

**RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
CLERK'S OFFICE**

Jul 12, 2016, 3:07 pm

**RECEIVED ELECTRONICALLY**

Court of Appeals No. 32336-6-III  
Stevens County Superior No. 12-2-00459-3

**SUPREME COURT OF THE STATE OF WASHINGTON**

---

**ANTHONY GRABICKI, Respondent**

v.

**LINDA BAYS, Petitioner**

---

**RESPONDENT'S ANSWER TO APPELLANT'S  
PETITION FOR REVIEW**

---

EVANS, CRAVEN & LACKIE, P.S.  
CHRISTOPHER J. KERLEY, WSBA 16489  
COURTNEY A. CONKLIN, WSBA 41734  
818 W. Riverside Ave., Suite 250  
Spokane, Washington 99201  
(509) 455-5200  
(509) 455-3632 (fax)  
Attorneys for Respondent Anthony Grabicki

 ORIGINAL

**TABLE OF CONTENTS**

Table of Authorities.....ii

- I. Introduction.....1
- II. Issues Presented for Review.....2
- III. Respondent’s Statement of the Case.....3
- IV. Argument Why Review Should Be Denied.....4
  - a. Petitioner Has Failed to Establish Any of the Required Considerations Governing Acceptance of Review Under RAP 13.4.....4
  - b. Standard of Review.....6
  - c. Article IV § 7 of the Washington State Constitution and RCW 2.08.150 Authorizes a Judge of Any Superior Court to Hold Superior Court in Any Other County at the Request of the Superior Court Judge(s) of the Other County.....7
  - d. Court Rules Authorize the Superior Court Administrator to Act for the Presiding Superior Court Judge Requesting the Appointment of a Visiting Judge.....9
- V. Conclusion.....11

## TABLE OF AUTHORITIES

### CASES

<i>City of Spokane v. Rothwell</i> , 166 Wn.2d 872, 876, 215 P.3d 162 (2009).....	6
<i>Fed. Way Sch. Dist. No. 210 v. State</i> , 167 Wn.2d 514, 523, 219 P.3d 941 (2009).....	6
<i>Orwick v. City of Seattle</i> , 103 Wn.2d 249, 256, 692 P.2d 793 (1984).....	5
<i>State v. Chenoweth</i> , 160 Wn.2d 454, 462, 158 P.3d 595 (2007).....	6
<i>State v. Hawkins</i> , 164 Wn. App. 705, 712, 265 P.3d 185 (2011).....	11
<i>State v. Holmes</i> , 12 Wn. 169, 40 P. 735 (1895).....	1, 8, 9
<i>State v. Immelt</i> , 173 Wn.2d 1, 6, 267 P.3d 305 (2011).....	6

### CONSTITUTIONAL PROVISIONS

Wash. Const. art. IV, § 7.....	<i>passim</i>
--------------------------------	---------------

### STATUTES

RCW 2.06.030.....	5
RCW 2.08.150.....	<i>passim</i>

### COURT RULES

RAP 13.1.....	5
RAP 13.4.....	1, 2, 4, 5, 6

### LOCAL RULES

Ferry, Pend Oreille and Stevens County LAR 3.....	10
Spokane County Local Rule LAR 0.2.....	10

## I. INTRODUCTION

Visiting superior court judges frequently decide matters outside of their home counties, especially in rural areas. Article IV § 7 of the Washington State Constitution and RCW 2.08.150 authorize a superior court judge of one county to preside over a superior court case in another county, if requested to do so by the judges of the other courts. A party contesting jurisdiction of a visiting judge bears the burden of providing evidence demonstrating the absence of the visiting judge's jurisdictional authority. In this case, the Court of Appeals correctly determined that Ms. Bays failed to meet this burden under *State v. Holmes*, 12 Wn. 169, 40 P. 735 (1895).

Ms. Bays now petitions for review, yet fails to establish a single ground under RAP 13.4(b) warranting review by this Court. Simply put, no issue of genuine concern has been raised by Ms. Bays pursuant to the well-defined criteria set out in the Rules of Appellate Procedure. The Court of Appeals carefully considered the facts of this case and appropriately applied long-standing precedent. Thus, further review of this matter should be denied.

