

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

Jul 27, 2016, 4:40 pm

RECEIVED ELECTRONICALLY

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,

PETITIONER'S REPLY BRIEF

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

 **ORIGINAL**

TABLE OF CONTENTS

Table of Authorities ii.

A. THE RESONDENT IGNORES ISSUE 2

B. COURT OF APPEALS ONLY SUGGESTS “CARE” 3

C. JUDICIAL DUTIES CANNOT BE DELEGATED 4

D. CONCLUSION 5

EXHIBIT A. 6

(Letter of Judges James E. Warne, Jame J. Stonier, Stephen M. Warning, and Jill M. Johanson, judges of the Superior Court of the State of Washington for Cowlitz County dated November 8, 2002 to the Honorable Joseph A. Tribobeau, Superior Court Presiding Judge of Snohomish County requesting , specifically pursuant to RXW 2.08.150, that the Snohomish County provide a visiting judge to hear a matter in Cowlitz County.)

TABLE OF AUTHORITIES

Page(s)

Cases

State ex rel Carpenter v. Superior Court of Lewis Co.
131 Wash. 448, 230 Pac. 144 (1958) 4

State v/ Hawkins, 164 Wash.App. 705, 265 P.3d 185 (2011) 3

State v. Holmes, 164 Wash. 169, 40 Pac. 735 (1895) 3

**Hynde’s Case, 4 C. 70b [book 4 of Coke’s English Kings’
Bench Reports] 76 Eng. Rep[1040 (1378-1865) 3**

Statutes

RCW 2.08.150 3 & 5

RCW 2.56.030(3) 5

RCW 2.56.040 5

Other Authorities

WASHINGTON STATE CONSTITUTION, Article 4, Sec 7 5

WASHINGTON STATE CONSTITUTION, Article 1, Section 29 . 5

Supreme Court Rule 29 5

A. THE RESPONDENT IGNORES ISSUE

This is truly a case of first impression. The Petitioner was determined to avoid being accused of first litigating to attempt to take advantage of the possibility of favorable decision before appealing. The issue is lack of jurisdiction when the proper procedures are not followed by the judges in a county when requesting a visiting judge to hear cases in their county in which the visiting judge was not elected.

The Respondent again wants to sidetrack the issue as he did in the Court of Appeals. He now suggests the Petitioner, **LINDA BAYS**, filed her appeal only on January of 2015. The Respondent wishes to shift to other matters. He does not want to face the fact that a decision by a court without jurisdiction is void.

The Petitioner filed her “Notice of Appeal” on basis of lack of jurisdiction on the part of the judge on March 17, 2014. Because the Court of Appeals demanded it, she had to file what she labeled an “Amended Notice of Appeal” on August 12, 2014 even as the Respondent continued his case in Stevens County without further opposition on her part. And after Respondent finally concluded his case the Petitioner was required by the Court of Appeals to file yet what she labeled a “Notice of Second Amended Appeal” on January 26, 2015. But she has throughout always appealed the lack of jurisdiction.– all of which are clearly shown on the Steven County Court docket.

The Petitioner points out that the Spokane Superior Court Administrator has no authority to assign judges, especially from other counties (in this instance first from Lincoln, and finally from Whitman County) to sit as visiting judges in the Tri Counties (Stevens, Ferry and Pend Oreille). There is neither constitutional nor statutory authority for that, and, clearly, the duty of the majority of the judges of the county where the visiting judge is to sit to make the request was not followed.

B. COURT OF APPEALS ONLY SUGGESTS “CARE”

The case, *State v. Holmes*, 12 Wash. 169, 40 Pac. 735 (1895), cited by the Respondent and the Court of Appeals Division III relies upon a Latin phrase suggesting that everything done by a court is supposedly done properly, unless the Petitioner proves otherwise. As indicated it is equally impossible to require Defendants to prove themselves innocent in a criminal trial. One cannot prove a negative.

