

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY
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NO. 40865-1-II

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

ARTHUR S. WEST,

Appellant,

v.

THURSTON COUNTY

And

THE PORT OF OLYMPIA,

Respondents.

RESPONDENT THURSTON COUNTY'S BRIEF

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I. NATURE OF THE CASE

Plaintiff/Appellant Arthur West alleged in his complaint that representation of Thurston County by a private law firm was illegal. West sought declaratory relief against the County enjoining representation by “unlawful private entities.” West also complained of alleged violations of the Public Records Act. West sought from the County attorney fee invoices generated by a private law firm, Patterson Buchanan Fobes Leitch & Kalzer, Inc., P.S., regarding two cases the firm was handling on behalf of the County as well as records of any appointment or “authority” for representation of the County by anyone other than the Thurston County Prosecutor’s Office.

After West sued the County, all sitting judges of Thurston County Superior Court recused themselves. Thurston County Presiding Judge Gary Tabor reassigned the case to Judge Bruce Heller of King County Superior Court as a visiting judge. The parties were notified of the case reassignment to Judge Heller by letter from Judge Tabor’s judicial assistant. West voiced no objection to the appointment of Judge Heller.

After Judge Heller later announced his decision to grant summary judgment on all of West’s claims against the County, West sent an email to the trial court asserting that Judge Heller had been improperly appointed. Specifically, West asserted that Judge Heller was unlawfully

exercising judicial power. Judge Heller recused himself. The case was reassigned to King County Superior Court Judge Bruce Hilyer with the concurrence of then Thurston County Presiding Judge Paula Casey for resolution of West's remaining claims against the other defendants.

II. RESTATEMENT OF THE ISSUES

1. Was the appointment of Judge Heller and, later, of Judge Hilyer to act as visiting judges by the Presiding Judge of Thurston County Superior Court proper?

2. Was representation of the County by the private law firm of Patterson Buchanan proper?

3. Was the trial court's ruling that West did not have standing to pursue a claim for "illegal representation" proper?

4. Did the trial court err by taking "too long" to issue its ruling?

5. Was the trial court's ruling on West's PRA claims proper?

III. RESTATEMENT OF THE CASE

West filed his complaint on November 28, 2007. CP 4-10. The complaint listed numerous defendants, including Thurston County. CP 4. The complaint sought declaratory relief preventing the County from appearing through private counsel and also alleged violation of the Public Records Act. *Id.* The specific causes of action asserted included

(1) violation of the Public Records Act, (2) a claim for declaratory relief as to the representation of the County by unlawful private entities, and claims for (3) unconstitutional expenditure of public funds, (4) fraud, and (5) negligence. CP 8-9.

It is undisputed that the County had been represented in several previous cases by attorney Michael Patterson, formerly with the private firm of Lee Smart Cook Martin and Patterson, P.S., Inc. (Lee Smart) and later with the private law firm of Patterson Buchanan Fobes Leitch & Kalzer, Inc., P.S. (Patterson Buchanan). It is also undisputed that the County has a contract/coverage agreement with the Washington Counties Risk Pool. CP 1089. After West filed his complaint in this case, the Risk Pool assigned the Patterson Buchanan firm to represent the County. *Id.*

Given the amorphous nature of the allegations asserted in plaintiff's complaint related to the PRA claim, the County served discovery requests seeking clarification from West on exactly how it had allegedly violated the PRA. The County asked West for a copy of the specific PRA request at issue in this lawsuit (CP 184) and for copies of any documents West had received in response. CP 185. In response, West identified three sets of documents he had requested: (1) attorney fee invoices for *Broyles v. Thurston County*, (2) attorney invoices for *West v. Thurston County*, and (3) records of any lawful appointment for

representation of the County by anyone other than the Thurston County Prosecutor. CP 193. The only document produced by plaintiff in response to the County's requests for production was a September 8, 2007, letter to West from County Chief Administrative Officer Donald Krupp that set forth the County's response to West's September 3, 2007, PRA request. CP 196; CP 1753 at 5:16-18; CP 166 at ¶ 7.

