

80393-5

FILED  
COURT OF APPEALS  
DIVISION II

No. 32520-9-II  
No. 34130-1-II

06 AUG 18 AM 11:25

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

---

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

---

The Honorable Richard B. Sanders,

Appellant,

v.

The State of Washington,

Respondent.

---

REPLY BRIEF OF APPELLANT THE HONORABLE  
RICHARD B. SANDERS

---

PRESTON GATES & ELLIS LLP

Paul J. Lawrence, WSBA # 13557  
Matthew J. Segal, WSBA # 29797  
Graham M. Wilson, WSBA # 36587  
Attorneys for Appellant  
The Honorable Richard B. Sanders

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

pm 8-7-06

**Table of Contents**

|  | <b><u>Page</u></b> |
|--|--------------------|
| I. INTRODUCTION.....   | 1                  |
| II. ARGUMENT.....  | 2                  |
| A. Justice Sanders was Acting in his Official Capacity. ....   | 2                  |
| B. The Legislative History of RCW 43.10.040 is<br>Consistent with the State’s Obligation to Provide<br>Justice Sanders a Defense. .... | 8                  |
| C. The Plain Language of RCW 43.10.030 and .040<br>does not Afford the Attorney General Discretion. ....                               | 11                 |
| D. Public Policy Supports Providing Justice Sanders a<br>Defense.....  | 16                 |
| E. Even Assuming Allegations of Misfeasance are<br>Relevant, the State Cites the Wrong Standard. ....                                  | 18                 |
| F. An Insurer’s Duty to Defend Is Analogous to the<br>State’s Duty. ....   | 20                 |
| G. The Trial Court’s Stay of the Proceedings Was<br>Improper.....  | 22                 |
| H. Justice Sanders is Entitled to Attorney’s Fees in this<br>Action.....   | 23                 |
| III. CONCLUSION.....   | 25                 |

Table of Authorities

Page

**Washington State Cases**

|  |            |
|--|------------|
| <i>Berge v. Gorton</i> ,<br>88 Wn.2d 756, 567 P.2d 187 (1977) .....  | 13, 14, 16 |
| <i>Carlson v. Lake Chelan Cmty. Hosp.</i> ,<br>116 Wn. App. 718, 75 P.3d 533 (2003).....                       | 19         |
| <i>City of Kennewick v. Fountain</i> ,<br>116 Wn.2d 189, 802 P.2d 1371 (1991).....                             | 13         |
| <i>Cunningham v. Reliable Plumbing, Inc.</i> ,<br>126 Wn. App. 222, 108 P.3d 147 (2005).....                   | 12         |
| <i>Garrett v. Morgan</i> ,<br>127 Wn. App. 375, 112 P.3d 531 (2005).....                                       | 11, 12     |
| <i>In re Disciplinary Proceeding Against Egger</i> ,<br>152 Wn.2d 393, 98 P.3d 477 (2004) .....                | 20         |
| <i>In re Recall of Carkeek</i> ,<br>156 Wn.2d 469, 128 P.3d 1231 (2006).....                                   | 19         |
| <i>In re Recall of Kast</i> ,<br>144 Wn.2d 807, 31 P.3d 677 (2001) .....                                       | 19         |
| <i>King v. Olympic Pipeline Company</i> ,<br>104 Wn. App. 338, 16 P.3d 45 (2000).....                          | 22, 23     |
| <i>Lillig v. Becton-Dickinson</i> ,<br>105 Wn.2d 653, 717 P.2d 1371 (1986).....                                | 19         |
| <i>Olympic Steamship Company Inc. v. Centennial Insurance Co.</i> ,<br>117 Wn.2d 37, 811 P.2d 673 (1991) ..... | 23         |
| <i>Reiter v. Wallgren</i> ,<br>28 Wn.2d 872, 184 P.2d 571 (1947) .....   | 14         |
| <i>Schilling v. Radio Holdings, Inc.</i> ,<br>136 Wn.2d 152, 961 P.2d 371 (1998) .....                         | 19         |
| <i>State ex rel. Dunbar v. State Board of Equalization</i> ,<br>140 Wash. 433, 249 P. 996 (1926).....          | 14, 15, 16 |

|  |          |
|--|----------|
| <i>State v. Alvarez</i> ,<br>74 Wn. App. 250, 872 P.2d 1123 (1994),<br><i>aff'd</i> 128 Wn.2d 1, 904 P.2d 754 (1995) .....                 | 10       |
| <i>State v. D.H.</i> ,<br>102 Wn. App. 620, 9 P.3d 253 (2000).....   | 9        |
| <i>State v. Herrmann</i> ,<br>89 Wn.2d 349, 572 P.2d 713 (1977) .....  | 10, 11   |
| <i>State v. Jones</i> ,<br>92 Wn. App. 555, 964 P.2d 398 (1998).....   | 24       |
| <i>State v. Mollichi</i> ,<br>132 Wn.2d 80, 936 P.2d 408 (1997) .....  | 10       |
| <i>State v. O'Neil</i> ,<br>103 Wn.2d 853, 700 P.2d 711 (1985) .....   | 4, 6     |
| <i>Viking Insurance Company v. Hill</i> ,<br>57 Wn. App. 341, 787 P.2d 1385 (1990).....  | 21       |
| <i>Whatcom County v. State</i> ,<br>99 Wn. App. 237, 993 P.2d 273 (2000).....  | 15, 16   |
| <b>Federal Cases</b>   |          |
| <i>Commissioner, Immigration and Naturalization Service v. Jean</i> ,<br>496 U.S. 154, 110 S. Ct. 2316, 110 L. Ed. 2d 134 (1990).....      | 24       |
| <i>Kentucky v. Graham</i> ,<br>473 U.S. 159, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985).....   | 3, 4     |
| <i>U.S. v. White</i> ,<br>322 U.S. 694, 64 S. Ct. 1248, 88 L. Ed. 2d 1542 (1944).....  | 23       |
| <b>Other State Cases</b>   |          |
| <i>Board of Chosen Freeholders of Burlington County v. Conda</i> ,<br>164 N.J. Super. 386, 396 A.2d 613 (N.J. Super Ct. Law Div 1978)..... | 7        |
| <i>Chavez v. City of Tampa</i> ,<br>15 Fla. L. Weekly D742, 560 So.2d 1214<br>(Fla. Dist. Ct. App. 1990) .....                             | 7, 8     |
| <i>City of Tualatin v. City-County Insurance Services Trust</i> ,<br>321 Or. 164, 894 P.2d 1158 (1995).....                                | 7, 8, 21 |
| <i>Corning v. Village of Laurel Hollow</i> ,<br>48 N.Y.2d 348, 398 N.E.2d 537, 422 N.Y.S.2d 932<br>(N.Y. Ct. App. 1979).....               | 17       |

