NO. 32769-8-III

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

WASHINGTON COUNTIES RISK POOL, a public entity,

RESPONDENT,

vs.

TAMARA MARIE CORTER, a married individual, STEVE GROSECLOSE, an individual,

APPELLANTS

and

DOUGLAS COUNTY, a municipal corporation,

RESPONDENT.

APPEAL FROM DOUGLAS COUNTY SUPERIOR COURT
CAUSE NO. 14-2-00039-9

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Under RCW 4.96.041(4), an employee of a local governmental entity that has been represented at the local government's expense is entitled to indemnification for the amount of the judgment, so long as the employee was acting within the "scope of official duties." However, in ruling on the parties' motions for summary judgment, the trial court conflated the phrase "scope of official duties" with "scope of employment." The overwhelming majority of courts hold that these two phrases are not substitutes for one another, and that instead, "scope of official duties" is more akin to "under color of law."

In the underlying action, Steve Groseclose was found to have acted under color of law by accessing a county database to retrieve private information on his ex-wife. The jury's finding necessarily includes a finding that Groseclose acted within the scope of his official duties. As a result, and because Groseclose has followed all of the procedural formalities that are actually required of him, Douglas County and/or the WCRP is required to indemnify Groseclose for the judgment against him. It was error for the trial court to conclude otherwise, and this Court should reverse and remand for entry of judgment in favor of Appellants.

II. ARGUMENT

A. Douglas County admitted that it provided Groseclose with a defense in the underlying action.

RCW 4.96.041(4) mandates two prerequisites before a public employee can be indemnified for a judgment against him. First, the local governmental entity must have agreed to represent the employee. Second, the court in the underlying action must have found that the employee was acting within the scope of his official duties.

Pursuant to its own municipal code, Douglas County is prohibited from paying ***any*** expenses of defending a claim against an officer until a request for defense is received by the board of county commissioners and a majority of the board of county commissioners (or legal counsel selected by the board) determines that the claim against that officer is based upon an alleged act or omission of the officer which was, or in good faith purported to be, within the scope of his or her official duties. DCC 2.90.030. Here, Douglas County paid attorney's fees and costs for Groseclose in the underlying action. CP 54. This action is in and of itself evidence of Douglas County's authorization of Groseclose's defense at the County's expense.

Douglas County asserts that it did not provide a defense to Groseclose because the amount it spent on its deductible would have been

spent in its own defense anyway. This argument is belied by the County's prior representations. Douglas County admitted that Mr. Groseclose was represented at the expense of the WCRP. CP 54. In its answer to Appellant's cross-claim, Douglas County stated that it "paid a deductible to the Plaintiff [WCRP], which includes **all** attorney's fees and other defense costs incurred by the Pool up to the County's deductible limit." CP 54 (emphasis added). "All" does not mean "some." At this point in the proceedings, the County cannot retract this admission. *Neilson v. Vashon Island Sch. Dist. No. 402*, 87 Wn.2d 955, 958, 558 P.2d 167 (1976).

Even if Douglas County were not precluded from making this argument, the record does not support its contention. This issue was initially raised in Appellant's cross-motion for summary judgment.[1] Once the moving party has demonstrated that there is no genuine issue of material fact, "the burden shifts to the non-moving party to establish specific and material facts to support" its claim or defense. *Sedlacek v. Hillis*, 104 Wn. App. 1, 12, 3 P.3d 767 (2000) *rev'd in part on other grounds*, 145 Wn.2d 379, 36 P.3d 1014 (2001). Appellants demonstrated that there was no genuine issue of material fact by relying on Douglas County's admission that it paid for **all** attorney's fees and defense costs up

[1] Notably, the County did not assert this argument in its cross-motion for summary judgment.

to $25,000. Douglas County never provided an itemized deduction of expenses, a copy of Mr. Bastian's billing invoices, a declaration from its accounting office, or any other evidence which would demonstrate how it allocated the $25,000 it unquestionably spent on the underlying litigation. Instead, Douglas County filed a cross-motion for summary judgment, conceding that there was no issue of material fact. *Pleasant v. Regence Blue Shield*, 181 Wn. App. 252, 261, 325 P.3d 237, *review denied*, 181 Wn.2d 1009, 335 P.3d 940 (2014). It is far too late for the County to raise an issue of fact now.

Because Douglas County admitted that it paid all expenses and because there is no evidentiary basis for its assertion to the contrary, this Court must conclude that Douglas County provided Groseclose with a defense at its expense.

