Court of Appeals NO 32336-6-III

(State Court Stevens Co 12-2-00459-3)

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

LINDA BAYS,
Appellant,

V.

ANTHONY GRABICKI,
Respondent

APPELLANT'S REPLY TO RESPONDENT'S AMENDED REPLY BRIEF

JAY NUXOLL, LAWYER
Washington State Bar No. 3506
13843 SE 10th Street
Bellevue, WA 98005-3717
(425) 641-2600
FAX (425) 641-2600
Attorney for Appellant, Linda Bays

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1. "PRO-TEMPORE" means "FOR A TIME"

There is no question that any temporary judge – whether merely a member of the bar or a judge from some other State of Washington county -- hearing a trial or doing a specifically judicial function in a different county where he is not a judge elected in that county is still a judge "pro-tempore", a judge "for a time.". The Washington Constitution does make some distinctions, but clearly **LABELS** even a "visiting" judge elected in another county a "pro-tempore" judge when handling cases in a county not his own. The very words of the Constitution make that clear, as follows:

> . . . ; 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 rules." Article 4, Section 7.

Members of the bar can also become judges "pro-tempore" if certain conditions are met. Consequently, while it is clear that not all judges "pro-tempore" are "visiting" judges, all "visiting" judges are still judges "pro-tempore.

2. REQUEST OF THE JUDGE IS "DUTY" OF THE JUDGE

The Constitution also specifies that any "pro-tempore" judge, even a sitting judge of some other superior court "acting as a judge pro-tempore" in a county may do so only "**at the request of the judge of the superior court thereof**". That specific provision of the Washington State Constitution designates the judge of that superior court to make the request, not the court administrator, and even more certainly for the Tri-Counties not the court Administrator for Spokane County. That request is thus a judicial "**duty.**." Judicial duties cannot be delegated to court administrators. Only judges can do duties designated as theirs by the Constitution.

In **State ex rel Carpenter v. Superior Court of Lewis County,** 131 Wash. 448, 230 Pac. 144 (1958) the Supreme Court declared the county judge (emphasis added) had failed **his duty** (emphasis added) in requesting a "pro-tempore" judge who did not continue the assigned case to its end. It was, the court said, the:

> Duty of the resident judge to designate a judge as soon as he was able to find [a judge "pro-tempore" – a visiting judge, by the way] who would consent to try the

case, who would thereafter have jurisdiction over the entire case . . When the visiting judge has been obtained, an order should be made transferring the case to such judge and notice given to the parties to the cause, or their attorneys, of the designation and transfer to the visiting judge to take charge of the cause."

A prior case in accord is **Nat Bank of Wash v. McCrillis,** 15 Wn 2d. 345, 130 P.2d. 901, 144 A.L.R. 1197 (1942) which dealt with the conditions to appointment of judge "pro-tempore" by parties litigant or their attorneys:

"Appointment must be approved by the court, and appointee before entering upon his duties, must take oath provided by law."

3. RESPONDENT WRONGLY CITES TRI-COUNTY LOCAL RULES

Perhaps in Spokane County the Administrator may claim to be acting under some Spokane County local rule in sending judges to Tri-County courts, but the Tri-County Administrator has no authority to make a request. The Tri-County Administrators duties are controlled by the rules of Tri-County, as follows:

d) **Duties of the Court Administrator**. The court administrator shall assist the presiding judge in his or her administrative responsibilities. Subject to the general supervision of the presiding judge, the court administrator's duties shall include:

(1) Administrative control of all non-judicial activities of the court;
(2) Case setting and trial calendar management;
(3) Preparation and administration of the budget;
(4) Coordination with state Administrative Office of the Courts;
(5) Assisting the presiding judge in dealing with county governments, governments, bar associations, news media and other public and private groups having a reasonable interest in the administration of the court;
(6) Preparation of such reports and compilation of statistics as may be required by the judges or state Administrative Office of the Courts;
(7) Making recommendations to the judges for the improvement of the administration of the court.
[Adopted September 1, 1991; amended effective September 1, 2004.]

Appellant must point out and totally object that Respondent completely misrepresented the Tri-County (i.e.**Ferry/Pend Oreille/Stevens) LOCAL GUARDIAN AD LITEM GRIEVANCE RULE** [LRGAL 10], as follows:

(LRGAL 10). **UNAVAILABILITY OF PRESIDING JUDGE.**

> In the event the presiding judge is not able to sit on the committee, issue an order or make an assignment as required by these rules, on account of being the judge who is assigned to a particular case, or is recused or may otherwise be disqualified, the other sitting judge shall act in the place and stead of the presiding judge. In the event both judges are unable to so act, the court administrator shall arrange for a court commissioner or visiting judge, so to act.
> [Adopted effective September 1, 2004.]