|   |            |
|---|------------|
| <i>Eugene Police Employees' Assoc. v. City of Eugene</i> ,<br>157 Or. App. 341, 972 P.2d 1191 (1998) .....  | 18, 20     |
| <i>Filippone v. Mayor of Newton</i> ,<br>392 Mass. 622, 467 N.E.2d 182 (1984).....  | 16, 17, 20 |
| <i>Frontier Ins. Co. v. New York</i> ,<br>87 N.Y.2d 864, 662 N.E.2d 251, 638 N.Y.S.2d 933, (1995).....  | 20         |
| <i>Hart v. County of Sagadahoc</i> ,<br>609 A.2d 282, (Me. 1992).....   | 7          |
| <i>Lo Russo v. N.Y. State Office of Court Admin.</i> ,<br>229 A.D.2d 995, 645 N.Y.S.2d 209 (N.Y. App. Div. 1996) .....  | 20         |
| <i>Mathis v. State of New York</i> ,<br>140 Misc.2d 333, 531 N.Y.S.2d 680 (N.Y. Gen. Term. 1988).....   | 16, 21     |
| <i>Matthews v. City of Atlantic City</i> ,<br>196 N.J. Super. 145, 481 A.2d 842 (N.J. Sup. Ct. Law Div. 1984),<br><i>aff'd</i> , 482 A.2d 530 (N.J. Sup. Ct. App. Div. 1984)..... | 5          |
| <i>McCormack v. Town of Granite</i> ,<br>1996 Okla. 19, 913 P.2d 282 (1996) .....   | 25         |
| <i>Office of Disciplinary Counsel v. Au</i> ,<br>107 Haw. 327, 113 P.3d 203 (2005).....   | 20         |
| <i>Salmon v. Davis County</i> ,<br>916 P.2d 890 (Utah 1996).....  | 25         |
| <i>Triplett v. Town of Oxford</i> ,<br>439 Mass. 720, 791 N.E.2d 310 (2003).....  | 21         |
| <i>Wayne Township Board of Auditors v. Ludwig</i> ,<br>154 Ill.App.3d 899, 507 N.E.2d 199, 107 Ill.Dec. 535 (1987) .....  | 25         |
| <i>Wright v. Danville</i> ,<br>174 Ill.2d 391, 675 N.E.2d 110, 221 Ill.Dec. 203 (1996).....   | 17, 18     |
| <b>Washington State Statutes</b>  |            |
| Laws of 1941, ch. 50.....   | 9, 10      |
| Laws of 1941, ch. 50, §1 .....  | 9, 10      |
| Laws of 1941, ch. 50, §2.....   | 10         |
| RCW 10.01.150 .....   | 15         |
| RCW 4.92.....   | 11         |
| RCW 4.92.060 .....  | 11, 15     |
| RCW 4.92.070 .....  | 11, 15     |

|   |        |
|---|--------|
| RCW 4.96.041 .....                                | 15     |
| RCW 9A.16.110 .....                               | 24     |
| RCW 9A.68.010(1)(a) .....                         | 4      |
| RCW 42.52.460 .....                               | 15     |
| RCW 43.10.030 .....                               | passim |
| RCW 43.10.030(2).....                             | 13     |
| RCW 43.10.030(3).....                             | 13, 15 |
| RCW 43.10.040 .....                               | passim |
| RCW 43.10.067 .....                               | 10     |
| <b>Other State Statutes</b>                       |        |
| Mass. Gen. Laws ch. 258 §9 .....                  | 21     |
| Or. Rev. Stat. § 30.285.....                      | 8, 21  |
| <b>Washington State Rules</b>                     |        |
| DRJ 1(c) .....                                    | 5      |
| <b>Other Sources</b>                              |        |
| Black's Law Dictionary (2d Pocket ed. 2001) ..... | 19     |

## I. INTRODUCTION

RCW 43.10.030 and .040, by their unambiguous terms, require Respondent, the State of Washington (the “State”), to defend Appellant, the Honorable Richard B. Sanders (“Justice Sanders”), in his current judicial conduct proceedings. The State is required to defend Justice Sanders because he is an officer of the State, all the allegations against him concern activity in his official capacity, and the Commission on Judicial Conduct (the “CJC”) is an “administrative tribunal” within the meaning of RCW 43.10.040.

The State’s contrary arguments are unpersuasive. For example, the State attempts to circumvent the statutes’ plain language by confusing an “official capacity action,” a proceeding against a state office or entity, with proceedings that concern an official “acting in his or her official capacity,” as described in RCW 43.10.030. The State also ignores the “official capacity” rulings of the trial court, the CJC, and the court in Justice Sanders’ previous litigation involving alleged violations of the Judicial Canons. The State then claims that no defense is required based upon the legislative preamble of RCW 43.10.040, even though the plain language of the statute rebuts the State’s assertion. The State next relies on statutes not at issue in this case to claim it has discretion to deny Justice Sanders a defense, a surprising argument given that the State argued to the

trial court that it had no discretion. The State also claims that there is no “intentionality” requirement underlying an allegation of misfeasance, but ignores the most recent judicial authority on point. Finally, the State attempts to undermine the analogy between RCW 43.10.030 and an insurer’s duty to defend based on the lack of a formal contract of insurance, even though numerous other jurisdictions have applied the analogy in the absence of a contract.

