

179966-1

No. 255271

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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HOWARD F. DELANEY,

Appellant,

v.

THE BOARD OF SPOKANE COUNTY COMMISSIONERS, *et al.*,

Respondents.

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APPELLANT'S REPLY BRIEF

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## REPLY ANALYSIS

The analytical paradigm overlaying this issue is not complex. The analysis starts and ends with the plain meaning of the Constitution and laws that apply to this situation. *McFreeze Corp. v. Dep't of Rev.*, 102 Wn. App. 196, 199, 6 P.3d 1187 (2000). A court's interpretation should follow the first rule of construction: The Legislature means exactly what it said and plain words do not need construction. *Id.* at n. 1 (citation omitted).

**1. The plain language of the Constitution, RCW 3.34.010, and SMC 1.16.020 mandate ten judicial positions for Spokane County District Court.**

The Washington State Constitution unequivocally gave the State Legislature sole authority to determine the number of county district court judges. Art. IV, § 10. Ironically, however, the Respondents' Brief does not mention – much less cite – the constitutional mandate. See RESP. BR., pp. i-26. Ignoring the constitutional mandate, however, does not make it go away or mitigate the import of its clear command.

The Constitution mandates that the power to set the number of district court judges rests with the Legislature, not the Spokane County Commission. The plain and unambiguous language of the 2002 amendments to RCW 3.34.010 clearly shows that the

Legislature created the tenth position that Spokane County requested and testified that it would fund.

RCW 3.34.010 sets the minimum number of judicial positions for a county. Here, the plain language unambiguously sets that number at ten positions. The interplay between RCW 3.34.020 and .025 comes into effect when a county seeks to create a judicial position in excess of the number set forth in RCW 3.34.010. Here, Spokane County District Court “shall” have ten full-time judicial positions. Mr. Delaney’s writ of mandamus should be granted because the plain language of the Constitution and RCW 3.34.010 require the Board of County Commissioners and the Auditor to place ten district court judicial positions on the election ballot.

As the last sentence in RCW 3.34.010 states, the minimum number of judges set forth “may be increased as set forth in RCW 3.34.020.” Here, RCW 3.34.010 sets the number of Spokane County judicial positions at ten. The procedures set forth in RCW 3.34.020 only apply when Spokane County seeks to increase beyond the number set forth in RCW 3.34.010 (e.g., 10).

Spokane County amended its code to reflect the Legislative change to RCW 3.34.010, but claims that Resolution 2-0403

purported to give the County “sole discession [sic]” whether and when to establish the tenth position. See RESP. BR. at pp. 17-19<sup>1</sup>.

This claim is misplaced: A Spokane County resolution cannot trump the State Constitution and the Washington State Legislature.

Respondents argue that once the Legislature amended RCW 3.34.010 to increase the number of judges to ten, the procedures set forth in RCW 3.34.020 and .025 must be employed for that change to be effective. Aside from deviating from the plain language of the Constitution and RCW 3.34.010, this circular argument is logically flawed. In essence, the Legislature would first amend the statute to change the number of judges and then determine if the statutory amendment was justified under RCW 3.34.020, and .025. This simply doesn't make sense. The plain language of RCW 3.34.010 sets the minimum number of judicial positions for Spokane District Court at ten. This case does not involve an increase from ten judicial positions, which would then implicate an analysis using RCW 3.34.020 and .025.

Ten means ten. Shall means shall. As appellate courts routinely note, plain words do not need construction. Legislative

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<sup>1</sup> “Clearly under Spokane County Resolution No. 02-0403, the Board of County Commissioners did not create or agree to fund the 10<sup>th</sup> full time District Court Judge position.” RESP. BR. at p. 19.

and constitutional mandates mean what they say. The trial court erred by not granting Mr. Delaney's writ of mandamus.

However, even under the County's argument that the tenth position set forth in RCW 3.34.010 involves RCW 3.34.020 [increasing number set forth in 3.34.010 requires objective caseload analysis] and .025 [additional positions created under 3.34.020 require County approval to pay without using State funds], the facts establish that these requirements were met.

**2. The County should be estopped from changing its position once it received the necessary Legislative approval for the tenth judicial position it requested and testified that it would fund.**

Spokane County does not dispute that the then-Chair of its County Commission testified that Spokane County wanted the tenth judicial position for its district court, and agreed to fund the position. RESP. BR. at p. 19. As noted, the legislative history surrounding the amendments to RCW 3.34.010 states: "The county legislative authority wants the new position to be created and has agreed to pay for it." SB 6596 HOUSE BILL REP.

