SC#93215-8

Court of Appeals No. 32336-6-III

Stevens County Superior Court No 12-2-00459-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ANTHONY GRABICKI, Respondent

v.

LINDA BAYS, Appellant,

PETITION FOR REVIEW

JAY NUXOLL, WSBA 3506
13843 SE 10th Street
Bellevue, WA 98005-3717
Phone or FAX (425) 641-2600
Attorney for Appellant, Linda Bays

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON STATE CONSTITUTION

WASHINGTON STATUTES

WASHINGTON CASES

COURT RULES

OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Linda Bays asks this court to accept review of the Court of Appeals decision designated in Part B of this petition. **Linda Bays** filed this appeal immediately challenging the jurisdiction of the visiting judge at his first ruling, paid the filing fee, and is the sole Appellant. The case manager of Division III of the Court of Appeals prevented her appeal from proceeding until the Respondent, **Anthony Grabicki,** finished the case without her in Stevens County. The Respondent never filed for appeal at all, but after a ruling by the Court of Appeals Commissioner that he could not file "additional materials" on his motion to do so, he accomplished that anyway by adding those intended "additional materials" to a subsequent motion to expedite the case when it was already expedited. He succeeded in diverting the Court of Appeals from the true issue.

B. COURT OF APPEALS DECISION

A copy of the decision is in the Appendix at Pages A-1 through A-9. A copy of the order denying petitioner's motion for reconsideration is in the Appendix at Page A-10.

C. ISSUES PRESENTED FOR REVIEW

This is a true case of first impression because unlike all previous cases concerning the issue of judicial jurisdiction of a visiting judge, the

Appellant challenged the initial ruling of that judge instead of first participating to see if she might have a favorable outcome.

The Appellant specifically objects to the totally irregular, non authorized and casual procedure by which the administrator of Spokane County Superior Court designated and directed a judge from an entirely different county, one elected in Whitman county, to preside at her case in Stevens county (one of the Tri-City Counties) when none of the provisions as set out in the Washington State Constitution, the Revised Code of Washington provisions, or Supreme Court Rules were followed. A judgment, order or ruling by a judge without valid jurisdiction is void.

D. STATEMENT OF THE CASE

The Appellant's Issue on Appeal was ignored by the Court of Appeals. She immediately appealed from the attempt at exercise of jurisdiction by a visiting Superior Court judge from Whitman County assigned to her case in Stevens County Superior Court by the court administrator of Spokane County Superior Court (a) because he was never requested as a visiting judge by any elected judge of that Tri-County (Stevens, Ferry and Pend Oreille) system, (b) nor directed to so serve by the Supreme Court, but (c) assigned and directed to serve rather by the administrator of the Spokane County Superior Court who at best might have some authority in Spokane County assignments but

certainly had no authority to assign any judge from some other county anywhere.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review ought to be a matter of right rather than whim of the Supreme Court because it concerned a direct violation of the Washington State Constitution and statutes augmenting it. Tri County (Stevens, Ferry and Pend Oreille) has only two elected judges for three counties, so pro-tempore and/or visiting judges were foreseen to be needed and procedures set up to supply at least pro-tempore judges in the Constitution, and later by visiting judges by statute.

Proper procedure in any event still requires the county's own judges to themselves request even visiting judges so decisions made by those so requested can be also rightly considered at the re-elections of the county's own judges. The fact that the Court Administrator of Spokane County Superior Court assigned a judge elected in Whitman County, not even one of the judges on which she was Court Administrator, had never been denied.

The Court of Appeals ignored this most important jurisdictional issue and suggested merely that judges of counties be careful to follow proper procedures in the future. Were the case allowed to stand the administrator of any county court could select and assign a judge elected by the citizens of some other county to hear a case in even some third county.

FURTHER ARGUMENT

At issue is how a judge elected from Whitman County came to be designated as a visiting judge in Stevens County without being requested by any judge of Stevens County in accord with **Washington State Constitution, Art IV. Sec 7.** or **RCW 2.08.150**. Although he clearly was not a judge elected in Spokane County where the Spokane County Court Administrator might claim some authority, he was assigned as a visiting judge to sit on a case in Stevens County Superior Court by the Court Administrator of Spokane Superior Court.

When that Whitman County judge was so assigned he was contacted by the Appellant to ask him to get in writing from the judges of Stevens County a request that he sit as a visiting judge. And he responded that he was not a judge pro tem and would not so seek such a request. Court Documents 1 and 2 provided for the appeal are that correspondence request and answer.