This Court should compel the State to honor its obligation to defend Justice Sanders as required by RCW 43.10.030 and .040. This Court should also award Justice Sanders the attorney’s fees that he has incurred in forcing the State to satisfy its statutory obligations in order not to frustrate the purpose of Washington’s public defense laws.

## **II. ARGUMENT**

### **A. Justice Sanders was Acting in his Official Capacity.**

The State concedes, as it must, that the Attorney General is obligated to defend state officials acting in their official capacity. Brief of Respondent State of Washington, (hereinafter “Br. of Resp’t”) at 18 (“RCW 43.10.030 entitles a public officer to a publicly-funded defense in proceedings against the public officer only when the conduct complained of occurred while he was ‘acting in his official capacity.’”). As the official capacity requirement is the only statutory condition to a publicly-

funded defense, the State spends a significant portion of its briefing addressing this issue.

The State first asserts that RCW 43.10.030 and .040 only apply to proceedings brought against a state office or entity rather than an individual office-holder. Br. of Resp't at 18-21 (relying on *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) and its Washington progeny). Accordingly, the State claims that a "CJC action can never be a proceeding against a judge acting in his or her 'official capacity.'" Br. of Resp't at 21. This argument cannot be squared with the language of the statutes. And appropriately, the trial court and the court in Justice Sanders' previous public defense litigation both rejected this argument. Clerk's Papers ("CP") 168; CP 85-89.

The trial court ruled that "RCW 43.10.030 requires the Attorney General to defend state officials acting in their official capacity in, *inter alia*, administrative proceedings before the Commission on Judicial Conduct." CP 168 (emphasis added). Likewise, Judge Hicks, in Justice Sanders' earlier dispute with the State, awarded Justice Sanders the attorney's fees he expended in defending himself before the CJC on a previous occasion. CP 85-98. As Judge Hicks correctly observed, RCW 43.10.030 and .040 apply to CJC proceedings because "official capacity" turns on whether one is acting "not as a private citizen but as a Justice of

the Supreme Court,” or whether the allegations at issue arose from “official activity of your office,” as opposed to an officer’s “private activity.” CP 89-90.

This conception of “official capacity” is supported by the ruling in *State v. O’Neil*, 103 Wn.2d 853, 858, 700 P.2d 711 (1985). In *O’Neil*, the court addressed the meaning of the phrase “action in [one’s] official capacity” under Washington’s bribery statute, RCW 9A.68.010(1)(a). *Id.* The court ruled that official capacity “simply means that the public servant is acting within the scope of what he or she is employed to do as distinguished from being engaged in a personal frolic.” *Id.* at 859. Whether an officer is acting in his or her official capacity does not depend on whether the charges are directed at a state office or entity as opposed to an actual officer. The *Kentucky v. Graham* “official capacity suits” framework is inapplicable here. 473 U.S. at 165-66.<sup>1</sup>

The State attempts to further confuse the “official capacity” issue by importing the phrase “official duties” into RCW 43.10.030. Br. of Resp’t at 18. The State relies on a New Jersey Superior Court case for the

---

<sup>1</sup> While the State argues that CJC proceedings are inherently “personal capacity” proceedings, elsewhere the State concedes that the Attorney General would have to provide Justice Sanders a defense should he ultimately be exonerated. *See* Br. of Resp’t at 17 (“Neither RCW 43.10.030 nor 43.10.040 require the State to provide a taxpayer-funded defense to a public officer in a proceeding where the officer is charged with ethics violations unless and until the official is ultimately exonerated.”) (emphasis added). Whether Justice Sanders is exonerated does not change the nature of the CJC proceedings

proposition that “[i]f the allegations of the law suit itself do not involve the exercise of or the failure to exercise an official duty, the public official is not entitled to indemnification.” *Matthews v. City of Atlantic City*, 196 N.J. Super. 145, 150, 481 A.2d 842 (N.J. Sup. Ct. Law Div. 1984), *aff’d*, 482 A.2d 530 (N.J. Sup. Ct. App. Div. 1984). The *Matthews* ruling was based on New Jersey common law and New Jersey public defense statutes that explicitly limited a public defense to proceedings concerning “official duties.” *Id.* at 149-52. Neither RCW 43.10.030 nor .040 contain the phrase “official duties.” Furthermore, unlike in the present case, *Matthews* ruled that the official was not entitled to a public defense because the proceedings concerned activity that took place before the official was inducted into office. *Id.* at 151. *Matthews* thus provides no guidance in this case.<sup>2</sup>

The State also claims that “neither [the trial court nor the CJC] has ruled or even considered the question” of whether “the acts forming the

---

against him. Allegations of the CJC are always directed at an officer-holder, never an office. *See* Discipline Rules for Judges (“DRJ”) 1(c).

<sup>2</sup> Later in its brief, the State readily alleges that Justice Sanders’ conduct, including discussions with SCC residents “who had cases pending before the Supreme Court about a precise issue presented in their cases, interfered with his own performance of a duty and constituted performance of duties in an improper manner.” Br. of Resp’t at 39-40 (emphasis added). The State first maintains that “official capacity” turns on whether an officer’s actions concern the exercise of a duty, and then states that Justice Sanders’ actions at the CJC concern the exercise of a duty. Thus, even assuming that the State’s proposed test from *Matthews* is applicable here, Justice Sanders was acting in his official capacity during his entire visit to the SCC.

basis for the CJC charges were ‘official capacity’ acts for purposes of publicly-funded defense under RCW 43.10.030.” Br. of Resp’t at 21. Both the trial court and the CJC, however, ruled that the allegations against Justice Sanders are based on official capacity activity. CP 173; Supplemental Clerk’s Paper’s (“Supp. CP”) at 236. The trial court could hardly have been more explicit:

In this particular statutory scheme – and that is we’re considering .030 and .040 about requiring representation, and reimbursement if you will if there’s been representation that was not afforded by the attorney general – one must consider other aspects of the allegations. I do adopt Judge Hicks’ determination that one must determine first of all whether or not a public official was acting in their official capacity. In this particular case I find that Justice Sanders was acting within his official capacity.