West eventually filed a motion to show cause on his PRA claim against the County. CP 1746-48. The County responded (CP 1749-67, 1768-76) and provided declarations supporting its position (CP 165-598). West failed to reply. In summary, the County made the following arguments regarding West's PRA claims:

Broyles invoices

The County argued that West had previously requested the *Broyles* invoices in a January 22, 2007, PRA request. CP 1750; 1770-73. West's request for *Broyles* invoices became the subject matter of a lawsuit West filed in Mason County Superior Court prior to the time this lawsuit was filed. *Id.* When West made a second PRA request to the County for the same invoices on September 3, 2007 (the request at issue in this lawsuit), the County responded by referring plaintiff to the documents previously produced and that were the subject of the Mason County lawsuit. CP 1771; CP 196. Because West's request for the *Broyles* invoices was

already being litigated in a different lawsuit in Mason County, it made no sense for the same issue to be litigated before the Thurston County court.

West invoices

The County argued that when a person making a PRA request is also a party, the documents available through the PRA to that party are limited to that which is available under the Civil Rules. CP 1773-74. As a litigant, the County argued, West would not be able to discover the County's attorney fee invoices incurred in the defense of his case under the Civil Rules while his case remains pending.

"Authority" to represent the County

In regard to authorization for private counsel to represent the County in *Broyles*, the County argued that in response to West's September 2007 PRA request it referred him to a letter for a previous PRA request which enclosed a "Special Attorney Appointment" dated January 24, 2003. CP 677. In regard to authorization for private counsel to represent the County in *West v. Thurston County*, the County argued that it did not have a Special Attorney Appointment at the time of West's PRA request, and that it could not produce a document it did not have. *Id.*

The trial court's ruling on West's PRA claims

On September 3, 2008, the trial court heard oral argument on West's motion to show cause. CP 612-13. Although an order was not

entered on that date, the clerk's minute entries memorialize that that Court deferred to the Court in Mason County consideration of the *Broyles* invoices. CP 612. The minute entry memorializes that the deferral was by agreement of the parties. The trial court denied West's request for the attorney invoices in the *West* case. CP 613. Finally, the court reserved ruling on the disclosure of records regarding the appointment of Patterson Buchanan to represent the County. CP 613.

On December 30, 2008, Judge Heller signed an order on plaintiff's motion to show cause. The order was filed in Thurston County Superior Court on January 26, 2009. CP 675-79. The order articulates Judge Heller's rationale as to why the request for "authority" for private counsel to represent the County in *Broyles* had been complied with (CP 677) and why the County had no obligation to produce "authority" for private counsel to represent the County in *West v. Thurston County* (CP 677-79).

The County's motion for summary judgment on all non-PRA claims

After the trial court's ruling on West's PRA claims, the County filed a motion for summary judgment on West's remaining non-PRA claims, i.e., his claims for declaratory relief regarding illegal representation of the county by private law firms, unconstitutional expenditure of public funds, fraud and negligence. Despite obtaining a one month continuance, West did not submit any argument as to why the

trial court should not dismiss his fraud, negligence, and “unconstitutional expenditure of public funds” claims. CP 629-40; 1777-84. In reply, in regard to the “illegal representation” claim, the County argued, first, that there is no cause of action for “illegal representation.” CP 1778. Second, the County argued, West did not have standing to bring such a claim. CP 1778-80. Third, the County pointed out that West had inquired with the State Auditor’s Office as to whether the County’s use of private attorneys is lawful (CP 1780) and that in a September 3, 2008 letter opinion to West the State Auditor explained that RCW. 36.32.200 does not apply when private counsel is retained by a risk pool to represent a County. *Id.*

On January 13, 2009, Judge Heller heard oral argument on the County’s motion for summary judgment. The court ruled from the bench that it was granting summary judgment on plaintiff’s claims of fraud, negligence, and unconstitutional expenditure of public funds. CP 672. The court reserved ruling on the claim for illegal representation, directing the parties to submit additional briefing on the standing issue by February 3, 2009. CP 672.