The Appellant asserted that (a) even a judge elected in Whitman County would be an ex tempore judge who needed to be requested in writing by a judge of Stevens County (at least by one of the two in the Tri-County area deemed the presiding judge) to be a visiting judge in Stevens County, (b) that court administrators can only be delegated to do ministerial tasks, and (c) that if the designation of a judge to sit as a visiting judge in another county could ever be claimed merely a ministerial task, the such designation by a court Administrator of Spokane County would not extend to designating judges of counties other than Spokane County to be visiting judges in Stevens County.

Thereafter, when the visiting judge make his first decision in the Stevens County case, Linda Bays immediately appealed without waiting to see how other matters might be decided, making her appeal clearly a matter of First Impression. Both cases mentioned by the Court of Appeals as potential authority for a differing view (seemingly focusing more on the issue of necessary writing) involved Appellants who delayed to first take advantage of any potential favorable decision of the court, and because of such delay might rightly be thought to have waived the right to appeal on such a basis. In both **State v. Holmes**, 12 Wash. 169, 40 Pac 735 (1895) and **State v. Hawkins**, 164 Wn. App. 705,

265 P.3d 185 (2011) the visiting (pro-tempore) judge jurisdiction issue was raised only after the trial was long before completed.

In fact, in **Hawkins** there had not only first been a jury verdict followed by sentencing and imprisonment, the lack of jurisdiction issue was not even raised until the third or fourth appeal thereafter. The justices were not about to let the Appellant prevail after such delay regardless of the rule that an issue of jurisdiction can be raised at any time. **46 Am. Jur 2nd, section 266, page 344** "A jurisdictional defect in the appointment of a special judge cannot be waived; such a defect results in a void judgment which may be attacked at any time. "There is no need for the demonstration of a meritorious defense to vacate a void order" **Mid City Materials, inc v. Heater Beaters Custom Fireplaces**, 36 Wn.App. 480, 486, 674 P.2d 127 (1984) "A void judgment is a judgment or decree or order entered by a court which lacks jurisdiction of the parties or of the subject matter of which lacks the inherent power to make or enter the particular order involved"

Strangely, the **Hawkins** case (supra) also mentions a Latin phrase totally misapplied and cited in the 1895 **Holmes** case: (supra) as follows: ***"Omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium".*** which literally translates [apologies to the court's for its translation] as "All acts are presumed to be done rightly and properly until tested by the contrary." [Note that the proper translation for the Latin verb "probare" is "to test" rather than "to prove.] The adage is cited sometimes in English as "The exception proves the rule.", but more accurately should be "An exception tests the rule". The Latin maxim in the **Holmes** case is itself without cite but the closest Latin phrase that can be found in an English case is ***"Stabit praesumptio donec probetur in contrarium"*** (best translated as) "A presumption will stand until it is tested by the contrary". In **Hynde's Case**, 4 C. 70b, [book 4 of Coke's English King's Bench Reports] 76 Eng Rep 1040 (1378-1865) merely one contrary exception in how a supposed owner should have dealt concerning the apparent title to his land tossed out all presumption that he actually owned it.

Unfortunately, the Latin phrase in **Holmes** seems to have been interpreted totally opposite by the justices in 1895. They suggested as a test that one must demonstrate

something completely impossible – that something has never happened rather than that there was no evidence of something had actually happened. That would be the equivalent of requiring the defense to prove the Defendant innocent in a criminal case. Obviously no one could hope to prove that no matter how many instances of good actions could be demonstrated. Even if no record of any request by any judge at any time were found, that would fall far short of disproving such requests had ever been made. They might merely might still be undiscovered.

Incidentally in the Fall 1964 in preparation for the adoption of the Federal Rules concerning of Pleading, Practice and Procedure by the State of Washington, the Dean of the University of Washington School of Law, George Neff Stevens, noted the misused maxim in **Holmes** (supra) specifically as an example in Washington of bewildering, untenable and illogical decisions on a par with the famous "**This time the horse was white**" case often criticized from Early English Common Law.

