

No. 80393-5

SUPREME COURT OF THE STATE OF WASHINGTON

The Honorable Richard B. Sanders,

Petitioner,

v.

The State of Washington,

Respondent.

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SUPREME COURT
STATE OF WASHINGTON

SUPPLEMENTAL BRIEF OF PETITIONER
THE HONORABLE RICHARD B. SANDERS

K & L GATES LLP

Paul J. Lawrence, WSBA # 13557

Matthew J. Segal, WSBA # 29797

Gregory J. Wong, WSBA # 39329

Attorneys for Petitioner

The Honorable Richard B. Sanders

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

Table of Contents

| | Page |
|---|-------------|
| I. INTRODUCTION | 1 |
| II. SUPPLEMENTAL STATEMENT OF THE CASE | 2 |
| III. ARGUMENT..... | 6 |
| A. The Court of Appeals Erred by Looking Beyond the Plain Language of Unambiguous Statutes..... | 7 |
| 1. The Plain Language of the Duty to Defend Statutes is Unambiguous and Controls this Case | 7 |
| 2. The Court of Appeals Transformed the Duty to Defend into a Right to Reimbursement | 9 |
| B. The Court of Appeals Erroneously Applied the EPSA. | 12 |
| 1. The EPSA Does Not Apply to this Case. | 12 |
| 2. The Court of Appeals Improperly Conflated Disciplinary Proceedings Under the Canons with EPSA Proceedings..... | 14 |
| 3. The AGO Waived Its Claim that the EPSA Applies..... | 16 |
| C. Justice Sanders’ Actions Do Not Constitute Misfeasance | 18 |
| D. Justice Sanders Should Be Awarded His Attorney’s Fees..... | 19 |
| IV. CONCLUSION | 20 |

Table of Authorities

| | Page |
|--|--------|
| Washington State Cases | |
| <i>Bauer v. Bauer</i> , 5 Wn. App. 781, 490 P.2d 1350 (1971)..... | 16 |
| <i>Haslett v. Planck</i> , 140 Wn. App. 660, 166 P.3d 866 (2007)..... | 16 |
| <i>In re Disciplinary Proceeding Against Sanders</i> , 159 Wn.2d 517, 145 P.3d 1208 (2006), <i>cert. denied, Sanders v. Wash. State Comm'n on Judicial Conduct</i> , _ U.S. _, 128 S. Ct. 137, 169 L. Ed. 2d 29 (2007)..... | 5, 19 |
| <i>In re Recall of Carkeek</i> , 156 Wn.2d 469, 128 P.3d 1231 (2006)..... | 19 |
| <i>In re Recall of Feetham</i> , 149 Wn.2d 860, 72 P.3d 741 (2003)..... | 19 |
| <i>Olympic Steamship Company Inc. v. Centennial Insurance Co.</i> , 117 Wn.2d 37, 811 P.2d 673 (1991)..... | 19 |
| <i>Sanders v. State</i> , 139 Wn. App. 200, 159 P.3d 479 (2007)..... | passim |
| <i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003)..... | 9 |
| <i>State v. Herrmann</i> , 89 Wn.2d 349, 572 P.2d 713 (1977)..... | 11 |
| <i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003)..... | 8, 9 |
| <i>Wash. State Coal. for the Homeless v. Dep't of Soc. & Health Servs.</i> , 133 Wn.2d 894, 949 P.2d 1291 (1997)..... | 8 |
| Federal Cases | |
| <i>Hamilton v. State Farm Fire & Cas. Co.</i> , 270 F.3d 778 (9th Cir. 2001)..... | 16 |
| Other State Cases | |
| <i>Hayseeds, Inc. v. State Farm Fire & Cas.</i> , 352 S.E.2d 73 (W.Va. 1986)..... | 19 |
| Washington State Statutes and Constitutional Provisions | |
| Const. Art. IV, Section 31 | 14 |
| RCW 42.52 | 1, 13 |
| RCW 42.52.370 | 13, 15 |
| RCW 42.52.430(1) | 13 |

| | |
|------------------------|----------------|
| RCW 42.52.430(6) | 13 |
| RCW 42.52.430(7) | 12, 13, 14, 17 |
| RCW 42.52.460 | 12, 16 |
| RCW 43.10.030 | 1, 3, 7, 17 |
| RCW 43.10.030(3) | 7 |
| RCW 43.10.040 | 1, 7, 10 |