Supp. CP 307 (emphasis added).

The record supports this ruling. Justice Sanders was visiting a correctional institution, something the Judiciary is encouraged to do, and received Mandatory Continuing Judicial Education Credit, an obligation for all Washington judges. Supp. CP 234; CP 78-79. Justice Sanders was “acting within the scope of what he ... is employed to do” and was not “engaged in a personal frolic.” *O’Neil*, 103 Wn.2d at 859.

The State also attempts to negate these rulings by claiming that both tribunals were only generally discussing Justice Sanders’ visit to the Special Commitment Center at McNeil Island (the “SCC”), and not the

actual conduct that gave rise to the CJC proceedings. Br. of Resp't at 22-23. Yet, the CJC answered the question of "[w]hether the misconduct occurred in the Justice's official capacity or his private life" by declaring that "[a]ll of the misconduct took place in the Justice's official capacity." Supp. CP 236 (emphasis added). Thus, the State's assertion that neither the trial court nor the CJC addressed the actual conduct giving rise to the CJC proceedings is simply incorrect.

Finally, the State cites to decisions from other jurisdictions for the proposition that public officers accused of ethical violations do not generally have a right to a public defense. Br. of Resp't at 23-24. The decisions cited by the State provide no guidance in interpreting "official capacity" under RCW 43.10.030 and .040. For example, the State cites *Hart v. County of Sagadahoc*, 609 A.2d 282, 283 (Me. 1992), and *Board of Chosen Freeholders of Burlington County v. Conda*, 164 N.J. Super. 386, 395, 396 A.2d 613 (N.J. Super Ct. Law Div 1978), but neither Maine nor New Jersey have public defense statutes like RCW 43.10.030 and .040; both of these cases address a request for a publicly-funded defense based solely on the common law. *Hart*, 609 A.2d at 283; *Conda*, 164 N.J. Super. at 395. *Chavez v. City of Tampa*, 15 Fla. L. Weekly D742, 560 So.2d 1214 (Fla. Dist. Ct. App. 1990), and *City of Tualatin v. City-County Insurance Services Trust*, 321 Or. 164, 894 P.2d 1158 (1995), are similarly

inapposite. Both cases concern statutes that, unlike RCW 43.10.030 and .040, explicitly do not apply to disciplinary proceedings. *Chavez*, 560 So.2d at 1217 (holding that an official was not entitled to reimbursement for legal expenses incurred in successfully defending ethics charges under certain state statutes because the statutory language limited the right to a defense to “civil action ... for damages or injury”); *Tualatin*, 321 Or. at 171 (holding that Or. Rev. Stat. § 30.285 does not provide for a publicly-funded defense in disciplinary proceedings because its application is expressly limited to “tort claims”).

In sum, none of the State’s arguments provide any reason to question the findings of the trial court and the CJC that the allegations against Justice Sanders concern official capacity activity.

**B. The Legislative History of RCW 43.10.040 is Consistent with the State’s Obligation to Provide Justice Sanders a Defense.**

The State next argues that Justice Sanders is not entitled to a defense under RCW 43.10.040, because that provision purportedly does not create any independent right to representation but only extends entitlements created elsewhere. The State here ignores RCW 43.10.030 which creates a substantive entitlement to a defense before state and federal courts.<sup>3</sup> RCW 43.10.040 creates an independent right to a defense

---

<sup>3</sup> RCW 43.10.030 states that “The Attorney general shall: ... Defend all actions and

before administrative tribunals. Whether the reference in RCW 43.10.040 to administrative tribunals is an independent substantive right or an expansion of the right to a defense created in RCW 43.10.030 is a matter of semantics—either way, the State is obligated to defend Justice Sanders before the CJC.

Furthermore, the state advances this argument based on a misinterpretation of the limited legislative history of RCW 43.10.040. The State claims that RCW 43.10.040 only applies to governmental offices, not officials, based on the general preamble to the Laws of 1941, ch. 50, which neglects to use the word “officials” specifically.<sup>4</sup> Br. of Resp’t at 25-26. Yet, the word “officials” appears plainly in the text of RCW 43.10.040 itself, as well as in several other sections of the chapter. Laws of 1941, ch. 50, §1. The State cannot rely on a legislative preamble to override unambiguous elements of a statute. *State v. D.H.*, 102 Wn. App. 620, 627, 9 P.3d 253 (2000) (“This court may not rely on a statement of intent found in a legislative preamble to a statute ‘to override the

---

proceedings against any state officer or employee acting in his or her official capacity, in any of the courts of this state or the United States.” (Emphasis added).

<sup>4</sup> The preamble to the Laws of 1941, ch. 50 states:

POWERS AND DUTIES OF THE ATTORNEY GENERAL.

AN ACT relating to the powers and duties of the Attorney General; providing for the legal representation of the State of Washington and departments, commissions, boards, agencies, and administrative tribunals thereof and providing for the appointment of certain personnel therein, excepting certain state agencies; repealing acts or parts of acts

unambiguous elements section of a penal statute or to add an element not found there.” (citing *State v. Alvarez*, 74 Wn. App. 250, 258, 872 P.2d 1123 (1994), *aff’d*, 128 Wn.2d 1, 904 P.2d 754 (1995)); *State v. Mollich*, 132 Wn.2d 80, 87, 936 P.2d 408 (1997) (“Where statutory language is plain and unambiguous, a statute’s meaning must be derived from the wording of the statute itself.”). It is, therefore, irrelevant that the word “officials” does not appear in the brief summary of the chapter. Laws of 1941, ch. 50.