That limited rule cannot be cited to attempt to somehow claim the administrator of Tri-Counties had some right to request and arrange for a "pro-tempore" judge. Those rules were adopted in 2004 when the **TEDRA** provisions for Trust and Guardian Ad Litem litigation under RCW 11.96.010 etc were adopted. The rule cited provides no authority except in such matters.

4. BEWARE LEST HARD CASES MAKE BAD LAW

The commissioner commented that the email thread the Respondent had included in his motion to add "additional material" seemed irrelevant. Of course the opposite is really what is totally true. The email proves no Tri-County judge had anything whatsoever to do with the arrival of Judge Frazier to hear the Stevens County case. However, that email thread was not really what the Respondent intended to add. He had all along intended to put into the record what he later added to his second motion, his "**motion for accelerated disposition.**" Despite the commissioners denial of his petition he just changed the name of the document he had already prepared and sent the "additional material" anyway.

But the fact situation that Respondent's email trail shows is directly opposite and entirely different fact situation in case, **State v. Hawkins**, 164 Wn.App. 705, 712, 265 P.3d 185 (2011) cited by the commissioner in her order. In that case the court commented:

> "[N]either the Washington State Constitution nor any statute "**make provision for the spreading upon the record of the fact that the visiting judge has been called to hold court.**" A superior court, as a court of general jurisdiction, is presumed to act within its authority absent an affirmative showing to the contrary." Ibid at 712.

But the cases, **supra,** certainly show there is a requirement that the judges do make the request. What the Respondent originally presented in the emails proves the exact opposite, that despite the Constitution requiring the judges make the request, **NO JUDGE WAS INVOLVED WHATEVER**. His emails presented proof that the "lower court" of Spokane County and the other various administrators made all the requests and all the arrangements. This is not a case of merely lacking something in writing.

That is exactly what the Appellant has been claiming all along. This is not a case where the Appellant intended not to accept any "visiting" judge. Instead the clerks papers (CP 01 to 019) show Appellant had gone out of her way to see that the record would show that a judge of Tri-Counties had actually made the request for a visiting judge. The **Hawkins** case, supra, certainly could lead to bad law if not carefully examined. Nowhere does it relieve the judges of a county from requesting the visiting judge (even if the court bewilderingly said: "**Presuming, for the sake of the argument, that the provisions of the statute are mandatory**" [really?]), merely that it was not necessary to provide written record of a request. The present case is entirely opposite. The very documents originally submitted by Respondent shows no judges were involved in any way. The court administrators had a nice little "email chit chat" and accomplished it.

CONCLUSION

Obviously, this court should ignore the devious attempt of the Respondent to have it enter an order that Judge Frazier himself would not. And credit should be given to Judge Frazier. A judge can not determine his own jurisdiction once challenged since he might not have jurisdiction to determine anything. Once jurisdiction is challenged it must be proven. A personal judgment rendered without jurisdiction is in violation of the due process clause of the United States Constitution. This issue of jurisdiction of Judge Frazier must be examined most clearly in light of the Constitution and Statutes. **State ex rel Anderson v. Chapman**, 86 Wn.2d 189, 543 P.2d 229 (1975);

> The wisdom of statutes or of Constitutional provisions is not subject to judicial review and the courts cannot engraft exceptions on the Constitution, no matter how desirable or expedient such exception might be."

There are prior cases which involve a judge brought from another county as a visiting judge which involve the specific duties of the resident judge of the county to request that pro-tempore judge, In **State ex rel Carpenter v. Superior Court for Lewis County**, 131 Wash. 448, 230 Pac. 144 (1958) construing the provisions of the Constitution; the Washington Supreme Court said:

> "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 Appellant must strongly object to the Respondent bringing additional materials to confuse the crucial issue, that of jurisdiction and the proper legal way judges of counties have a duty to designate a pro-tempore judge (even if a "visiting" judge) to hear a case in a county in which that judge was not elected. The issue is jurisdiction, and decisions by judges made without jurisdiction are void.

RESPECTFULLY SUBMITTED this 28th day of August, 2015

JAY NUXOLL, WSBA 3506
Attorney for Appellant, Linda Bays

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, than on the 28th day of October, 2015, a copy of the **APPELLANT'S REPLY TO RESPONDENT'S AMENDED REPLY BRIEF** was delivered to the following persons in the manner indicated:

CHRISTOPHER J. KERLEY, WSBA 16489
EVANS CRAVEN & LACKIE, P.S.
818 W. Riverside Ave, Ste. 250
Spokane, WA 99201
(509) 455-3632 facsimile
(509) 455-5200

via Regular Mail
via Certified Mail
via Fascimile

DATED this 28th day of October, 2015 in Bellevue, Washington

JAY NUXOLL