Washington State Regulations

| | |
|----------------------|----|
| WAC 292-09-010 | 15 |
|----------------------|----|

Rules

| | |
|---------------------|------|
| Canon 1 | 3, 4 |
| Canon 2(A) | 3, 4 |
| Canon 3(A)(4) | 3 |
| RAP 18.1(a) | 19 |

I. INTRODUCTION

The question before this Court is whether the plain language of a statute controls where it squarely applies. The Court of Appeals erroneously answered this question in the negative. RCW 43.10.030 and .040 (collectively, the “Duty to Defend Statutes”) state that the Attorney General’s Office (“AGO”) “shall” defend state officers in any legal, quasi-legal or administrative proceeding involving acts taken within their official capacity. The court did not find ambiguity in the Duty to Defend Statutes and recognized the mandatory nature of the AGO’s duty. The court found, as the Commission on Judicial Conduct (“Commission”) and trial court did, that Justice Sanders acted in his official capacity at all times during his visit to the Special Commitment Center (“SCC”) on McNeil Island. Despite this, the court held that the AGO had discretion to deny Justice Sanders a defense and instead reimburse him if he was eventually exonerated.

The court rejected each and every argument the AGO made as to why the Duty to Defend Statutes grant discretion. At oral argument, however, the court requested supplemental briefing on an entirely different statutory scheme: the Ethics in Public Service Act, ch. 42.52 RCW (the “EPSA”), a statute the AGO did not even argue applies to this action. The EPSA is irrelevant to Justice Sanders’ hearing before the Commission

alleging violations of the Code of Judicial Conduct (the “Canons”). No EPSA complaint was ever filed against Justice Sanders. Regardless, the court held that the EPSA provides the AGO with the right to reimburse, rather than represent, judges in Commission proceedings. The court extrapolated that a section of the EPSA that requires the AGO to defend state officials in subsequent citizen actions, a factual situation inapposite to Justice Sanders’ Commission proceeding, demonstrates legislative intent to grant the AGO discretion in all Commission proceedings.

The court’s holding that judges only have a right to reimbursement creates a troubling public policy where judges will be forced to go unrepresented or seek private counsel in Commission proceedings. The AGO has no incentive to follow the plain language of the Duty to Defend Statutes as it bears no risk in denying representation if it takes a “wait and see” approach. This Court should reverse and hold that the AGO breached its statutory duty to defend Justice Sanders.

II. SUPPLEMENTAL STATEMENT OF THE CASE

In 2004, the Commission informed Justice Sanders that it would commence initial proceedings against him in relation to two complaints, only one of which it ultimately pursued. CP 46-48. The Commission filed a Statement of Charges alleging that Justice Sanders engaged in *ex parte* communications during a tour of the SCC and thereby violated

Canons 1, 2(A), and 3(A)(4). CP 58-65. The Commission did not allege that Justice Sanders intentionally violated the Canons. *Id.*

Justice Sanders requested that the AGO provide him with a defense before the Commission pursuant to the Duty to Defend Statutes. CP 50-51. The AGO refused. CP 53-56. Accordingly, Justice Sanders was forced to retain private counsel at his own expense. CP 33.