## **II. ISSUES PRESENTED FOR REVIEW**

Mr. Grabicki acknowledges the issues Ms. Bays presents for review, yet believes the question is more appropriately formulated as follows:

Should this Court deny review of a decision by the Court of Appeals to affirm a trial court's jurisdiction of this case where Ms. Bays fails to identify any significant question of law under the Constitution of the State of Washington – or any other requirement of RAP 13.4 – meriting such review?

## **III. RESPONDENT'S STATEMENT OF THE CASE**

Respondent Anthony Grabicki is the bankruptcy trustee for the Bankruptcy Estate of David Bays. The Bankruptcy Estate contains certain real property located in Stevens County, Washington, referred to as the "Kettle Falls Property." On October 9, 2012, as part of his effort to sell the Kettle Falls Property for the benefit of the Bankruptcy Estate, Mr. Grabicki filed a Complaint for Ejectment of Petitioner Linda Bays and others, in Stevens County Superior Court.

Ms. Bays responded to the Complaint by filing a "cross claim" wherein she added a number of other parties to the suit, including multiple Spokane County Superior Court judges. On June 4, 2013, both the Honorable Allen C. Nielson and the Honorable Patrick A. Monasmith – the only sitting judges for Stevens, Ferry and Pend Oreille County Superior Courts – recused themselves from this action, and an Order of Recusal was issued.

Subsequent to the Order of Recusal, Judge Neilson requested the Stevens County Court Administrator to confer with Spokane County Superior Court to find a replacement judge. In August, 2013, Presiding Judge of the Spokane County Superior Court, Ellen Kalama Clark, assigned Judge David Frazier of Whitman County Superior Court to preside over the case.

Ultimately, Judge Frazier issued summary judgment orders in favor of Mr. Grabicki, quieting title against Ms. Bays and other individuals/entities who had asserted an interest in the Kettle Falls Property. Judge Frazer ordered that Ms. Bays and others be ejected from the property.

In January, 2015, Ms. Bays lodged a Notice of Appeal with the Division 3 of the Washington State Court of Appeals. The only issue raised on appeal was whether Judge Frazier had “jurisdiction” to preside over this case. The Court of Appeals affirmed Judge Frazier’s authority to hear the case, holding that Ms. Bays “failed to present any affirmative evidence...that would demonstrate a visiting judge had not properly been requested.” *Petition for Review, Appendix*, at A-7. Ms. Bays now seeks review of the Court of Appeal’s decision.

#### **IV. ARGUMENT WHY REVIEW SHOULD BE DENIED**

##### **a. Petitioner Has Failed to Establish Any of the Required Considerations Governing Acceptance of Review Under RAP 13.4**

Ms. Bays fails to acknowledge *any* of the mandatory conditions governing this Court's acceptance of review, as set forth in RAP 13.4. Specifically, RAP 13.4(b) requires a party seeking review to establish one of the four criteria described in the rule before review can be accepted. Review will only be granted upon a sufficient showing by the Petitioner that: (1) the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; (2) the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; (3) a significant question of law under the Constitution of the State of Washington or the United States Constitution is involved; or (4) the petition involves an issue of substantial public interest. RAP 13.4(b).

Strikingly, Ms. Bays fails to articulate a single basis warranting review under RAP 13.4(b) in her Petition. Ms. Bays does not identify the existence of a conflict between the Court of Appeals' decision and any prior decision of the Supreme Court or Court of Appeals. Ms. Bays also fails to identify any significant question of law present in this case. Lastly, Ms. Bays fails to identify a substantial public interest sufficient to merit this Court's review.

Rather than complying with RAP 13.4's procedural requirements, Ms. Bays makes the conclusory assertion that "[r]eview ought to be a matter of right rather than whim of the Supreme Court." *Petition for Review*, at 4. This statement ignores the the specific directives contained in the Rule of Appellate Procedure. RAP 13.1(a) explicitly states:

**(a) One Method of Seeking Review.** The only method of seeking review by the Supreme Court of decision of the Court of Appeals is review by permission of the Supreme Court, called "discretionary review."