Finally, the State relies on *State v. Herrmann* to argue that the purpose of Laws of 1941, ch. 50 was “to end the proliferation of attorneys hired by various state agencies and place the authority for representation of state agencies in the Attorney General.” *State v. Herrmann*, 89 Wn.2d 349, 354, 572 P.2d 713 (1977). RCW 43.10.040 was adopted in Section 1 of Laws of 1941, ch. 50. Section two of Laws of 1941, ch. 50, as discussed by *Herrmann*, was later codified as RCW 43.10.067 and that section limits state agencies’ hiring of private attorneys. *Herrmann*, 89 Wn.2d at 354. But the goal of reducing the use of outside counsel expressed in RCW 43.10.067 has no bearing upon the Attorney General’s duty to defend Justice Sanders. The State was free to provide a State Attorney General to provide that defense. Moreover, *Herrmann* held that

---

in conflict herewith; and declaring an emergency.

RCW 4.92.060 and .070 apply to officials' requests for a defense in civil actions for damages, rather than any other statutory provision. *Id.* at 354.

This case is not a civil action for damages, and chapter 4.92 RCW is not at issue. The State cites no authority under the statutes at issue in this case that undermines Justice Sanders' right to a defense.

**C. The Plain Language of RCW 43.10.030 and .040 does not Afford the Attorney General Discretion.**

The State next asserts that the Attorney General has the discretion to refuse to defend Justice Sanders under RCW 43.10.030 and .040. Br. of Resp't at 27. The statutes' plain terms provide no such discretion. Indeed, the State argued the exact opposite position below and, thus, judicial estoppel precludes this argument on appeal.

Previously, the State asserted that it had no discretion regarding whether to provide an official a defense in an ethics proceeding. Supp. CP 45 ("The State's position is not, and has not been, that it has discretion to whom it provides a defense at the outset of an ethics/disciplinary/licensing proceeding brought against a state employee."); *see also* Supp. CP 12, 16, 19, 31. Judicial estoppel "arises in equity and serves to preclude a party from gaining an advantage by asserting one position before a court and then later taking a clearly inconsistent position before the court." *Garrett v. Morgan*, 127 Wn. App. 375, 379, 112 P.3d 531 (2005) (*citing*

*Cunningham v. Reliable Plumbing, Inc.*, 126 Wn. App. 222, 224-25, 108 P.3d 147 (2005)). In deciding whether to apply judicial estoppel, a court considers three factors: (i) whether the party's later position clearly conflicts with its earlier one, (ii) the party's success in convincing a court to accept its earlier position such that accepting the later position creates the perception that the party misled either court, and (iii) an unfair detriment to the opposing party from allowing assertions of the inconsistent position. *Garrett*, 127 Wn. App. at 379. All of these factors support a finding of judicial estoppel in this case.

Justice Sanders sought to engage in discovery to determine whether the State claimed any discretion to deny officials a defense in ethics proceedings. Supp. CP 52, 64. In attempting to quash Justice Sanders' discovery requests, the State argued that it did not have discretion. Supp. CP 12, 16, 19, 31, 45. In response to the State's request, the trial court indicated at the discovery hearing that it would not move forward with the case, and later granted the State's request for a stay of all proceedings. Supp. CP 320, 360, 370, 391, 635-36. The State now has completely reversed its position. Br. of Resp't at 27-35.

Even if this Court elects to entertain the State's arguments regarding discretion, the plain language of the statute contradicts the State's position. RCW 43.10.030's use of the word "shall" indicates that

the State has a mandatory obligation to provide Justice Sanders a publicly-funded defense. *See* Opening Br. 24-26.

The State largely rests its claims about the purported discretion of the Attorney General on *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977). Yet, *Berge* did not address RCW 43.10.030(3), the subsection under which the State is required to defend Justice Sanders. *Berge* only discussed RCW 43.10.030(2). While the operative language “[t]he attorney general shall” applies to all the subsections of RCW 43.10.030, subsection two contains a specific qualification. It states that the Attorney General shall “[i]nstitute 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.” (emphasis added). While the phrase, “which may be necessary,” indicates that some degree of discretion might be appropriate under RCW 43.10.030(2), no similar language appears in RCW 43.10.030(3).

Furthermore, the *Berge* court explicitly based its holding on the “consistent ruling of courts under statutes vesting power to commence actions or institute proceedings.” 88 Wn.2d at 761 (emphasis added). The concept of prosecutorial discretion is well established. *See City of Kennewick v. Fountain*, 116 Wn.2d 189, 194, 802 P.2d 1371 (1991). Yet, in defending Justice Sanders, the Attorney General is not being asked to

“commence,” “institute,” or “prosecute” any new proceeding. Unlike in *Berge*, where the Attorney General was asked to commence a new action to attempt to collect improperly dispersed government funds, there is no need for the Attorney General to consider whether any “proposed litigation [is] warranted” when he is required to defend an already existing proceeding. *Berge*, 88 Wn.2d at 761. *Berge* is thus inapplicable here.

The State also attempts to manufacture a grant of discretion based on *State ex rel. Dunbar v. State Board of Equalization*, 140 Wash. 433, 249 P. 996 (1926). *Dunbar*, however, addressed potential conflicts of interest inherent in the Attorney General’s duty both to prosecute actions and defend state officials. *Dunbar* did not discuss any “discretion” of the Attorney General. Instead, the *Dunbar* court held that the Attorney General could not be precluded from commencing an action against state officials because of the potential conflict of interest that could arise from the concomitant “duty of the Attorney General to defend all actions against any state officer.” *Id.* at 440. As held in *Reiter v. Wallgren*, *Dunbar* does not generally prevent the Attorney General from defending state officials. 28 Wn.2d 872, 880 184 P.2d 571 (1947) (holding that, since there was no general conflict of interest between the Attorney General’s duty to defend state officials and bring actions against state officials, “it is both possible and proper for the attorney general to defend

such state officers”). Because there is no actual conflict of interest here, *Dunbar* does not limit the State’s obligation to defend Justice Sanders.