In April 2004, as the Commission commenced formal proceedings, Justice Sanders initiated the present case seeking to require the AGO to fulfill its statutory duty to provide him a defense. CP 4-8. The parties filed cross-motions for summary judgment. CP 31-41, 101-14. 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, including proceedings before the Commission on Judicial Conduct, except in the case of misfeasance or malfeasance.” CP 168. The trial court also ruled that Justice Sanders was acting in his official capacity and that there was no allegation of malfeasance. CP 168. The court further ruled that “not every violation of the Code of Judicial Conduct constitutes misfeasance” and that “misfeasance depends on a finding of a willful violation of the Code.” *Id.* (emphasis added). Yet, the court denied the cross-motions for summary judgment, finding that a material issue of fact existed as to whether Justice Sanders committed misfeasance.

Id. Justice Sanders sought discretionary review, which the Court of Appeals granted. CP 170-174; Supp. CP 192-95.

Following the grant of discretionary review, the Commission found that Justice Sanders had not engaged in any prohibited *ex parte* contact. Supp. CP 232. The Commission exonerated Justice Sanders from all allegations under Canon 3 concerning diligent and impartial judicial performance, and found only a violation of the more general Canons 1 and 2(A).¹ Supp. CP 232-34. The Commission also concurred with the trial court's finding that all of the allegations at issue occurred in Justice Sanders' official capacity. Supp. CP 236. There was no finding of any misfeasance, malfeasance, or intent to violate the Canons or any other provision of law. Supp. CP 231-35.

Justice Sanders filed a Notice of Contest with this Court on June 27, 2005 to appeal the Commission's findings regarding Canons 1 and 2(A). Supp. CP 240-255. As the Commission's ruling appeared to resolve the trial court's remaining issue, Justice Sanders also moved to stay the appeal and remand to complete the record. Supp. CP 116. The Court of Appeals granted his motion. Supp. CP 123.

¹ "The Commission found that Justice Sanders' conduct violated Canon 1 by failing to enforce high standards of judicial conduct and also violated Canon 2(A) by failing to promote public confidence in the integrity and impartiality of the judiciary." *In re Disciplinary Proceeding Against Sanders*, 159 Wn.2d 517, 520-21, 145 P.3d 1208 (2006), *cert. denied*, *Sanders v. Wash. State Comm'n on Judicial Conduct*, _ U.S. _, 128

On October 14, 2005, the AGO filed a motion with the trial court to stay all proceedings in this case. Supp. CP 385-98. Justice Sanders opposed the stay because it would interfere with his right to finally resolve this case and receive an actual defense during his appeal of the Commission decision. Supp. CP 399-409. The trial court nonetheless granted the AGO's motion, and stayed proceedings below in their entirety. Supp. CP 635-36. Justice Sanders again sought discretionary review, which the Court of Appeals granted. Supp. CP 637-40. In October 2006, prior to the Court of Appeals' opinion, this Court upheld the Commission's decision and sanction. *In re Disciplinary Proceeding Against Sanders*, 159 Wn.2d at 527.

The Court of Appeals heard oral argument in the present case. At oral argument, the court *sua sponte* requested further briefing on an issue not previously raised by the parties, the Commission or the trial court: the potential applicability of the EPSA. The AGO had made a passing reference to the EPSA in its briefing, where it admitted that the EPSA did not apply to Justice Sanders' disciplinary hearing. Respondent's Opening Br., pp. 31-32. The AGO cited the EPSA as an example of a situation where the AGO is granted discretion in an attempt to draw an analogy. *Id.* Both parties submitted supplemental briefing on the EPSA.

S. Ct. 137, 169 L. Ed. 2d 29 (2007).

On June 12, 2007, the Court of Appeals issued its written opinion. *Sanders v. State*, 139 Wn. App. 200, 159 P.3d 479 (2007). The court agreed with Justice Sanders that the Duty to Defend Statutes contain mandatory language that require the AGO to provide representation. *Id.* at 207. In spite of this, the court held that the EPSA affords the AGO discretion to withhold a defense to Justice Sanders: “We hold that under [the EPSA], the attorney general has the discretion to decline representation, subject to a duty to reimburse a judge for defense costs in the event that the Commission later dismisses the charges or exonerates the judge of all violations of the Canons.” *Id.* at 202. Even though the trial court had never ruled on the ultimate issue of whether Justice Sanders was entitled to a defense, the Court of Appeals also summarily dismissed the case. *Id.* at 202, 214.