Incredibly, Spokane County now argues that it really didn't mean what it said when testifying<sup>2</sup> that Spokane County wanted

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<sup>2</sup> Those testifying in favor included the Chair of the Spokane County Board of Commissioners and the Presiding Judge of the Spokane County District Court.

and would fund the tenth position before the Washington State Legislature – but rather it was “analogous to lobbying” (RESP. BR., p. 19; see, *also id.* at p. 13), and didn’t rise to the level of formal Commission approval (RESP. BR. at p. 23). The Legislative Record speaks for itself.

In an attempt of further legal legerdemain, the County attempts to distinguish Mr. Delaney’s authority by stating: “Whereas here, the County has done nothing to present to the public the position has been approved and funded.” RESP. BR. at p. 23. Irrespective of the County attempting to characterize its public testimony under oath to the State Legislature that Spokane County wants and would fund the tenth position as informal lobbying, the statement that the County has “done nothing” to state such a position to the public is simply not accurate. The County’s testimony speaks for itself regardless of how it wants to characterize it.

Spokane County should be estopped from changing its public testimony that it would fund a tenth position after the Legislature gave the County what it requested by increasing its minimum number of judicial positions to ten. Courts apply equitable estoppel when a person establishes an inconsistent claim, upon

which that person reasonably relied, and injury results if the party that made the inconsistent claim is allowed to contradict the earlier claim or statement. *Wash. State Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19-20, 43 P.3d 4 (2002)(citations omitted).

Here, Mr. Delaney tendered his declaration of candidacy for the tenth judicial position, which is established in RCW 3.34.010 and SMC 1.16.020. He reasonably relied on the plain language of these laws:

- RCW 3.34.010 unambiguously states that Spokane County “shall” have ten full-time elected district court judges.
- SMC 1.16.020 states: “There shall be ten elected full-time judges in the Spokane County District.”

If Spokane County is allowed to repudiate its public testimony that it will fund the tenth judicial position, injury results to Mr. Delaney in that he lost an opportunity to seek election to a judicial position.

While generally disfavored against governmental entities, equitably estoppel nevertheless can be applied.<sup>3</sup> And it should here. This is not a situation in which a low-level government employee said something that the County later disavowed. Rather,

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<sup>3</sup> When the doctrine is asserted against the government, it must be necessary to prevent manifest injustice and not impair the exercise of governmental functions. *Campbell & Gwinn, LLC*, 146 Wn.2d at 20 (citation omitted).

the Chair of the Board of Spokane County Commissioners and the Presiding Judge of the Spokane County District Court publicly testified before the State Legislature as to an agreement that the County would fund the tenth judicial position for which it was asking the Legislature to create. Preventing the County from repudiating saves a manifest injustice, not creates one. Equitable estoppel does not impair the exercise of governmental functions. The County doesn't dispute the testimony that they need more judicial officers.

Moreover, Spokane County claims that the Board's Chair mere "lobbying" under oath "was in support of the perceived need to secure approval for a 10<sup>th</sup> position." *Id.* The need to secure approval from the State Legislature to establish a judicial position isn't "perceived," but rather mandated by our constitution.

The County's claim underscores the circular logic replete in its position. Respondents argue throughout their brief that it is the County that determines when and whether it will establish and fund the tenth judicial position – irrespective of the unambiguous language of the state statute and its own Code that sets the number of judicial positions at ten. However, it cannot usurp the constitutional or legislative mandate by County resolution stating

that it would establish the position – which it requested and testified it would fund – at its “sole discession [sic].”

Under its analysis of RCW 3.34.020 and 3.34.025, the County argues that the remaining necessary two steps to formally establishing the tenth judicial position do not exist. See RESP. BR., pp. 14-15. It seems to recognize the District Court Districting plan amended SMC 1.16.020 to state how: “There shall be ten elected full-time judges in the Spokane County District.” See RESP. BR. at pp. 14-15. However, the County claims that it “merely” amended the Districting Plan, but by resolution reserved upon the County the right to establish that tenth judicial position “at its sole discession [sic],” which means that the County didn’t really establish the tenth position – just as it never really agreed to fund the position. RESP. BR. at p. 19.