(emphasis added). Contrary to Ms. Bays' assertion, the Rules of Appellate Procedure clearly state that the *only* method of seeking review is by permission of the Supreme Court. The ability to seek review by the Supreme Court "as a matter of right" simply does not exist.<sup>1</sup>

Ms. Bays has failed to provide a single basis in which this Court may grant review pursuant to RAP 13.4, and her Petition woefully lacks compliance with the Court Rules. "It is not the function of trial or appellate courts to do counsel's thinking and briefing." *Orwick v. City of Seattle*, 103 Wn.2d 249, 256, 692 P.2d 793 (1984). Ms. Bays' failure to assert any argument addressing "why" review should be accepted prevents this Court from properly assessing whether review "should" be granted. It is not the function of this Court to explicate the basis for review on behalf

---

<sup>1</sup> Indeed, RCW 2.06.030 was amended in 1979 to eliminate this method of review. See Laws 1979, ch. 102.

of Ms. Bays. Ms. Bays' failure to comply with RAP 13.4 by ignoring her obligation to identify an appropriate consideration for review is fatal to her Petition and review must be denied.

**b. Standard of Review**

At most, Ms. Bays' Petition can be interpreted as asserting that review should be accepted because a "significant question of law under the Constitution of the State of Washington...is involved." RAP 13.4(b)(3). As to the merits of Ms. Bays' appeal, she asserts Judge Frazier acted without constitutional authority because he was assigned the case by a Spokane County judge rather than a judge from Stevens County. As was appropriately addressed by the Court of Appeals, the resolution of these issues necessarily involves interpretation Article IV § 7 of the Washington State Constitution and RCW 2.08.150. Interpretation of constitutional provisions and statutes present a question of law, which appellate courts are required to review de novo. *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011) (citing *City of Spokane v. Rothwell*, 166 Wn.2d 872, 876, 215 P.3d 162 (2009); *Fed. Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 523, 219 P.3d 941 (2009) (citing *State v. Chenoweth*, 160 Wn.2d 454, 462, 158 P.3d 595 (2007))).

**c. Article IV § 7 of the Washington State Constitution and RCW 2.08.150 Authorize a Judge of Any Superior Court to Hold Superior Court in Any Other County at the Request of the Superior Court Judge(s) of the Other County.**

Article IV § 7 of the Washington State Constitution and RCW 2.08.150 authorize a superior court judge of one county to preside over a superior court case in another county, if requested to do so by the judges of the other courts. Article IV § 7 of the Washington State Constitution states:

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. The supreme court rule must require assignments of judges pro tempore based on the judges' experience and must provide for the right, exercisable once during a case, to a change of judge pro tempore. Such right shall be in addition to any other right provided by law. 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.

Wash. Const. art. IV § 7 (emphasis added). Significantly, Article IV § 7 distinguishes between a visiting superior court judge and a judge pro

tempore. *Id.* A visiting judge must be a superior court judge in another county. *Id.* In contrast, an attorney may act as a judge pro tempore through written agreement of the parties, approved by the court and sworn to try the case. *Id.*

Likewise, RCW 2.08.150 provides, “Whenever a like request shall be addressed by the judge, or by the majority of the judges (if there be more than one) of the superior court of any county to the superior court 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.”

In this case, it is undisputed that Judge Frazier expressly told Ms. Bays on the record that he was acting as a visiting judge rather than as a pro tempore. *Petition for Review, Appendix* at A-5. The dispositive issue raised for review by Ms. Bays is whether the source of Judge Frazier’s authority to act in Stevens County was appropriate given the facts and circumstances of this case, including the lack of written request in the court record.

As the Court of Appeals explained, the controlling case on this issue is *State v. Holmes*, 12 Wn. 169, 40 P. 735 (1895). In that case – which remains good law – the Court held 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. Further, the Court instructed, “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. In other words, the party contesting jurisdiction bears the burden of providing evidence demonstrating the claimed defect in a visiting judge’s authority to hear the case. *Id.* at 180.

While *Holmes* is distinguishable from this case based upon the timing in which the jurisdictional challenge was raised, Ms. Bays nevertheless failed to present any affirmative evidence demonstrating that Judge Frazier had not been properly requested. It was Ms. Bays’ obligation to set forth facts in the record sufficient to demonstrate that Judge Frazier had not been appropriately requested or assigned to hear the case. She failed to do so. The Court of Appeals appropriately denied her appeal on the basis that she failed to meet her burden under *Holmes*.