Justice Sanders petitioned for review, which this Court granted.

III. ARGUMENT

The Duty to Defend Statutes govern this case. The Court of Appeals erred by not giving effect to the statutes’ mandatory language and by implicitly writing a discretionary exception into the law. The court improperly converted a judge’s right to representation into a right to reimbursement by finding legislative intent in the EPSA, an entirely unrelated statute. Because Justice Sanders acted within his official

capacity, he was entitled to a defense.

A. The Court of Appeals Erred by Looking Beyond the Plain Language of Unambiguous Statutes.

1. The Plain Language of the Duty to Defend Statutes is Unambiguous and Controls this Case.

Two statutes directly and unambiguously apply to this dispute.

RCW 43.10.030(3) provides that: “The attorney general shall...[d]efend all actions and proceedings against any state officer or employee acting in his official capacity, in any of the courts of this state or the United States.” (emphasis added). RCW 43.10.040 extends the AGO’s duty by requiring that “[t]he attorney general shall also represent the state and all officials... before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings....” (emphasis added). There is no dispute that these statutes apply to Justice Sanders’ claim.

Section .030 contains the proper standard for determining when representation is required – the AGO is only obligated to defend state officials “acting in [their] official capacity.” § .030(3). Here, “there is no dispute that Justice Sanders is a state official and [] the Commission found that he was acting in his official capacity when he visited the SCC....” *Sanders*, 139 Wn. App. at 206; *see also* Supp. CP 236. As such, Justice Sanders was entitled to a defense.

“When the plain language is unambiguous – that is, when the

statutory language admits of only one meaning – the legislative intent is apparent, and [courts] will not construe the statute otherwise.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The central question in this case is whether the AGO’s duty to defend is mandatory or discretionary. The Duty to Defend Statutes’ plain language answers this question by stating that the AGO “shall” provide a legal defense and advice. “By using the word ‘shall,’ [a statute] imposes a mandatory duty.” *Wash. State Coal. for the Homeless v. Dep’t of Soc. & Health Servs.*, 133 Wn.2d 894, 907-08, 949 P.2d 1291 (1997) (emphasis added).

While the Court of Appeals recognized the mandatory nature of the legislature’s choice of the word “shall,” *Sanders*, 139 Wn. App. at 207, it erroneously looked beyond the plain language of the Duty to Defend Statutes. Most perplexing is that the court did so without finding any ambiguity in the statutes. The court’s holding that the AGO has discretion is premised on finding legislative intent in an entirely different, and entirely irrelevant, statute – the EPSA. *Id.* at 212. Further, the court rejected every statutory and common law argument the AGO offered in its Opening Brief in support of its claim of discretion. *Id.* at 207-10. The court’s decision to not follow the plain language of the Duty to Defend Statutes was error.

There is no exception to the AGO’s mandatory duty to defend in

the context of judicial disciplinary hearings. Courts “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language’” *J.P.*, 149 Wn.2d at 450 (quoting *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)). The Court of Appeals’ holding implicitly adds the clause “except in judicial disciplinary hearings, in which case the attorney general has discretion” to the Duty to Defend Statutes. While the Legislature has the power to create exceptions to the Duty to Defend Statutes,² it has not chosen to do so in this context.³ The Court of Appeals erred in finding such an exception.⁴

2. *The Court of Appeals Transformed the Duty to Defend into a Right to Reimbursement.*

The Court of Appeals held that “the [AGO] has the discretion to provide a defense initially or instead to reimburse an accused judge for his or her defense costs later if the judge is exonerated of ethical wrongdoing.” *Sanders*, 139 Wn. App. 212-13. Reading the Duty to Defend Statutes this way converts a state official’s right to a defense into a right to reimbursement. The Duty to Defend Statutes do not stipulate that

² For example, the Legislature has done so in the context of tort claims and criminal charges against state officials but those proceedings are not at issue here. *Sanders*, 139 Wn. App. at 208.