B. Collateral estoppel has no application to this case.

In its response brief, Respondent Douglas County asserts that the issue of whether Groseclose is entitled to indemnification was fully litigated and decided in the summary judgment proceedings of the underlying action. This is the first time that the issue of collateral estoppel, or "issue preclusion" as the County refers to it, has ever been raised in this case. Should this Court choose to consider the issue for the

for the first time on appeal, the Court should find that collateral estoppel does not apply in this case. In order for collateral estoppel to apply,

> the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.

Christensen v. Grant Cnty. Hosp. Dist. No. 1, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). Here, collateral estoppel cannot apply in the manner Douglas County asserts because the first element has not been met.

At issue in the summary judgment proceeding in federal court was whether the County had acted under color of law for purposes of 42 U.S.C. § 1983. In order to make this determination, the federal court examined whether "the County ratified any wrongful conduct by Defendant Steve Groseclose or failed to train its employees." CP 100. What the County seems to ignore is that the federal court specifically **declined** to address the issue of whether Groseclose was acting in the scope of his employment, in the scope of his official duties, or on the County's behalf. Specifically, the federal court stated, "A municipality cannot be liable based on respondeat superior; instead to prove a municipality 'acted' under color of state law, a plaintiff must show that a

'policy or custom' of the municipality caused the injury." CP 107. It was the County's actions, not Groseclose's, that were at issue for summary judgment. As the federal court recognized, the nature of Groseclose's actions was not relevant to the summary judgment proceeding, and therefore was not addressed at that time. An issue cannot have been fully and fairly litigated when it was not even litigated at all. The summary judgment proceeding in the underlying case has no estoppel effect here.

C. "Scope of official duties" is not equivalent to "scope of employment."

"Scope of official duties," as used in RCW 4.96.041, is undefined by statute and has not been interpreted by any court in this state. *LaMon v. City of Westport*, 22 Wn. App. 215, 588 P.2d 1205 (1978), is of course not precisely on point, having been decided before the enactment of RCW 4.96.041, but provides a significant starting point for the Court's analysis. In 1978, municipalities could self-insure their employees under Former RCW 35.23.460, enabling them with a means to indemnify some of the employee's legal expenses. *LaMon*, 22 Wn. App. at 217-18. The plaintiffs in *LaMon* asserted that because the federal court had found that "the police chief willfully refused equal police protection" to them in violation of § 1983, the City of Westport could not indemnify the police chief for his

legal fees.[2] *Id.* at 218, 220. In holding that a § 1983 judgment did not bar indemnification,[3] the Court noted, "Plaintiffs admit in this petition that the United States District Court found that the police chief was acting under color of state law and his office when he engaged in the activity that led that court to find liability," the implication being that the plaintiffs could not now argue that the police chief had been acting outside the scope of his official duties. *Id.* at 220. *LaMon* did not apply a "scope of employment" standard to the question of indemnification; had it done so, it would have needed to remand the case for further fact finding. 22 Wn. App. at 218 ("We hold that the trial court was correct in finding no question of fact existed on this question."); *see also Monell v. Dep't of Soc. Servs. Of City of N.Y.*, 436 U.S. 658, 663 n. 7, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) (respondeat superior not a relevant question in § 1983 actions). In sum, the Court's dicta suggest that "color of law" is a relevant consideration in "scope of official duties," whereas "scope of employment" is not.

One of the foremost canons of statutory interpretation is that courts should first view the plain language of a statute before resorting to other

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[2] The precise nature of the § 1983 violation is not evident in *LaMon*, and the original federal court opinion is not available.

[3] In other words, contrary to Respondents' assertion, the holding of the Court was that a § 1983 judgment does not automatically render the employee's actions outside of the scope of their official duties. *LaMon*, 22 Wn. App. at 220. If anything, the Court suggests that the precise opposite is true.

canons of construction. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009). The plain meaning of the phrase "scope of official duties" is not the same as "scope of employment." As explained by the Louisiana Court of Appeals, "The use of the word 'duties' indicates expansive coverage over actions complementary to any of many job duties rather than coverage of actions that are only employment rooted or essential to an employee's entire employment." *Latiolais v. State Farm Mut. Auto Ins. Co.*, 949 So.2d 455, 461 (La. App. 3 Cir. 2006).

As Appellants addressed in detail in their opening brief, the vast majority of courts have held that "scope of official duties" does not mean the same thing as "scope of employment," regardless of the context in which it is used. *See e.g. Neuens v. City of Columbus*, 275 F.Supp.2d 894, 900 (S.D. Ohio 2003) (§ 1983); *Scherer v. Brennan,* 379 F.2d 609, 611 (7th Cir. 1967) (official immunity); *United States v. Street*, 66 F.3d 969, 978 (8th Cir. 1995) (crime of interfering with a federal officer); *Latiolais*, 949 So.2d at 462 (insurance). Respondents cite to nothing that would indicate that indemnification statutes are somehow special as to exempt them from this line of reasoning.