Moreover, in **Holmes,** there was evidence that while at least one of the three King County judges had requested the visiting Spokane County judge (albeit by a "nunc pro tunc" order) the other two of them had not, and even then requests by a majority of the judges were required. Despite the ancient theory that jurisdiction can be challenged at any time in a case, the justices in 1895 were not about to allow the Defendant a new trial Hard cases make bad law. They had to come up with something. The maxim was neither necessary or applicable.

Too bad the justices in **Holmes** and **Hawkins** even mentioned or bothered with the provisions of **Washington State Constitution, Article IV, Sec 7** which requires the majority of the judges in a county to make requests in writing for a visiting or pro-tempore judge as they did. If only they had merely noted that the appellants in both those cases had make belated challenges after first silently and slyly "taking their chances" of a favorable outcome but losing, they would have merely said they had waived their right to belatedly raise the issue. That would have been a more logical rationale, and probably what the justices felt but could not express in that fashion. At least that delayed element is not present in this case. There should be no reluctance to call void a judgment by a judge without jurisdiction.

The **Washington State Constitution, Art IV , sec 7**, and the statutes **RCW 2.08.140, RCW 2.08.150** and **RCW 2.08.180** all indicate clearly that even visiting judges, despite the fact that they have actually been elected in a particular county, are pro tempore (i.e. Latin "for a time" or "temporary") judges when sitting in a different county where they were not elected. How they get to be pro tempore judges in a different county, however, is not always by the same method.

Moreover, there is clearly some differences how the terminology "pro tempore" judge is used as compared to the term "visiting" judge. While all visiting judges are judges for a time (i.e. pro-tempore), not all pro tempore judges are visiting judges. In the case, e **National Bank of Washington v. McCrillis**, 15 Wn.App. 353,357, 130 P.2d 901, 144 A.L.R. 1197 (1942) the difference is given thusly:

> A judge PRO TEM, under our statute, is appointed to hear one particular case. He does not derive his authority from a general election, nor from an appointment by an executive officer, but his power to act is based upon the consent of the parties litigant to his appointment. A judge PRO TEM, under our statue is not a superior court judge, and could make no claim to the office of superior court judge. We are of the opinion that it clearly appears from the constitutional and statutory provision the essential element to the valid appointment of a judge PRO TEM which must exist is the consent of the parties.

And on the other hand in **State v. Sain,**, 34 Wn.App 553, 663 P.2d 493 (1983), a case where the Defendant did not know that the pro tempore judge was no longer a sitting judge from some other county, and thus not a "visiting" judge the court sent the case back for a retrial when it was clear that the Defendant could not have waived his right, holding: "We find the right under Const. Art 4, sec 5 to be tried in a court presided over by an elected superior court judge accountable to the electorate is a substantial right"

In Washington judges are not appointed for life, but stand for re-election. They should be consequently taking care who they request as visiting judges because they will themselves face the consequences in subsequent elections if those selected are not fair and impartial. Where only two judges serve three counties as in the Tri-County judicial district of Steven, Ferry and Pend Oreille counties, those two judges must be even more careful lest objectionable decisions be made by pro-tem judges they request to sit in their places.

Nevertheless **RCW 2.08.140** specifically mentions that even visiting judges are ex tempore judges when assigned by the Governor upon request made to him by a court needing a judge. In that case the statute clearly requires such a request must be in writing. But the statute **RCW 2,08,150** passed as part of the same visiting and pro-tempore judge solution applies when the request to serve is "addressed **(1) by the judge, or by a majority of the judges (if there be more than one) of the superior court of any county (2) to the superior judge of any other county**. In which case the judge selected in the other county is empowered to hold session of the superior court **(3) of the county the judge or judges whereof shall have made such request**." (Emphasis and numbers added). That request is supposed to be made judge to judge.

Although the statute **RCW 2.08.150** does not specifically contain a requirement that the request between judges must be made in writing, it is still a companion legislative act concerning ex tempore judges enacted at the very same time as **RCW 2.08.140.** The starting word of **RCW 2.08.150** bear a specific reference to how the other statute's way (i.e. in writing) of requesting a temporary judge be assigned by the governor, to wit: **"WHENEVER A LIKE REQUEST SHALL BE ADDRESSED"** (followed by the part about the judges of one county making a request to the judge in a different county as above, rather than to the governor). To make a like request when the one to the Governor had to be in writing would surely mean that request from judge to judge must also be in writing. In **State v. Chapman**, 140 Wn.2d 436, 998 P.2d 282 Cert. denied 531 US 988, 121 S.Ct. 438, 148 LEd.2d 444 (2000) our own Supreme court noted:

> "The purpose of interpreting statutory provision together with related provisions is to achieve a harmonious and unified statutory scheme that maintains the integrity of the respective statutes. Statutes relating to the same subject with be read as complementary instead of in conflict with each other."