³ The court also rejected the AGO’s assertion that the common law has created a discretionary exemption for judicial disciplinary proceedings. *Sanders*, 139 Wn.App at 208-10.

⁴ Further, while the court held that the AGO has discretion, it did not clarify what, if any, standard applies to the AGO’s decision. The broad exception that the court found requires future courts to write further language into the Duty to Defend Statutes to define

the AGO's duty only arises in those cases where it believes the state official will be exonerated. Nor do they refer to reimbursement.

Implying a discretionary right to reimbursement into the Duty to Defend Statutes is against public policy. State officials must be confident that they can act in their official capacities without fear of individually shouldering the cost of a defense and possible appeals. Allowing the AGO discretion to refuse to represent judges before the Commission will encourage the AGO never to provide a defense. The AGO always benefits from taking a "wait and see" approach: if the judge loses then the AGO did not expend any resources; if the judge prevails, then the AGO need only reimburse the judge for the costs and fees that it should have incurred in the first place. The AGO bears no risk in this situation.⁵

On the other hand, the stakes for the judge could not be higher. First, the judge may not have the resources to pay for an adequate defense and potential appeals. If this is true, then the judge's case may be lost before it is even heard. Second, the AGO's decision to decline representation means that the judge must retain private counsel for the hearing. This is what RCW 43.10.040 was enacted to prevent. *State v.*

the standard.

⁵ As Justice Sanders argued in his prior briefs, this presents a situation analogous to the duty to defend in insurance cases. Petitioner's Opening Br., pp. 33-39; Petitioner's Reply Br., pp. 20-21. In the insurance context, the duty to defend arises once there is a potential covered claim. *See id.* The same reasoning applies here.

Herrmann, 89 Wn.2d 349, 354, 572 P.2d 713 (1977) (“It is clear that the purpose...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.”). Granting the AGO discretion to decline representation turns this statute on its head by forcing judges to hire private counsel. As a result, public officials cannot be confident that serving in public office and acting within their official capacity will offer them security against bearing the cost of litigation.

The Court of Appeals sidestepped the serious public policy concern that qualified candidates will be deterred from entering public service if there is uncertainty in the provision of a defense for acts taken in an official capacity. *See* Petitioner’s Opening Br., pp. 26-29. The court simply observed that in Massachusetts, one of the jurisdictions to which Justice Sanders referred to articulate this public policy,⁶ the duty to defend would not arise. *Sanders*, 139 Wn. App. at 213. The significant deterrent that converting the right to representation into a right to reimbursement would have on citizens’ willingness to serve in public office underscores the mandatory nature of the AGO’s duty.

B. The Court of Appeals Erroneously Applied the EPSA.

The Court of Appeals held that the EPSA applies to Justice Sanders' Commission proceeding. *Sanders*, 139 Wn. App. at 202, 212-13. However, the EPSA does not apply on its face. First, no complaint was ever brought against Justice Sanders alleging a substantive violation of the EPSA. Appropriately, the Commission, the trial court, and the Court of Appeals did not address whether or not Justice Sanders violated the EPSA. The sole question has always been whether his actions violated the Canons. Nothing about Justice Sanders' actions provides a basis for an EPSA violation. Second, procedurally, Justice Sanders did not seek a defense from the AGO for a subsequent action; he sought a defense for his Commission proceeding under the Canons. The EPSA is simply not relevant to this case.

1. The EPSA Does Not Apply to this Case.

The Court of Appeals held that the AGO has discretion under the Duty to Defend Statutes based on its examination of one provision of the EPSA: RCW 42.52.430(7).⁷ *Sanders*, 139 Wn. App. at 212-13. The

⁶ Petitioner's Opening Br., pp.26-29; Petitioner's Reply Br., pp. 16-18.