Next, the State asserts that various other Washington statutes give the Attorney General some measure of discretion and that, accordingly, the Attorney General must have discretion under RCW 43.10.030. To the contrary, the supposed grants of discretion under the statutes cited by the State indicate that the Legislature is aware of what language to use when it desires to convey a discretionary right, and that it did not do so in RCW 43.10.030(3) or .040. Every statute cited by the State directly limits the Attorney General’s various obligations to instances when the Attorney General first “finds” or “approves” of the statutes’ applicability.<sup>5</sup> There is no such language anywhere in RCW 43.10.030(3) or .040.

Furthermore, even under these other statutes, the Attorney General has no discretion to deny a request for a public defense when the requisite statutory conditions are met. The court in *Whatcom County v. State* so held regarding RCW 4.92.070:

The statute states that if certain conditions are met, the Attorney General “shall” defend the official. There is no room for discretion in this standard. Therefore, if a trial

---

<sup>5</sup> See RCW 42.52.460 (including the phrase, “if the Attorney General finds...”); RCW 4.92.060 and .070 (providing a defense “[i]f the attorney general shall find” the statutory conditions are met); RCW 10.01.150 (“if ... the attorney general concurs”); RCW 4.96.041 (allowing municipalities to provide officers a defense “if the legislative authority of the local governmental entity ... finds” that the requisite conditions are met).

court finds that the statutory conditions for a defense were met, it follows that the Attorney General wrongly rejected the request.

99 Wn. App. 237, 251, 993 P.2d 273 (2000) (emphasis added). Under RCW 43.10.030 and .040, the only statutory condition for a defense is that the officer must have been acting in his official capacity. The trial court already determined that Justice Sanders was acting in his official capacity. CP 173. Therefore, the Attorney General wrongfully rejected Justice Sanders' request for a defense. The Attorney General has no "discretion" to ignore the law.

**D. Public Policy Supports Providing Justice Sanders a Defense.**

The State also asserts that public policy supports its decision not to defend Justice Sanders. Br. of Resp't at 33-37.

Other than again mischaracterizing *Berge* and *Dunbar*, the State attempts to distinguish the public policy cases previously cited by Justice Sanders. Br. of Resp't at 33-35. Neither *Filippone v. Mayor of Newton*, 392 Mass. 622, 467 N.E.2d 182 (1984), nor *Mathis v. State of New York*, 140 Misc.2d 333, 531 N.Y.S.2d 680 (N.Y. Gen. Term. 1988), concern the discretion to deny a defense to a public official. Instead, these cases recognize that defending public officials encourages public service. The State's claim that the reasoning in *Filippone* only applies to actions for damages is wrong; in addition to the threat of substantial judgments, the

Massachusetts Supreme Court recognized that the policy of encouraging public service “would be defeated if the legal expenses of civil rights litigation were to be borne personally throughout years of pretrial activity, trial, and appeal, and only later, if at all, reimbursed.” *Filippone*, 392 Mass. at 629. The State also cites *Corning v. Village of Laurel Hollow*, 48 N.Y.2d 348, 352 398 N.E.2d 537, 422 N.Y.S.2d 932 (N.Y. Ct. App. 1979), for the proposition that officials should expect to pay for their own defense unless a legislative choice provides otherwise. The Washington Legislature has made such a choice: the Legislature adopted RCW 43.10.030 and .040, which require the State to defend state officials.

The State’s final policy argument relies on *Wright v. Danville*, 174 Ill.2d 391, 675 N.E.2d 110, 221 Ill.Dec. 203 (1996), for the proposition that public officials should only be reimbursed if they are exonerated. Br. of Resp’t at 36. Yet, as the State recognizes, the holding in *Wright* only applies to indemnification for criminal charges. 174 Ill.2d at 403 (holding that, “the purpose of indemnification, so as not to inhibit capable individuals from seeking public office, has no relevance in the context of the criminal conduct involved in this case.”) (emphasis added). This case does not involve any criminal proceedings. To the contrary, the trial court found that, as a matter of law, that this case did not involve even allegations of malfeasance (i.e., commission of an unlawful act). CP 173.

Furthermore, any public policy concerns regarding excusing or encouraging misconduct only apply to indemnification and not defense provisions, as: “[p]roviding a defense to a person ... does not permit the person to avoid the punishment that flows from his or her actions.”

*Eugene Police Employees’ Assoc. v. City of Eugene*, 157 Or. App. 341, 345, 972 P.2d 1191 (1998). The holding in *Wright* is thus inapposite.

Providing Justice Sanders a defense directly serves the public policy goals underlying RCW 43.10.030 and .040.

**E. Even Assuming Allegations of Misfeasance are Relevant, the State Cites the Wrong Standard.**

Under the plain language of RCW 43.10.030 and .040, whether Justice Sanders allegedly committed “misfeasance” has no bearing on the State’s obligation to defend him. The only statutory condition to the State’s duty to defend is that Justice Sanders was acting in his official capacity. *See* Opening Br. at 20-21. Despite the State’s misstatement to the contrary, issues of official capacity and misfeasance are distinct. The trial court ruled that Justice Sanders was acting in his official capacity without any discussion of misfeasance, and later ruled separately that there was a factual issue regarding misfeasance. CP 172-74; Supp. CP 305-8.

Even if this Court views an allegation of misfeasance as a bar to a publicly-funded defense, misfeasance includes an intentionality

requirement.<sup>6</sup> Any potential ambiguity regarding misfeasance and intentionality that the State points to in *In re Recall of Kast*, 144 Wn.2d 807, 31 P.3d 677 (2001), is resolved by *In re Recall of Carkeek*, 156 Wn.2d 469, 472, 128 P.3d 1231 (2006), as argued in Justice Sanders' Opening Brief.<sup>7</sup> The State does not address *Carkeek* in its response. The trial court correctly ruled that, in this context, "misfeasance" only applies to an action that "was purposeful or willful." Supp. CP 313; CP 173.