There are other Washington cases that say that such statutes on the same material have to be read together. See **Hallauer v. Spectrum Props**, 143 Wn.2d 126, 18 P3d 540 (2000)

And, in fact, a very early case **Hindman v. Boyd,** 42 Wash. 17, 84 Pac 609 (1906) specific agreed and based its decision that the two differing manner of giving a judge from a different county jurisdiction to hear cases in a another county as a

temporary judge must be read as both part and parcel of the same **section 7 of Article 4 of the Washington State Constitution,** quoting part of the section follows:

> "The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his duty to do so".

But then proceeded to find there was jurisdiction in that particular case even though all the resident judges were already holding court sessions in that county at the same time, and the Appellant claimed **Sec 5 of Article 4 of the same Washington Constitution** allowed only as many sessions in a county as there were "local" judges:

> Under the last quoted provision it is clear that a visiting judge may act at the request of a resident judge and with the request of the governor, and that upon the request of the latter it becomes his duty to do so. The two provisions must be construed together so as to give harmonious effect if possible. It is clear that the constitution designated two methods for the assignment of visiting judges. If the above portion of **section 7** should be read as a part of **section 5 [of Article 4 of the Constitution**], and it may properly be so read, then we think the intention appears that there may be as many sessions in a county at one time as there are local and assigned judges. We therefore believe that the provision of section 7 should be held to be a mere enlargement of that in section 5, to the effect that there may be as many sessions as there are resident judges and addition assigned judges, whether assigned by the governor or by request of a local judge. (emphasis added)

Whatever the difference -- in writing or not -- the real issue is that in the case under appeal there was no request made by the judges (or presiding judge) of the Tri-County judicial area to the Whitman County judge to come be a temporary visiting judge in Stevens County. Instead the "additional materials" initially submitted by the Respondent himself showed no judges were involved, merely email correspondence between court administrators of Stevens County and Spokane county if there were a request. Not only did the Court of Appeals totally ignore that issue of lack of writing in the process of judges requesting judges under **RCW 2.08.150** because of **Hawkins** (supra) and **Holmes** (supra) they ignored the fact that the requests were (in whatever manner made) merely between administrators for the various courts – Stevens County and Spokane County..

That is why **State ex rel Carpenter v. Superior Court for Lewis County**, 131 Wash. 448, 230 Pac. 144 (1958) construing the provisions of the Constitution and giving

the reason why judges of the county are to designate a substitute judge becomes important. The Washington Supreme Court in that case makes it clear:

> "It was the **DUTY** (emphasis added) of the **RESIDENT JUDGE** (again, emphasis added) to designate a judge as soon as he was able to find one who would consent to try the case, who would thereafter have jurisdiction over the entire case."

The key word is **DUTY,** clearly a judicial duty, a chore that a judge cannot delegate to a non judge. Only a judge can do what the **Carpenter** case, supra, clearly calls a duty of the judges of the county to make such a request to a judge of a different county to come as a visiting judge. That is why the current decision is astonishingly wrong. Even **Supreme Court Rule 29, (f)** makes it clear that the presiding judge of a superior court system (the one or the other of the two judges of the Tri-County system presides) "***can only delegate ministerial duties***" to court personnel (emphasis added). Requesting a visiting judge to hear a case in ones county, according to **RCW 2.28.150,** is a duty of the resident judges, not of court administrators.

Admittedly, court administrators have special positions dependent upon the court rules of Specific Superior Courts. For example, **Spokane Superior Court Local Rule L.R. 0.2 COURT ORGANIZATION AND MANAGEMENT (e) Duties of the Court Administrator (6)** says: [The Court Administrator shall be responsible for] Coordination with state court administrator and of the visiting judge program. The local rules, however, of the Tri Counties (Stevens, Ferry and Pend Oreille) have no such duties assigned (or delegated) to its court administrators.

Moreover, the duties of the State Administrator of the courts is given in **RCW 2.56.0030,** Powers and duties: The administrator for the courts shall has no authority to direct or assign judges. Instead the administrator, under the supervision and direction of the chief justice, is only authorized to:

> (3) Make recommendations to the chief justice relating to the assignment of judges where courts are in need of assistance and carry out the direction of the chief justice as to the assignments of judges to counties and districts where the courts are in need of assistance.