⁷ At oral argument, the court requested additional briefing on two sections of the EPSA: .430(7) and .460. The court did not discuss § .460 in its opinion, nor has the AGO sought review of whether this statute applies. Regardless, § .460 is plainly inapplicable. Section .460 states that the AGO has a duty to defend a state official in a "citizen action" under the EPSA if it determines that the official's conduct complied with the EPSA and was within the scope of employment. § .460. There is no question that Justice Sanders' hearing was not the result of an EPSA citizen action. *See id.* (allowing citizen actions

EPSA sets forth a set of substantive ethical violations primarily related to transgressions of a financial nature that apply to state employees including judges. *See* ch. 42.52 RCW. The EPSA requires the Commission to enforce the substantive requirements of the EPSA. RCW 42.52.370. The EPSA, however, has nothing to do with violations of the Canons, a completely separate set of ethical requirements for judges.

Section .430(7) provides that if a complaint is filed alleging a substantive violation of the EPSA, the Commission must determine whether there is reasonable cause to believe that a violation of the EPSA has taken place. If there is reasonable cause, the board must hold a hearing, RCW 42.52.430(1), but otherwise, the charges must be dropped. Ethics charges will also be dismissed if the board proceeds with a hearing but finds that the officer has not engaged in the alleged violation. RCW 42.52.430(6). Section .430(7) states as follows:

If the board makes a determination that there is not reasonable cause to believe that a violation has been or is being committed or has made a finding under subsection (6) of this section, the attorney general shall represent the officer or employee in any action subsequently commenced based on the alleged facts in the complaint.

Thus, § .430(7) applies to subsequent actions involving alleged violations of the EPSA. This section does not apply to ethics proceedings

only where the ethics board has failed to act and certain procedural requirements have been met). Thus, the statute does not apply on its face.

themselves, let alone to ethics proceedings only involving alleged violations of the Canons unrelated to EPSA substantive requirements. If a board dismisses an allegation of a substantive violation of the EPSA, either before or after a full hearing, § .430(7) requires the AGO to defend the officer in different, i.e. non-Commission, actions arising from the same facts. For example, the AGO may be required to defend a state officer against criminal charges or a tort suit.

Further, both the Duty to Defend Statutes and § .430(7) impose a mandatory duty on the AGO. The court inexplicably took these two statutes, both of which plainly state that the AGO “shall” represent state officials in certain actions, and added them together to find a legislative intent to create a discretionary duty. But one plus one does not equal three. That the AGO has an additional mandatory duty to defend in actions brought subsequent to certain ethics proceedings under the EPSA does not abrogate the Duty to Defend Statutes’ separate mandatory duty of representation for actions taken in a judge’s official capacity.

2. *The Court of Appeals Improperly Conflated Disciplinary Proceedings Under the Canons with EPSA Proceedings.*

The Commission operates in two separate capacities. First, the Commission investigates and adjudicates alleged violations of the Canons. Const. art. IV, § 31. Second, the Legislature extended the Commission’s

jurisdiction to investigate complaints alleging substantive violations of the EPSA. RCW 42.52.370.

The Court of Appeals' decision has far-reaching implications. In holding that the AGO has discretion to reimburse judges rather than represent them in all cases involving a question of judicial ethics, the court essentially treats every Commission proceeding as if it was a complaint brought pursuant to the EPSA. Indeed, the court stated that the EPSA's "language encompasses Commission proceedings." *Sanders*, 139 Wn. App. at 210. But the real question is whether the alleged violation is of the Canons alone, or implicates the EPSA as well (or alone). If the AGO is granted discretion in all judicial disciplinary hearings, regardless of whether the EPSA has been applied, then the court has created an unprecedented and broad exception to the Duty to Defend Statutes.⁸ The Court of Appeals erred by analogizing EPSA hearings to hearings under the Canons and concluding that they were one and the same.⁹

⁸ While it is conceivable that a citizen may bring a complaint under the EPSA for an action that also violates the Canons, this was not done here.