Regarding the meaning of "willfulness," the State relies on various holdings in distinct contexts, all of which construe "willfulness" differently. See *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 961 P.2d 371 (1998) ("willful" withholding of wages); *Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 75 P.3d 533 (2003). In any applicable context, however, "willfulness" includes an intentionality requirement. *Schilling*, 136 Wn.2d at 160 (holding that an action is "willful 'when it is the result of a knowing and intentional action'") (quoting *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 659, 717 P.2d 1371 (1986)) (emphasis added); Black's Law Dictionary 769 (2d Pocket ed. 2001) ("willfulness. 1. The fact or quality of acting purposely or by design; deliberateness;

---

<sup>6</sup> As argued in Justice Sanders' Opening Brief, the State has a duty to provide him a defense even if there is an unsettled allegation of misfeasance. Opening Br. at 33-39.

<sup>7</sup> *Carkeek* held that for a prima facie misfeasance showing, "on the whole, the facts must indicate an intention to violate the law." 156 Wn.2d at 474 (internal quotes omitted).

intention.”) (emphasis added). The State also tries to undercut the meaning of “willfulness” by citing *In re Disciplinary Proceeding Against Egger*, 152 Wn.2d 393, 416, 98 P.3d 477 (2004), and *Office of Disciplinary Counsel v. Au*, 107 Haw. 327, 340, 113 P.3d 203, 218 (2005). Neither of these cases discusses “misfeasance” or “willfulness”; both address the meaning of “knowledge” under the American Bar Association’s *Standards for Imposing Lawyer Sanctions*. *Id.* at 342.<sup>8</sup> Thus, these cases provide no guidance in interpreting “willfulness”, and do not support any finding of misfeasance. Here, under no interpretation of the facts alleged or found by the Commission, can Justice Sanders be said to have intentionally violated the Canons.

**F. An Insurer’s Duty to Defend Is Analogous to the State’s Duty.**

The State contends that general principles governing a duty to defend an insured do not apply here because there is no formal contract of insurance. The State’s technical argument is contrary to authorities in numerous other jurisdictions that have analogized public defense requirements and the duty to defend.<sup>9</sup> There was no “contract” at issue in

---

<sup>8</sup> As observed in *Egger*, under the ABA *Standards*, there is a clear difference between “intent” and “knowledge.” 152 Wn.2d at 413.

<sup>9</sup> *Eugene Police Employees’ Assoc. v. City of Eugene*, 157 Or. App. 341, 972 P.2d 1191 (1998); *Filippone*, 392 Mass. 622; *Frontier Ins. Co. v. New York*, 87 N.Y.2d 864, 662 N.E.2d 251, 638 N.Y.S.2d 933, (1995); *Lo Russo v. N.Y. State Office of Court Admin.*, 229 A.D.2d 995, 645 N.Y.S.2d 209 (N.Y. App. Div. 1996); *Mathis*, 140 Misc.2d 333,

any of those holdings. *Id.* The State, nonetheless, asserts that the duty to defend is based on an agreement to perform. Br. of Resp't at 41. But in the present case, the State has made such an agreement: through an enactment of its legislature, the State has agreed to defend State officials under RCW 43.10.030 and .040.

The State cites *Viking Insurance Company v. Hill* for the proposition that an insurer's duty to defend is based on the potential for indemnification liability. 57 Wn. App. 341, 346, 787 P.2d 1385 (1990); Br. of Resp't at 41. But, the *Viking* Court held that the "duty to defend is broader than the duty to indemnify because it is antecedent to and independent of the duty to indemnify." *Id.* at 346-47 (emphasis added). The State cites no other authority to undermine the broadly accepted insurance analogy. Accordingly, the State's duty to defend should be based on the potential for liability, and the Attorney General should have provided Justice Sanders a defense when he first requested it.<sup>10</sup>

---

531 N.Y.S.2d 680. In that public defense statutes from other states do not apply to disciplinary proceedings, these restrictions are based on the specific limiting language in the statutes, language not found in RCW 43.10.030 and .040. *See Tualatin*, 894 P.2d at 1158 (discussing Or. Rev. Stat. § 30.285 as described in Opening Br. at 36 n. 9); *Triplett v. Town of Oxford*, 439 Mass. 720, 791 N.E.2d 310 (2003) (holding that Mass. Gen. Laws ch. 258 §9 only applies to tort claims, because of tort-related terminology in the statute).

<sup>10</sup> *See* Opening Br. at 34-39.

**G. The Trial Court's Stay of the Proceedings Was Improper.**

The State argues that the trial court was correct to stay the proceedings because its decision was based on the belief that “the defense cost issue could not be determined until Justice Sanders’ appeal of the CJC’s ruling was finally resolved.” Br. of Resp’t at 44-45. This assertion ignores the fact that RCW 43.10.030 and .040 require the State to provide Justice Sanders a defense during the CJC proceedings and subsequent appeal. The trial court’s ruling that it must wait until completion of the underlying case before determining the right to a defense would create only a right to reimbursement, not a defense as required by RCW 43.10.030 and .040.

The State maintains that the trial court properly relied on *King v. Olympic Pipeline Company*, 104 Wn. App. 338, 16 P.3d 45 (2000), a case concerning parallel civil and criminal cases, because a disciplinary action can be analogized to a criminal proceeding. Br. of Resp’t at 45. The State ignores the posture of the criminal proceeding in *King*. *King* held that a stay of the proceedings was proper to prevent the defendants from having to waive their Fifth Amendment rights against self-incrimination. *King*, 104 Wn. App. at 369. Even if a disciplinary action before the CJC is at all analogous to a criminal proceeding, the analog to a criminal defendant

would be the judge. In this case, Justice Sanders does not seek to protect any right against self-incrimination, and the State cannot assert any Fifth Amendment rights. *See, e.g., U.S. v. White*, 322 U.S. 694, 698, 64 S. Ct. 1248, 88 L. Ed. 2d 1542 (1944) (“The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals.”). Thus, the trial court’s reliance on *King* was misplaced, and the stay should be reversed (should it prove necessary to reach this issue).