. And **RCW 2.56.040** shows that only the chief justice is in control to direct distribution of judges, as follows:

> The chief justice shall consider all recommendations of the administrator for the assignment of judges, and, *in the discretion of the chief justice*, direct any judge whose calendar, in the judgment of the chief justice, will permit, to hold court in any county of district where need therefore exists, to the end that the court of this state shall function with maximum efficiency, and the work of other courts shall be equitable distributed. It shall be the duty of every judge to obey such direction of the chief justice unless excused by the chief justice for sufficient cause.

Notice that even if the court administrator recommends assigning a visiting judge, it takes the order of the chief justice [in the discretion of the chief justice} to direct any assignment. Clearly there are no orders from the Chief Justice to the court administrator of Spokane County to direct any judge to go sit as a temporary judge, especially not the judge of some county other than Spokane. None of the Court Administrators can usurp the power of the chief justice of the Supreme Court to assign visiting judges.

Even if the justices of District III of the Court of Appeals (which is, after all, in Spokane) seem to blithely assume some magical arrangement by which the Spokane County Superior Court Administrator could somehow assign and direct a judge of the Spokane Superior Court to sit as a visiting judge in Stevens County, how would there be a right of the Spokane Court administrator to assign (and even direct) that a judge of Whitman County be sent as visiting (i.e. pro tempore) judge to Stevens County. That is what the Spokane Court Administrator accomplished merely by wielding the signature stamp of the Spokane Superior Court judge in this current case.

The pious suggestion of the Court of Appeals is merely that henceforth more care should be taken to see that the judges of a county themselves request visiting judges, but does not make it clear that judges of a county in requesting visiting judges need to make the requests themselves. The Respondent himself actually provided emails to prove that it was the workings of the court administrator of Spokane County, who handled the entire assignment of the Whitman County judge in the Appellant's specific case. If the Constitutional provision says the judges of the county where the visiting judge is called to serve are to request that judge, how can such a request be delegated to any court administrator, especially one of yet an entirely different county? "***The provisions of this Constitution are mandatory unless by express words they are declared to be otherwise.***" (emphasis added) **Washington State Constitution, Article I, Sec 29.** See also, **State ex**

rel Smith v. Neal, 25 Wash. 264, 68 Pac.1135 (1901 and **State v. Ide**, 35 Wash. 567, 77 Pac. 961 (1904).

There are other frustrations in how the Court of Appeals handled the Appeal and came to its decision. Although the Court Commissioner specifically denied a motion of the Respondent that he be allowed to file "additional materials, the Respondent actually managed to file those intended "additional materials" in a subsequent "motion for acceleration" he brought despite the case had already been so accelerated. He wanted to poison the court against the Appellant for her continuing desperate fight to remain living in her own home as she had for more than twenty years before the start of that constant litigation. That litigation started when an earlier visiting judge sent from Spokane as part of a "rotation" system disallowed her a continuance at the start of her dissolution trial. She was too sick to attend, so he ordered her attorney to withdraw and then continued without her or any one to represent her to distribute all assets of both parties to her spouse.

In filing his "additional materials" the Respondent wanted the Court of Appeal to disregard that they (as well as the Respondent and obviously everybody else) know that it is the Spokane County Court Administrator who requests and assigns the visiting (pro-tempore) judges to Stevens, Ferry and Pend Oreille Counties. The Respondent didn't want the justices to examine the email messages between the various "lower bench" personnel of Stevens and Spokane Counties he had himself provided. They make it absolutely clear that no Stevens County judge was even mentioned to be involved, let along as making the request for the Whitman County elected Judge to sit as a visiting judge in Stevens County.

Those "additional materials" also allowed the justices to overlook how the Respondent had either carelessly (or by intellectual dishonesty) misrepresented a Stevens County local rule adopted under the recently passed **RCW 11.96.010 et seq (i.e. TEDRA) [The Trust and Estate Dispute Resolutions Act]** which gave the court administrator a way to handle judge absences on trust or estate motion hearing. The judges of Stevens County never delegated their constitutional duty to request a visiting judge for their County to any court administrator, especially not one in Spokane County

who might direct a Whitman County judge to go preside as a visiting judge in Stevens County. Yet. under the current decision of the Court of Appeals in this case the duty of the judges themselves elected in a county to select any visiting judge to sit in their places will be allowed to be delegated to some Court Administrator, in fact to one of an entirely different County. The judge from Whitman county was directed to be a visiting judge in Stevens County at the whim of the Spokane County Superior Court administrator. The Court Administrator of Spokane County has no authority whatever in Whitman County.