⁹ The court cites WAC 292-09-010 in support of its position. *Sanders*, 139 Wn. App. at 211. This rule outlines the procedural steps for "implementing the [EPSA]" in the judiciary and states that "[a]ll proceedings involving 'judges' . . . shall proceed exclusively under the rules set forth in the [Commission On Judicial Conduct Rules of Procedure]." Justice Sanders does not dispute that judges are subject to EPSA actions. Rather, the court confuses the issue by reading the rule's use of the term "proceeding" as inclusive of all Commission proceedings. The rule explicitly states that its purpose is to implement the EPSA – the proceedings it refers to are EPSA proceedings.

3. *The AGO Waived Its Claim that the EPSA Applies.*

“A party is not permitted to maintain inconsistent positions in judicial proceedings.” *Bauer v. Bauer*, 5 Wn. App. 781, 792, 490 P.2d 1350 (1971) (discussing doctrines of waiver and estoppel).¹⁰ The AGO effectively conceded that the EPSA does not apply to this case. In fact, the AGO never argued that the EPSA applies in this case until the Court of Appeals specifically asked for the parties to do so at oral argument. In the AGO’s Opening Brief to the Court of Appeals, the AGO did not argue that the trial court erred by not applying the EPSA to Justice Sanders.¹¹ The entirety of the AGO’s reference to the EPSA in its briefing prior to oral argument is summarized in one sentence:

Under the statute governing proceedings before the State Ethics Board, which applies to state officials other than judges, the Attorney General may represent the defendant only in an action brought by a citizen, after the Executive Ethics Board declines to commence such proceedings, and after “the attorney general finds that the defendant’s conduct complied with this chapter [‘Ethics in Public Service,’ RCW 42.52] and was within the scope of employment.” RCW 42.52.460.

Respondent’s Opening Br., pp. 31-32 (emphasis in original).¹² The EPSA

¹⁰ See also *Haslett v. Planck*, 140 Wn. App. 660, 665, 166 P.3d 866 (2007) (noting that under the doctrine of judicial estoppel, courts do not allow parties to “play[] fast and loose” with the judicial process by taking inconsistent positions in the course of litigation) (quoting *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001)).

¹¹ Indeed, the trial court and Commission did not rule on a single issue related to the applicability of the EPSA.

¹² This sentence is parroted in the State’s Summary of Argument section. Respondent’s

is mentioned in passing as an example of a situation where the AGO is granted discretion. *Id.* Indeed, the reference is explicitly an attempt to create an analogy, not as an argument that the EPSA actually applies.¹³ Further, the AGO's briefing prior to oral argument does not contain a single reference to the statute upon which the Court of Appeals based its holding: § .430(7). *See* Respondent's Opening Br., pp. vii-viii.

The AGO waived its right to assert that the EPSA controls. The AGO's construction of the EPSA is telling. First, the AGO asserts that the EPSA "applies to state officials other than judges." Respondent's Opening Br., p. 31. This statement demonstrates that the AGO never considered the EPSA applicable. Second, the AGO acknowledges that the EPSA's duty to defend is only relevant "in an action brought by a citizen, after the [] Ethics Board declines to commence such proceedings..." *Id.* Here, the Commission did go through with the entire hearing process and no subsequent citizen action is at issue. The AGO's admissions and construction of the EPSA demonstrate its firm conviction that the EPSA provided nothing more than a potential analogy.

Opening Br., p.15.

¹³ This is evident by the subheading under which the AGO places the EPSA: "The discretion that RCW 43.10.030 affords the Attorney General is consistent with other

C. Justice Sanders' Actions Do Not Constitute Misfeasance.

The Court of Appeals did not address whether Justice Sanders committed misfeasance. *Sanders*, 139 Wn. App. at 214. The court based its entire holding on the application of the EPSA to Justice Sanders' hearing. *Id.* at 202, 214. The plain language of the Duty to Defend Statutes dispose of this case. Contrary to the trial court's holding, the issue of misfeasance is not relevant to the Duty to Defend Statutes. However, if this Court decides to address the issue of misfeasance, then Justice Sanders still prevails.