**d. Court Rules Authorize the Superior Court  
Administrator to Act for the Presiding Superior Court  
Judge Requesting the Appointment of a Visiting Judge**

Nevertheless, Judge Frazier was appropriately appointed to hear this matter under the Court Rules. General management of the Superior Court is vested in the presiding judge under the local rules of Ferry, Pend

Oreille and Stevens County. LAR 3. As the presiding judge's representative, the Court Administrator is authorized to manage the trial calendar and case assignments. LAR 3(d)(2).

Likewise, Spokane County local rules authorize the Spokane County Superior Court Administrator to assist the presiding judge with administrative responsibilities. Subject to the general supervision of the presiding judge, the Court Administrator's duties include coordinating with the state court administrator and with the visiting judge program. Spokane County LAR 0.2(f)

Judges Nielson and Monasmith – the only sitting judges for Stevens, Ferry and Pend Oreille County Superior Courts – recused themselves from this action, and an Order of Recusal was subsequently issued. Judge Nielson then requested Stevens County Court Administrator to confer with Spokane County Superior Court to arrange a visiting judge pursuant to LAR 3. Because Ms. Bays had added counterclaims to this lawsuit against sitting Spokane County Superior Court judges, presiding Judge Ellen Kalama Clark of Spokane County Superior Court appointed Judge Frazier to hear the matter. Despite the fact that there is no evidence in the record of the specific request, neither the Washington Constitution nor RCW 2.08.150 require that a request for a visiting judge to be made

part of the record before the visiting judge has authority to act. *State v. Hawkins*, 164 Wn. App. 705, 712, 265 P.3d 185 (2011).

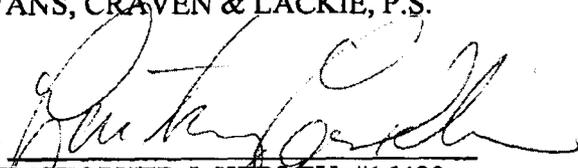
There is no question that the difficulty in finding a judge to hear this case was the direct result of Ms. Bays' legal maneuvering. Despite her repeated attempts to derail this litigation, Ms. Bays has failed to present any evidence on appeal demonstrating Judge Frazier's lack of jurisdictional authority to preside over this matter. Contrary to her assertions, Stevens County and Spokane County appropriately adhered to the Court Rules when assigning Judge Frazier to the case. This frivolous appeal is nothing more than another effort by Ms. Bays drag on what has already been a decade-long legal proceeding.

#### V. CONCLUSION

Based on the foregoing argument and authorities, Mr. Grabicki respectfully submits that the Court of Appeals decision was correct, and requests that Ms. Bays' Petition for Review be denied.

DATED this 12<sup>th</sup> day of July, 2016.

EVANS, CRAVEN & LACKIE, P.S.

By 

CHRISTOPHER J. KERLEY, #16489

COURTNEY A. CONKLIN, #41734

Attorneys for Respondent

**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, that on the 12<sup>th</sup> day of July, 2016, a copy of **RESPONDENT'S ANSWER TO PETITION FOR REVIEW** was delivered to the following persons in the manner indicated:

Linda Bays 1698 Nichols Rd. Kettle Falls, WA 99141	VIA REGULAR MAIL <input checked="" type="checkbox"/> VIA CERTIFIED MAIL <input type="checkbox"/> VIA FACSIMILE <input type="checkbox"/> HAND DELIVERED <input type="checkbox"/> VIA EMAIL <input checked="" type="checkbox"/>
Jay Nuxoll, WSBA 3506 13843 SE 10th Street Bellevue, WA 98005	VIA REGULAR MAIL <input checked="" type="checkbox"/> VIA CERTIFIED MAIL <input type="checkbox"/> VIA FACSIMILE <input type="checkbox"/> HAND DELIVERED <input type="checkbox"/> VIA EMAIL <input checked="" type="checkbox"/>

7-12-16 /Spokane, WA  
(Date and Place)

  
Benjamin Yesland