However, the County’s own argument defeats its claim that they -- not the State Legislature pursuant to its constitutional mandate -- “establish” the judicial positions. As noted in the materials the County cites, the Legislature creates the judicial position: “A county may take up to two years to phase in the new judicial positions **created by the legislature.**” Resp. Br. at 16 (quoting House Bill Rep., SB 6590)(emphasis supplied). The tenth

position was created by the Legislature upon the effective date of the 2002 amendments to RCW 3.34.010, which increased the number of judicial positions in Spokane County to ten.

In addition to arguing that the County never really agreed to fund the position, it claims there was no duty to fund the position anyway because the position lapsed when Spokane County didn't fund it. In support of this claim, it cites to how the most recent legislative history to 3.34.010 "**recreated**" an additional district court position. RESP. BR. at p. 24 (emphasis in original).

The County's own argument defeats their position. Respondents argue that Spokane County has the discretion to withhold creating the tenth judicial position and the two-year period does not commence until they create the position. If this were true, however, it would not be necessary for Clark County to "recreate" that new position; instead, it could do what Spokane County claims it can do: Indefinitely delay creating the tenth position. Despite being internally and logically inconsistent, this claim supports Mr. Delaney's position that it is the Legislature that creates the judicial positions, not the County.

Moreover, the fact that the County did not fund the position supports Mr. Delaney's argument that Spokane County had a duty

to fund the position as it testified it would. The County's argument that there was no duty to fund the position because the tenth position lapsed when the County did not fund it as agreed is flawed, circular logic.

Respondents argue that its interpretation is grounded in the concepts associated with the prohibition against unfunded State-mandates. Resp. Br. at pp. 22-23 (citing *Tacoma v. State*, 117 Wn.2d 348, 351, 816 P.2d 7 (1991)). In *Tacoma v. State*, the Washington Supreme Court affirmed the City of Tacoma's declaratory judgment for reimbursement of its costs associated with complying with new procedural requirements (*e.g.*, mandatory arrest provisions, protective orders, *etc.*) in the State's new Domestic Violence Prevention Act. When the Court rejected the claim that reimbursements had to be associated with costs that had traditionally been the State's function, the Court pointed to funding of judges:

RCW 43.135 is not limited in its application to programs and services which have traditionally been state functions. Two Attorney General Opinions support our conclusion. While not binding, they are persuasive. In AGO 3 (1980), the Attorney General considered the costs imposed by legislation mandating the addition of superior court judgeships. The Attorney General stated if the legislation imposes an increased level of service through its legally

mandated program with a resulting increase in costs, the State is liable to reimburse the taxing district. Because the addition of superior court judgeships increased the level of service to the public, the State was obligated to reimburse the taxing districts.

*Tacoma v. State*, 117 Wn.2d at 357. It is understandable that the Legislature would want to create additional positions upon a county's agreement to fund to position.

Secondly, and more importantly, unlike a traditional unfunded-mandate, this situation is far different from one where the State unilaterally legislates that a political subdivision must increase services. Here, Spokane County specifically requested the tenth judicial position, and testified that it would fund it. Based upon this testimony, the Legislature created the tenth position. The 2002 amendment to RCW 3.34.010, increasing the number of judges to ten, cannot be characterized as a compulsory legislative dictate over which the County had no control. Instead, Spokane County requested it and publicly testified that it would fund it.

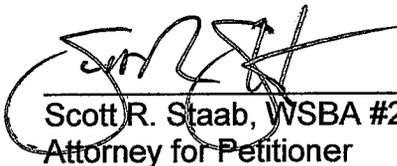
### **CONCLUSION**

The Constitution mandates that the Legislature set forth the number of District Court Judicial Positions. The unambiguous legislative mandate that Spokane County "shall" have ten judicial positions cannot be delegated or usurped by a County resolution.

resolution. The County has no discretion to ignore this number, but instead has a duty to place all ten positions on the ballot. The County should have accepted Mr. Delaney's duly tendered declaration of candidacy for the tenth position.

Mr. Delaney asks this Court to reverse the decision of the Superior Court and to grant his writ of mandamus, requiring Spokane County to hold a special election for the tenth district judicial position.

Respectfully submitted, February 26, 2007.

  
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Attorney for Petitioner

#### **CERTIFICATE OF SERVICE**

I, Scott R. Staab, declare under penalty of perjury under the laws of the State of Washington that on February 26, 2007, I had the original plus one copy filed with the Court of Appeals, Division III, and a copy of this brief personally served on the Respondent's attorney at:

James Emacio & Dan Catt  
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Signed this 26<sup>th</sup> day of February, 2007, in Spokane, Washington.

  
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Scott R. Staab