Justice Sanders reiterates his position that misfeasance is the incorrect standard to trigger the AGO's duty to defend. *See* Petitioner's Opening Br., pp. 2-3; Petitioner's Reply Br., p. 18. The Duty to Defend Statutes contain the appropriate standard: a duty to defend arises if Justice Sanders acted in his official capacity. The Commission, the trial court and the Court of Appeals answered this in the affirmative. *Sanders*, 139 Wn. App. at 206; *see also* Supp. CP 236.

Even if misfeasance is the correct standard, Justice Sanders did not commit misfeasance. *See* Petitioner's Opening Br., pp 29-33; Petitioner's Reply Br., pp. 18-20. The trial court correctly ruled that "misfeasance" only applies to "purposeful or willful" acts. Supp. CP 313; CP 173.

similar state statutes." *Id.* at 31 (emphasis added).

Willful acts, in turn, require intent to commit the act. See *In re Recall of Carkeek*, 156 Wn.2d 469, 474, 128 P.3d 1231 (2006) (to find a prima facie showing of misfeasance, “the facts must indicate an intention to violate the law.”) (citing *In re Recall of Feetham*, 149 Wn.2d 860, 865, 72 P.3d 741 (2003)) (emphasis added).¹⁴ Here, no interpretation of the facts alleged or found by the Commission in any way implies that Justice Sanders intentionally violated the Canons.¹⁵

D. Justice Sanders Should Be Awarded His Attorney’s Fees.

Justice Sanders respectfully requests that this Court award him all of his attorney’s fees and costs, including those incurred on appeal, in accord with RAP 18.1(a). This Court has held that a plaintiff is entitled to the attorney’s fees he expends in claiming his right to a defense where the right would be meaningless if one has to engage in “vexatious, time-consuming, expensive litigation” to claim it. *Olympic S.S. Co. Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52, 811 P.2d 673 (1991) (quoting *Hayseeds, Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73, 79 (W.Va. 1986)). The policy behind *Olympic Steamship* applies here. Forcing Justice Sanders to bear the burden of the attorney’s fees he has expended

¹⁴ See also Petitioner’s Reply Br., pp. 18-20.

¹⁵ This Court noted that Justice Sanders’ conduct “created an appearance of partiality.” *In re Disciplinary Proceeding Against Sanders*, 159 Wn.2d 517, 520, 145 P.3d 1208 (2006). The Commission did not find that Justice Sanders intentionally violated the Canons, rather that his actions demonstrated “lapses” in the “exercise [of] prudent

to claim his right to a publicly-funded defense would completely negate the value of the defense.

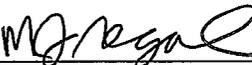
Further, Washington adopted a “fees for fees” rationale in *State v. Jones*, 92 Wn. App. 555, 564, 964 P.2d 398 (1998). The court explained that “[w]here a defendant claiming reimbursement incurs significant expense to vindicate the claim, denying ‘fees for fees’ would frustrate the statutory purpose.” *Id.* To preserve the purpose of the Duty to Defend Statutes, this Court should award Justice Sanders his “fees for fees.”

IV. CONCLUSION

A judge’s right is to representation, not reimbursement. The law is clear and mandatory on this point. Justice Sanders was entitled from the beginning of this suit to a defense by the AGO. The court erred by looking beyond the applicable law and finding legislative intent in a statute irrelevant to the facts of this case. This Court should reverse and hold that the AGO breached its statutory duty to defend Justice Sanders.

DATED this 7th day of July, 2008.

K & L GATES LLP

By 

Paul J. Lawrence, WSBA # 13557

Matthew J. Segal, WSBA # 29797

Gregory J. Wong, WSBA # 39329

Attorneys for Petitioner

The Honorable Richard B. Sanders

judgment.” Supp. CP 233.