F. CONCLUSION

The court should insist on hearing Oral argument in this case of first impression to make it clear its facts are so basically unlike the cases cited as authority in the decision of the Justices of the Court of Appeals.

The administrator of any county court should never be allowed to select and assign a judge elected by the citizens of some other county to hear a case in yet even a third county. That is what happened in this case and brought on this appeal to the Supreme Court which should want to prevent such events from ever happening in the State of Washington again.

If this decision of the Court of Appeals is not changed its precedent will wrongfully allow total disregard of the specific provisions of **Washington State Constitution, Art IV, Sec 7** and **RCW 2.08.150** and even **Supreme Court Rule 29** concerning responsibility of judges elected in a county to request visiting judges who themselves will never face the voters in the counties where they serve only for a time as pro-tempore visiting judges.

This case should be remanded for a new trial before a judge with jurisdiction. A determination, order, judgment, or ruling made by a judge without jurisdiction is void.

Respectfully submitted,

JAY NUXOLL, WSBA #3506
Attorney for Appellant

Certificate of service

PURSUANT to RCW 9A.72.085, the undersigned hereby certifies under penalty to perjury under the laws of the State of Washington, that on the 31st day of May, 2016, a copy of the **PETITION FOR REVIEW** was delivered to the following persons in the manner indicated:

CRISTOPHER J. KERLEY, WSBA 16489 via regular mail
EVANS CRAVEN & LACKIE, P.S. via certified mail
818 W. Riverside Ave, Ste, 250
Spokane, WA 99201

and to Honorable David Frazier, Whitman County Judge

via email to sonyam@co.whitman.wa.us in his behalf

DATED this 25th day of May, 2016 in Bellevue, Washington.

JAY NUXOLL

FILED
March 29, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

ANTHONY GRABICKI, UNITED STATES TRUSTEE, Respondent, v. LINDA BAYS, AGENTS/SERVANTS OF LINDA BAYS, ANGELA THUNSTROM, WILLIAM KLINGER, SR., THE LINJERICKS SOCIETY, an unincorporated society, THE LINJERICKS SOCIETY, a corporation sole, THE SONLIGHT PATHWAY SOCIETY, a corporation sole, AND ALL SQUATTERS, TENANTS, OR OTHER UNKNOWN RESIDENTS, Appellants.	)	No. 32336-6-III PUBLISHED OPINION

KORSMO, J. — Linda Bays appeals a Stevens County order ejecting her from property in the Kettle Falls area, claiming that the visiting judge who signed the order was not shown to have been properly brought into the case. We reject this argument because governing authority presumes that a visiting judge has been properly assigned to act in the absence of contrary evidence—which we do not have in this case. Accordingly, we affirm the judgment and also deny various motions brought by both sides.

FACTS

Respondent Anthony Grabicki served as bankruptcy trustee of the David Bays bankruptcy estate. The bankruptcy court quieted title in the Kettle Falls property in Mr. Grabicki as trustee over the objection of several people, including Ms. Bays. The trustee then brought the current action for ejectment of the people living on the Kettle Falls property in 2012.

Ms. Bays responded by filing a "cross claim" that added a number of other individuals to the suit, including some Spokane County Superior Court judges. The two tri-county judges then recused themselves from this action. Presiding Judge Ellen Kalama Clark of the Spokane County Superior Court appointed first Judge John Strohmaier[1] of the Lincoln County Superior Court, and subsequently, Judge David Frazier of the Whitman County Superior Court to hear the case.

Judge Frazier presided over the matter and rejected Ms. Bays' pro se argument, made in the context of a claim that she had removed the case to federal court, that Judge Frazier lacked authority to hear the case since he had not filed an oath as a judge pro tempore. Report of Proceedings (RP) at 2-4. Judge Frazier indicated that he was acting as a visiting judge in accordance with the assignment by Judge Clark. RP at 4. Judge

[1] Our record suggests, but does not establish, that a party filed an affidavit of prejudice against Judge Strohmaier.