Respondents rely upon only two cases for its assertion that "scope of official duties" is equivalent to "scope of employment." The first,

Cameron v. City of Milwaukee, 102 Wis.2d 448, 307 N.W.2d 164 (1981), has no application here because Wisconsin's indemnity statute actually uses the words "scope of employment," whereas Washington's does not. *See* Br. of Appellant, at 20-21. The second, *McDade v. West*, 60 Fed. Appx. 146 (9th Cir. 2003) (*McDade II*), was decided according to California law, whose indemnification statute also uses the words "scope of employment."[4] Moreover, *McDade II* is an unpublished disposition of the Ninth Circuit Court of Appeals, which lacks any precedential value and to which GR 14.1 prohibits citation.[5]

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[4] Cal. Gov't Code § 825(a) states:

> Except as otherwise provided in this section, if an employee or former employee of a public entity requests the public entity to defend him or her against any claim or action against him or her for an injury arising out of an act or omission occurring **within the scope of his or her employment** as an employee of the public entity...

(emphasis added).

[5] GR 14.1(b) states:

> A party may cite as an authority an opinion designated "unpublished," "not for publication," "non-precedential," "not precedent," or the like that has been issued by any court from a jurisdiction other than Washington state, only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court. The party citing the opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited.

The rule of the publishing jurisdiction, Ninth Circuit Rule 36-3, states:

> **(a) Not Precedent.** Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.
>
> **(b) Citation of Unpublished Dispositions and Orders Issued on or after January 1, 2007.** Unpublished dispositions and orders of this Court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with FRAP 32.1.
>
> **(c) Citation of Unpublished Dispositions and Orders Issued before January 1, 2007.** Unpublished dispositions and orders of this Court issued before January 1, 2007 may not be cited to the courts of this circuit, except in the following circumstances.

The overwhelming majority of cases, including one from this Court, demonstrate that "scope of official duties" is akin to "color of law," not "scope of employment." Respondents provide no support for their argument to the contrary. This Court should therefore hold that "scope of official duties," as used in RCW 4.96.041, does not mean "scope of employment."

D. Whether viewed as an insurance agreement or a contract, the JSILP policy should be interpreted consistent with RCW 4.96.041.

WCRP, in its response brief, asserts that the JSILP policy is not an insurance contract, and therefore not subject to the same interpretation principles used in *Latiolais* and similar cases. Even if viewed under regular contract principles, however, the JSILP policy should not be interpreted as to make "scope of employment" the relevant test.

Contracts are interpreted so as to give effect to the intent of the parties. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990).

(i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.

(ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.

(iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.

> Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

Stender v. Twin City Foods, Inc., 82 Wn.2d 250, 254, 510 P.2d 221 (1973). Furthermore, contracts should not be interpreted as to render any provisions "unreasonable, imprudent, or meaningless." *Spokane Sch. Dist. No. 81 v. Spokane Educ. Ass'n*, 182 Wn. App. 291, 305, 331 P.3d 60 (2014).

Here, the JSILP policy incorporates RCW 4.96.041 through its definition of "insured":

> This policy shall insure:
> ...
> B. Subject to and conditioned upon authorization by the member county, as provided in RCW 4.96.041 and the member county's implementing ordinance or resolution, all past and present employees... while acting or in good faith purporting to act within the scope of their official duties for the member county or on its behalf...

CP 230. Further, by reference to RCW 4.96.041, the County and WCRP surely intended that the contract incorporate the same meaning of "scope of official duties" as it is used in the statute. In that context as well, "scope of official duties" does not mean "scope of employment."

Further, if "scope of official duties" meant the same thing as "scope of employment," then the phrase "on its behalf" would be rendered meaningless. It is not likely that the parties to the JSILP policy intended to include meaningless language in its definition of "insured."

Accordingly, this Court should hold that "scope of official duties" as used in the JSILP policy also does not mean "scope of employment."

E. Appellants are not bound by the WCRP's bylaws.

The WCRP additionally contends that Appellants are precluded from seeking reimbursement under the JSILP policy because Groseclose failed to exhaust his administrative remedies under the WCRP bylaws. This precise argument was addressed and rejected in *Rasmussen v. Sauer*, 597 N.W.2d 328 (Minn. 1999). In that case, Rasmussen was a deputy sheriff for Freeborn County, Minnesota, who was injured in an auto accident while on duty. *Rasmussen*, 597 N.W.2d at 329. Rasmussen asserted a UIM claim against Freeborn County. *Id.* Freeborn County was a member of the Minnesota Counties Insurance Trust (MCIT), a county-comprised self-insurance pool like the WCRP. *Id.* The trial court dismissed Rasmussen's UIM claim, in part because they had failed to exhaust the administrative remedies provided by the MCIT bylaws.[6] *Id.*

[6] The trial court also held that it did not have subject matter jurisdiction over the claim, a finding which the Supreme Court also reversed. *Rasmussen*, 597 N.W.2d at 331.

