment. *DeFunis v. Odegaard*, 84 Wn.2d 617, 529 P.2d 438 (1974).

[2] At the time that the defendants filed the challenged amicus curiae brief, it was apparent that the United States Supreme Court's decision in the *Bakke* case was likely to affect the future of the admissions programs at the institutions of higher learning operated by the State of Washington. The United States Supreme Court decision upon the admissions issue could be expected to have the effect of determining whether this state's universities and colleges could continue to consider, and to what extent, the race of applicants in order to increase the enrollment of underrepresented minorities. In light of our view of this practice as expressed in *DeFunis*, we hold that the State of Washington, as well as the University of Washington, had a public interest in the outcome of the *Bakke* litigation which was sufficient to authorize the Attorney General to file the challenged brief.

The [***14] second and concluding argument advanced by plaintiffs is that the Attorney General's action violated their First Amendment rights of expression and association under the United States Constitution. Plaintiffs posit the view that their designated rights were infringed in that [*213] defendants: (1) unconstitutionally used plaintiffs' involuntarily extracted taxes to fund advocacy of ideas they do not support; and (2) unconstitutionally used plaintiffs' involuntary association as citizens of this state to advance a point of view they abhor.

[3] As authority for their first proposition, plaintiffs cite, among others, *International Ass'n of Machinists v. Street*, 367 U.S. 740, 6 L. Ed. 2d 1141, 81 S. Ct. 1784 (1961). This case held that a union operating under a statutorily authorized union shop agreement may not use an employee's dues, fees, or assessments over his objection to support political causes which he opposes. The United States Supreme Court reached this conclusion on statutory grounds and specifically declined to reach the constitutional issue. Furthermore, the facts of *Machinists* are distinguishable from those of the present case in that [***15] the plaintiffs in the former case were compelled to join an organization, a labor union, and were required to pay fees, assessments, and dues into that union. *Machinists* neither factually nor constitutionally supports plaintiffs' contention. Under the circumstances of this case, we do not deem it apposite to equate organizational dues, fees, or assessments with taxes in general. Accordingly, we find no viable merit in plaintiffs' argument on this score.

[4] In support of the second prong of plaintiffs' contention, they argue that they were involuntarily associated with other residents of the state due to the Attorney General's representation that he acted on behalf of the whole "association." Plaintiffs' argument is flawed in that a state is not an organization or an association; it is a political subdivision. And, it is not reasonable to infer

that citizens of a state must unanimously concur in all actions taken by an elected official before any official action may be taken. To conclude otherwise would have the effect of bringing governmental action to a standstill.

Plaintiffs undertake to support their claim of involuntary association by citing the case of [***16] *Good v. Associated Students of the Univ. of Wash.*, 86 Wn.2d 94, 542 P.2d 762 [*214] (1975). In *Good*, this court held that students at a state-supported university may not be compelled by the university to be members of a student organization advocating views they find objectionable. It was held that that type of mandatory membership violated the First Amendment right *not* to associate. *Good* is distinguishable from the present case in that the present plaintiffs have not been compelled [**201] to join any group or organization. They have not been forced to associate with those whom they wish to avoid. Their voluntary citizenship in a state cannot be equated with compelled membership in a club. The defendants have taken no action which infringes on plaintiffs' right not to associate.

We stated in *Good* that "[d]issenting students should not have the right to veto every event, speech or program with which they disagree." *Good*, at 105. The rationale of this statement becomes even more compelling when considered in the context of the present case.

We find no discernible merit in this prong of plaintiffs' argument.

In concluding, we note [***17] that plaintiffs' right to espouse their opinions has not been diminished by the defendants' action; plaintiffs did, in fact, as an organized group, submit to the United States Supreme Court an amicus curiae brief which expressed their views in the *Bakke* case.

The judgment of dismissal is affirmed.