Clark had become involved after Judge Nielson asked the Stevens County court administrator to confer with Spokane County Superior Court about finding a judge. *Id.*

Ms. Bays, the former wife of David Bays, defended the action on various theories that attempted to collaterally attack the decision of the bankruptcy court as well as the decision in her marriage dissolution case. Ultimately, Judge Frazier granted the order ejecting Ms. Bays and the others from the property.

Ms. Bays appealed to this court. The parties filed several motions that are relevant to this decision. Mr. Grabicki, after losing a motion to add evidence to the record on appeal, successfully obtained an order granting accelerated review of the case in light of its lengthy history. Our commissioner passed to the panel a motion by Ms. Bays for sanctions against the respondent.

ANALYSIS

The sole challenge presented by the appeal is to the authority of Judge Frazier to hear the matter rather than to the substantive ruling evicting her from the property. In light of the appellant having unsuccessfully argued a similar theory in the appeal to this court of her dissolution action, respondent asks for sanctions for responding to a frivolous appeal. We first address the appellant's argument.

Article IV, § 7 of the Washington constitution provides in part:

> The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so. A case in the

> superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule. . . . However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement.

Similarly, RCW 2.08.150 provides in part: "Whenever a like request shall be addressed by the judge, or by a majority of the judges (if there be more than one) of the superior court of any county to the superior judge of any other county, he or she is hereby empowered . . . to hold a session of the superior court of the county the judge or judges whereof shall have made such request."

An appellate court applies de novo review to the interpretation of both constitutional provisions and statutes. *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004). The goal of statutory interpretation is to give effect to legislative intent, typically discerned from the plain language of the statute. *Tesoro Ref. & Mktg. Co. v. Dep't of Revenue*, 164 Wn.2d 310, 317, 189 P.3d 28 (2008). Only if the statutory language is ambiguous does a court turn to tools of statutory construction. *Id.* at 317-18. Similarly, words in a constitutional provision are given their common and ordinary meaning. *State ex rel. Albright v. City of Spokane*, 64 Wn.2d 767, 770, 394 P.2d 231 (1964).

Ms. Bays argues that Judge Frazier acted without constitutional authority because (1) he was assigned the case by a Spokane County judge rather than a Stevens County

judge, and (2) he did not take an oath as a judge pro tempore. We give short shrift to the second argument because Judge Frazier expressly told Ms. Bays on the record he was acting as a visiting judge rather than as a pro tempore. RP at 4. No party claims otherwise.

The dispositive issue is whether Judge Frazier was acting as a visiting judge in accordance with Article IV, § 7 and RCW 2.08.150. The specific issue here is whether the source of his authority to act in a Stevens County matter had to be in the record. That issue has twice before been decided.

The controlling case on the construction of the noted constitutional provision and accompanying statute is *State v. Holmes*, 12 Wash. 169, 40 P. 735 (1895). There a Spokane County Superior Court judge sat and heard a King County murder trial at the request of a King County Superior Court judge. *Id.* at 171. The defendant did not challenge the jurisdiction of the Spokane judge to hear the case and there was "nothing in the record in this cause to show in what manner Judge Moore was authorized to hold court in King county [sic] at the time of the trial of this case." *Id.* An after-the-fact authorization was filed by the King County judge who issued the invitation, but the other two King County judges denied joining in a request for the judge to visit. *Id.* at 171-72.

Our court decided that "it will be presumed that the court in each instance acted within its jurisdiction, in the absence of an affirmative showing to the contrary." *Id.* at 173. The court further "observed that neither the constitution nor the statutes in this state

make provision for the spreading upon the record of the fact that the visiting judge has been called to hold court either by the governor or by the judges in the county where the term of court is held." *Id.* at 174. The burden was therefore placed on the party contesting jurisdiction to present the issue to the trial court rather than first gamble on a verdict before raising the jurisdictional challenge. *Id.* at 180.

Holmes remains good law. *See State v. Hawkins*, 164 Wn. App. 705, 711-12, 265 P.3d 185 (2011).[2] The sole distinction between this case and *Holmes* is that Ms. Bays did raise, albeit in a muddled[3] form, a trial court challenge to Judge Frazier's authority to hear the case. However, she did not present any evidence indicating that he had not been properly requested to serve as a visiting judge. The order appointing Judge Frazier and signed by Judge Clark was in the record, but the basis for Judge Clark's authority to act was not.[4]

---

[2] In *Hawkins*, a visiting judge had ruled on a posttrial motion after the local judges had all recused. 164 Wn. App. at 709. The following year another motion had to be addressed and the visiting judge returned to rule on the new motion. *Id.* at 710. Division One applied *Holmes* and ruled that the visiting judge had been appropriately requested in the absence of evidence to the contrary. *Id.* at 712.