The Minnesota Supreme Court reversed, holding that the MCIT bylaws did not provide administrative remedies to Rasmussen. *Id.* at 331-32. Its reasons for doing so were two-fold. First, it held that Rasmussen was not a party to and was thus not bound by the MCIT's bylaws. *Id.* Examining the language of the bylaws, the Court stated:

> [T]hose bylaws provide "members" with certain dispute resolution procedures. The term "member" is used throughout the bylaws and clearly refers to counties and other entities that are part of the insurance pool. *See* Bylaws Art. III, § 3.1 H. (" 'Member' means County Member, Sponsored Member, Associate Member or other class of member as defined in Article V of these Bylaws"); Bylaws Art. V, § 5.1 ("Membership in the Trust shall be open to any governmental unit, other political subdivision * * * or other Persons that are determined by the Board to qualify for membership."). No evidence has been provided to establish that the Board has determined that county employees qualify as members of the trust. Thus, the Rasmussens are not "members" of the MCIT, are not parties to that agreement, and are not subject to the dispute resolution procedures set out in the MCIT bylaws for its members.

Id. Second, the Supreme Court noted the MCIT policy "fails to set up a separate dispute resolution procedure for claims under its terms." *Id.* Thus, because the MCIT's insurance policy did not incorporate them, the bylaws could not otherwise be imposed upon Rasmussen. *Id.* at 332.

The WCRP's argument fails for the same reasons. Like the MCIT bylaws, the WCRP defines its members as "the several counties organized and existing under the Constitution and laws as political subdivisions of

the State of Washington which are parties signatory to this Agreement." CP 203. Nothing in the Interlocal Agreement or the bylaws purports to include any individual employee as a "member."[7] Therefore, the only agreement to which Groseclose is a party is the JSILP policy. As with MCIT's policy, there are no provisions in the JSILP policy relating to dispute resolution, and the WCRP bylaws are not incorporated by reference into the policy. Thus, as in *Rasmussen*, Groseclose is not bound by the bylaws, and there were no administrative remedies for him to exhaust.

F. Douglas County is not entitled to fees and costs on appeal.

Douglas County is not entitled to fees and costs under RAP 18.9(a), because Appellants' arguments are not frivolous. An appeal is frivolous if "it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal." *Streater v. White*, 26 Wn. App. 430, 434, 613 P.2d 187 (1980). "[A]ll doubts as to whether the appeal is frivolous should be resolved in favor of the appellant." *Id.* at 435. This case presents an issue of interpretation of statutory provisions not previously addressed by any appellate court in this state. An appeal to address an open question of law can hardly be considered frivolous. In fact, the trial court itself recognized the debatable nature of the issues

[7] In fact, the Interlocal Agreement excludes this possibility: "Pool membership shall be limited to the several counties of the State of Washington." CP 204.

presented. RP 28 ("So under the circumstances, the Court's going to grant the summary judgment. **This may be something for the Court of Appeals to look at.**").

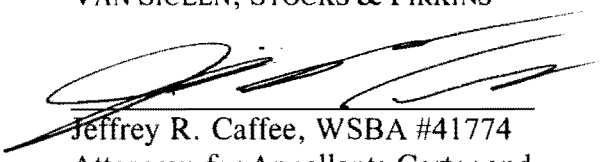
This appeal is not frivolous and Douglas County's request for attorney's fees and costs should be denied.

III. CONCLUSION

"Scope of official duties," as used in both RCW 4.96.041(4) and the JSILP, does not mean "scope of employment," but instead is more akin to "color of law." Respondents have cited no law to the contrary. Additionally, Respondents' procedural arguments are lacking in both evidentiary and legal support. Thus, Groseclose is entitled to be indemnified for the judgment against him. The decision of the trial court should be REVERSED and Douglas County's request for attorneys' fees should be denied.

DATED this 18th day of March, 2015.

VAN SICLEN, STOCKS & FIRKINS



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CERTIFICATE OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on March 18, 2015, she caused the *Reply Brief of Appellant* to be served on the following parties of record and/or interested parties by sending copies by U.S. Mail (postage prepaid), to the below as follows:

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