**H. Justice Sanders is Entitled to Attorney’s Fees in this Action.**

Justice Sanders is not only entitled to reimbursement of attorney’s fees incurred while defending himself before the CJC and the Supreme Court; he is also entitled to attorney’s fees in the present action. In *Olympic Steamship Company Inc. v. Centennial Insurance Co.*, the Washington Supreme Court held that the plaintiff was entitled to the attorney’s fees he expended in claiming his right to a defense because the right would be meaningless if one had to engage in “vexatious, time-consuming, expensive litigation” to claim it. 117 Wn.2d 37, 52, 811 P.2d 673 (1991). Similarly, forcing Justice Sanders to bear the burden of the attorney’s fees he has expended to claim his right to a publicly-funded defense would completely negate the value of the defense.

Despite the State’s assertion to the contrary, many courts in a number of different contexts have held that, in order to uphold the value of

a statutory right to attorney's fees, it is sometimes necessary to also award a plaintiff the fees incurred in the fees litigation. In *Commissioner, Immigration and Naturalization Service v. Jean*, the Court held that the plaintiffs were entitled to the attorney's fees they expended in claiming fees owed to them under the Equal Access to Justice Act ("EAJA"). 496 U.S. 154, 155, 110 S. Ct. 2316, 110 L. Ed. 2d 134 (1990). The Court reasoned that the purpose of awarding of attorney's fees under the act "would be defeated if the Government could impose on prevailing parties the costs of litigating fee requests, costs that may exceed those incurred in litigating the claim's merits." *Id.*

Washington adopted *Jean's* "fees for fees" rationale in *State v. Jones*, 92 Wn. App. 555, 964 P.2d 398 (1998). In *Jones*, the court held that citizens were entitled to the fees they incurred in claiming their right to be reimbursed for their defense costs under RCW 9A.16.110. *Id.* at 564 (applying Washington's self defense reimbursement statute). The court explained that "[w]here a defendant claiming reimbursement incurs significant expense to vindicate the claim, denying 'fees for fees' would frustrate the statutory purpose." *Id.*

A number of courts have similarly awarded government officials attorney's fees incurred in claiming their right to a publicly-funded defense; to do otherwise "would eviscerate the purpose of the statute."

*Salmon v. Davis County*, 916 P.2d 890, 896 (Utah 1996); *see also* *McCormack v. Town of Granite*, 1996 Okla. 19, 913 P.2d 282, 285 (1996) *Wayne Township Board of Auditors v. Ludwig*, 154 Ill.App.3d 899, 910, 507 N.E.2d 199, 107 Ill.Dec. 535 (1987). Likewise, Judge Hicks previously awarded Justice Sanders the attorney's fees he incurred in compelling the State to provide him a defense before the CJC. CP 81-83.

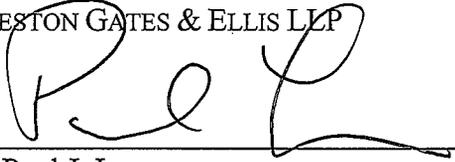
The State has compelled Justice Sanders to incur additional costs in enforcing his right to fees. To preserve the purpose of RCW 43.10.030 and .040, this Court should award Justice Sanders his "fees for fees."

### III. CONCLUSION

For the above stated reasons, this Court should reverse the trial court, grant summary judgment to Justice Sanders, and award reimbursement of Justice Sanders' defense fees and expenses incurred to date, including fees and expenses in the present case. Should this Court hold that remand is necessary, the stay below should also be reversed.

RESPECTFULLY SUBMITTED this 7th day of August, 2006.

PRESTON GATES & ELLIS LLP

By 

Paul J. Lawrence, WSBA # 13557

Matthew J. Segal, WSBA # 29797

Graham M. Wilson, WSBA # 36587

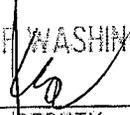
Attorneys for Appellant

The Honorable Richard B. Sanders

FILED  
COURT OF APPEALS  
DIVISION II

06 AUG -8 AM 11:25

STATE OF WASHINGTON

BY  \_\_\_\_\_  
DEPUTY

32520-9-II

34130-1-II

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

---

HONORABLE RICHARD B. SANDERS

Appellant,

vs.

STATE OF WASHINGTON

Respondent.

---

**AFFIDAVIT OF SERVICE BY MAIL**

---

Preston Gates & Ellis LLP  
925 Fourth Avenue, Suite 2900  
Seattle, WA 98104  
(206) 623-7580

**ORIGINAL**

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF KING )

Leah Tarabochia, being first duly sworn, upon oath deposes and says:

1. That I am over the age of eighteen years, not a party hereto and am competent to testify to the facts set forth herein.

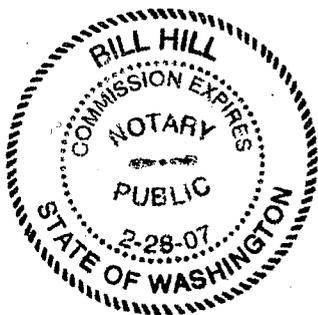
2. That on August 7, 2006, I caused a copy of the **REPLY BRIEF OF APPELLANT THE HONORABLE RICHARD B. SANDERS** to be served on counsel of record listed below by U.S. Mail, postage prepaid:

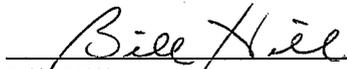
Timothy G. Leyh  
Randall T. Thomsen  
Katherine Kennedy  
Danielson Harrigan Leyh & Tollefson, LLP  
999 Third Avenue, 44<sup>th</sup> Floor  
Seattle, WA 98104

Peter R. Jarvis  
Hinshaw & Culbertson  
1000 SW Broadway, Suite 1950  
Portland, OR 97205-3078

  
LEAH M. TARABOCHIA

SUBSCRIBED AND SWORN TO this 7<sup>th</sup> day of August, 2006.



  
Bill Hill  
NOTARY PUBLIC in and for the State of  
Washington, residing at Seattle, WA  
My commission expires 2/28/07