However, the judges of other County Courts do bother to follow the Constitution and the various laws in such cases as the Petitioner has pointed out. For example, as shown by **EXHIBIT A attached**, the judges of the Superior Court of the State of Washington for Cowlitz County (Kelso) each signed on November 8, 2002 a letter to Judge Thibodeau of Snohomish County (Everett) requesting pursuant to **RCW 2.08.150** a visiting judge be sent to hear a matter in a specific Cowlitz County case. The ancient Latin rule as shown properly applied in *Hynde's Case*, 4 C. 70b, [book 4 of Coke's English King's Bench Reports] 76 Eng Rep 1040 (1378-1865), is that it takes but a single contrary instance to prove the assumption wrong. The contrary is now clearly shown. Are other counties to be deemed in error because they are following the Constitution and the statutes?

Further, upon honest consideration of the facts in *State v. Hawkins*, 164 Wash.App. 705, 265 P.3d 185 (2011) it is clear that at least the judges involved in that case knew of the requirement of themselves making the request for a visiting judge because there was a “nunc pro tunc” order entered. Everyone understands no appeals court would grant a jurisdiction challenge made only after two previous unsuccessful appeals never mentioning it by an already convicted and incarcerated Defendant.

The process by which the Spokane County Administrator has been assigning judges is clearly without authority or justification. And especially because those assignments were of sitting judges elected in Counties other than in Spokane. There is no way she can be claiming it was only an administrative action. How could she have any authority in other counties?

Were it an accepted practice for administrators to make such assignments, why would other honorable and learned judges in the state not also feel free to disregard the Constitution and the statutes and continue to bother having the majority of the judges of the county sign the letters to another county court when requesting a visiting judge. Besides, if the Court of Appeals Division III in Spokane could even piously suggest the courts of Spokane County and the Tri-Counties (and, apparently, also Lincoln and Whitman Counties) need to take more care, but still find acceptable what has been happening among them, why would more care be needed or suggested?

C. JUDICIAL DUTIES CANNOT BE DELEGATED

Respondent tries to make much of the various Local County Rules which give the Court Administrators a right to assist in scheduling. In fact, in the Court of Appeals the Respondent even wrongly cited a special rule allowing the Court Administrator of the Tri County Court to find pro-tem judges for guardianship contests as perhaps giving right to find pro-tem judges normally. The delegation of the judicial duty to request the visiting judges is one that cannot be delegated.

That is what State ex rel Carpenter v. Superior Court for Lewis County, 131 Wash. 448, 230 Pac. 144 (1958) says in 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. As pointed out, even in the Supreme Court the Court Administrator can only advise the Presiding Justice concerning the needs of judges to be assigned to counties as visiting judges. The administrator for the courts has no authority to direct or assign judges, only under the supervision and direction of the chief justice, to:

RCW 2.56.030 (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:

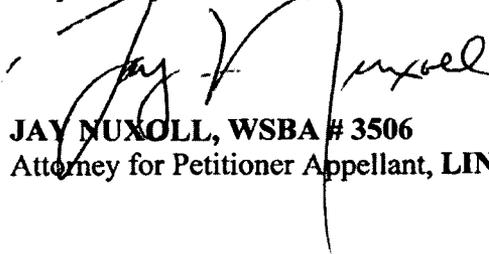
The chief justice shall consider all recommendations of the administrator for the assignment of judges, and, *in the discretion of the chief justice*, direct any judge whose calendar, in the judgment of the chief justice, will permit, to hold court in any county or district where need therefore exists, 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.

Likewise, there is no authority can be given to the Spokane County Administrator to assign and direct the judge of another county (Lincoln or Whitman, for example) to go sit as a visiting judge in the Tri-Counties, nor, for that matter, for a judge of Spokane County to assign and direct a judge from Lincoln or Whitman County to do so..

D. CONCLUSION

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. *"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.**

Respectfully Submitted,



JAY NUXOLL, WSBA # 3506
Attorney for Petitioner Appellant, **LINDA BAYS**

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR COWLITZ COUNTY
Judges' Chambers

ENDORSED
FILED
SUPERIOR COURT
NOV 12 2002

James E. Warme
Department No. 1

Stephen M. Warning
Department No. 2

Jill Johanson
Department No. 3

COWLITZ COUNTY
TERMINAL SERVICE
Department No. 4

Nancy Williamson
Court Administrator
360.577.3085

Gayle Engrat
Administrative Deputy
360.577.3070

November 8, 2002

The Honorable Joseph A. Thibodeau
Superior Court Presiding Judge
Snohomish County Courthouse
3000 Rockefeller Ave. MS 206
Everett, WA 98201-4060