[3] Her trial court argument appeared to assume that Judge Frazier had not been properly requested by the Stevens County judges and was therefore, if anything, serving as a judge pro tempore without having been agreed to by the parties or properly sworn by the Stevens County judges.

[4] The limited record before us does not indicate whether Judge Clark was appointed by a Stevens County judge or how otherwise she was assigned the case.

We believe that Ms. Bays, in order to meet her burden under *Holmes*, needed to present evidence indicating that she had reviewed the record and determined that no order appointing Judge Clark was present in the court file or in some other manner to provide affirmative evidence that Judge Clark was not authorized to act on the case. In other words, Ms. Bays had to determine how the case had been assigned and then obtain evidence from the actors to set the facts in the record that would demonstrate a visiting judge had not properly been requested. She failed to present any affirmative evidence and, hence, did not meet her burden under *Holmes*.

While we do not fault any of the judges or administrators who acted in this case, we do suggest that counties that call upon visiting judges have appropriate orders of appointment in the court file or otherwise respond to settle the record when a party formally expresses concern over the authority of a visiting judge. We take notice that visiting judges frequently decide matters outside of their home counties, especially in our rural areas.[5] The frequency of visiting judges suggests that well-practiced procedures are in place to summon aid when a local judge cannot hear a case. It should be easy to document the process when a litigant questions the visiting judge's authority.

---

[5] Seven of the twenty counties in Division Three have only a single superior court judge and six others have only two judges; three of the remaining seven counties have but three judges. These limited numbers all but assure that the superior court judges of eastern Washington will regularly need to assist neighboring counties.

We thus turn, briefly, to the motions before the court. Mr. Grabicki seeks attorney fees for having to respond to a frivolous appeal. He points to the delaying tactics used by Ms. Bays for several years, her presentation of a similar challenge (although resolved by the evidence in the record) to a visiting judge's authority in the appeal of her marriage dissolution case, and the fact that *Holmes* (and *Hawkins*) controlled the result of this case. While we understand and share respondent's concern that this appeal, which does not challenge the merits of the trial court's ruling, appears to have been brought primarily for the purpose of delay, it was not without merit. Because we believed this case turned on what Ms. Bays needed to do to meet her burden under *Holmes* after arguably raising the issue to the trial court, we decline to find it frivolous.

The appellant's motion for sanctions is without merit. We do not see where respondent used evidence that was not admitted in the other motion. Moreover, just because evidence is not added to the record on appeal does not mean it is irrelevant for other purposes. Ms. Bays has not demonstrated prejudicial error.

Finally, respondent asks that this court issue a nonappealable writ of restitution requiring Ms. Bays to be off the property within 10 days of the issuance of the mandate in this case. This motion, because it does not preclude hearing the case on the merits, should not have been included in the brief. RAP 17.4(d). Assuming that this court had the authority to issue such an order, it would not be necessary in this case since the issuance of the mandate will result in the trial court's order of ejectment taking effect.

That Ms. Bays is still on the property, if she even remains there at this time, is by the grace of the trial judge. A more rapid eviction order was appropriately addressed to the trial court.

Affirmed.

Korsmo, J.

WE CONCUR:

Fearing, J.

Pennell, J.

FILED
May 5, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

ANTHONY GRABICKI, UNITED STATES TRUSTEE, Respondent, v. LINDA BAYS, AGENTS/SERVANTS OF LINDA BAYS, ANGELA THUNSTROM, WILLIAM KLINGER, SR., THE LINJERICKS SOCIETY, an unincorporated society, THE LINJERICKS SOCIETY, a corporation sole, THE SONLIGHT PATHWAY SOCIETY, a corporation sole, AND ALL SQUATTERS, TENANTS, OR OTHER UNKNOWN RESIDENTS, Appellants.	No. 32336-6-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of March 29, 2016 is hereby denied.

PANEL: Judges Korsmo, Fearing, Pennell

FOR THE COURT:

George Fearing

GEORGE FEARING
Chief Judge

A-10