Re: Request for Visiting Judge

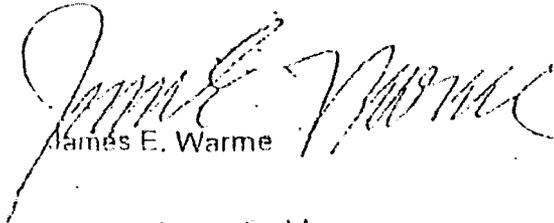
Dear Judge Thibodeau:

Pursuant to RCW 2.08.150, we are requesting that you provide us with a visiting judge to hear all matters in the case of Wozny, et al. vs. Bridgewater, et al., Cowlitz County Cause Number 02-2-01408-0.

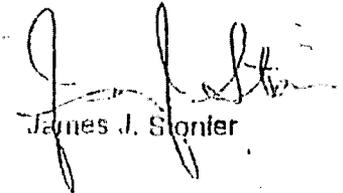
The reason for this request is that none of the sitting judges here in Cowlitz County are able to preside in this case.

The Superior Court Administrator will handle scheduling of any hearings.

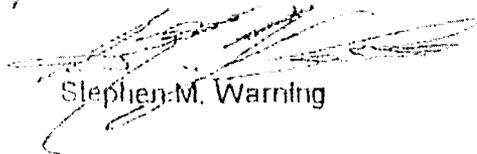
Sincerely,



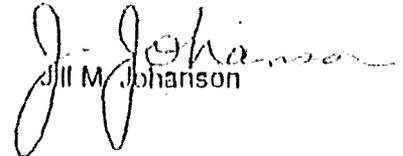
James E. Warme



James J. Stoner



Stephen M. Warning



Jill M. Johanson

JEW:grme

xc: Cowlitz County Clerk

Hall of Justice - 312 SW First Avenue - Kelso, WA 98626
TDD Phone 360.577.3061

3171729

6

Certificate of service

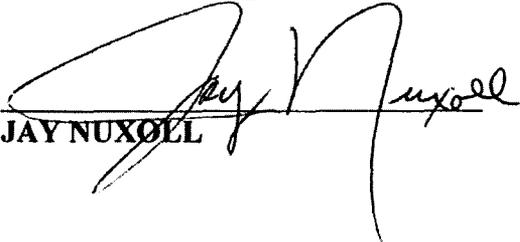
PURSUANT to RCW 9A.72.085, the undersigned hereby certifies under penalty to perjury under the laws of the State of Washington, that on the 31st day of May, 2016, a copy of the **PETITION'S REPLY BRIEF** was delivered to the following persons in the manner indicated:

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

via regular mail
via certified mail

and to Honorable David Frazier, Whitman County Judge
via email to sonyam@co.whitman.wa.us in his behalf

DATED this 26th day of July, 2016 in Bellevue, Washington.


JAY NUXOLL

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, July 27, 2016 4:41 PM
To: 'jay nuxoll'
Subject: RE: Scanned Document

Received 7/27/2016.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

Questions about the Supreme Court Clerk's Office? Check out our website:
http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/

Looking for the Rules of Appellate Procedure? Here's a link to them:
http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP

Searching for information about a case? Case search options can be found here:
<http://dw.courts.wa.gov/>

-----Original Message-----

From: jay nuxoll [mailto:jay@nuxoll.org]
Sent: Wednesday, July 27, 2016 4:34 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Fw: Scanned Document

You have no idea how difficult it was to get this emailed. My scanner would not work. I finally had to go to Fed Ex, have my originals scanned and sent to me, and I am now forwarding it.

JAY NUXOLL, LAWYER
Washington State Bar No. 3506
13843 SE 10th Street
Bellevue, WA 98005-3717
Phone or FAX (425) 641-2600
jay@nuxoll.org

----- Original Message -----

From: "usa5171" <usa5171@fedex.com>
To: <jay@nuxoll.org>
Sent: Wednesday, July 27, 2016 4:17 PM
Subject: Scanned Document

>
> --
> Thank you,
>

> #5171 Crossroads, WA
> FedEx Office
> 1313 156th Avenue NE
> Bellevue, WA 98007
> (425) 957-4415 - TEL
> (425) 957-4470 - FAX
> fedex.com\us
>
>