The parties submitted additional briefing on the issue of standing. However, the court mistakenly believed that the briefing was related to issues that had already been resolved and took no action.

On March 31, 2010, Judge Heller held a telephonic status conference in which he began by apologizing to the parties for the delay in the case. CP 1086-87. The trial court explained that court staff had assumed the briefing submitted by the parties pertained to motions that had already been heard. CP 1086. The court stated that its failure to issue a ruling on the illegal representation claim was inadvertent and that the court had not “declined to rule,” as Mr. West had suggested. *Id.* The court stated that the illegal representation claim had “slipped through the cracks” and apologized to the parties. CP 1087.

The trial court then ruled that Mr. West did not have standing to bring a claim for “illegal representation.” CP 1087-89. Judge Heller noted that West failed to establish (1) that he asked the Attorney General to institute an action, and (2) that the Attorney General refused. CP 1089. Judge Heller cited *Kightlinger v. PUD No. 1*, 119 Wn. App. 501 (2003), for the proposition that both of these criteria must be established. *Id.* The court noted that West alleged in paragraph 4.3 of his complaint that “he filed a request for investigation and/or action with the County Prosecutor and the Attorney General regarding [unconstitutional] expenditure of funds. *Id.* However, the court further noted, CR 56(e) makes clear that a party opposing summary judgment cannot rely on mere allegations, but must set forth specific facts showing that he has met the requirements for

standing. *Id.* The court ruled that Mr. West had not established through admissible evidence that the Attorney General declined his request. *Id.* Therefore, the trial court concluded, Mr. West lacked standing to bring his illegal representation claim. CP 1089.

The trial court also ruled that even if West had standing, it would have dismissed West's illegal representation claim on the merits. CP 1089. Judge Heller noted that the County did not directly hire the Patterson Buchanan firm. *Id.* Rather, the County had a contract (coverage agreement) with the Washington Counties Risk Pool which, in turn, retained the Patterson Buchanan firm. *Id.* Judge Heller stated that this is not a mere technical distinction. *Id.* Judge Heller noted that the State Auditor's Office concluded on September 3, 2008, that RCW. 36.32.200 applied to the County's authority to directly employ or contract with special attorneys. *Id.* However, Judge Heller ruled, RCW. 36.32.200 does not restrict the Risk Pool's ability to retain private counsel to represent the County. *Id.*

Finally, the trial court noted, "the result might be different if Mr. West had shown that the prosecutor's office routinely defended the County in civil actions. If under those circumstances, the County had hired Mr. Patterson as special counsel without demonstrating some disability preventing the prosecutor's office from handling the matter,

perhaps RCW. 36.32.200 would be implicated. Those, however, are not the facts presented to this Court.” CP 1089.

With the above stated oral ruling on March 31, 2010, all claims against the County had been dismissed. While an order was not signed memorializing the court’s rulings until a later date, the Court had disposed of all claims against the County made by West.

Later that day, West sent an email to the trial court, with copies to the parties’ respective counsel, asserting that Judge Heller was “unlawfully exercising judicial power.” CP 1785-86. It was not until after Judge Heller had ruled on all of West’s claims that West gave any indication he had an objection to the appointment of Judge Heller. Even then, no formal objection was filed. West merely sent an email at 5:41 p.m. on March 31, 2011. *Id.*

On the next day, April 1, 2011, West sent another email to the trial court, with copies to all parties’ respective counsel, stating that “bar complaints, tort claims, and judicial conduct commission complaints will issue all around.” CP 1787-90.

On April 2, 2010, Judge Heller signed a memorandum regarding his March 31, 2010, decision. CP 1085-90. The memorandum was filed in Thurston County Superior Court on April 8, 2011. CP 1085.

On April 21, 2010, Judge Heller signed the order granting Thurston County's motion for summary judgment. CP 1092-97. The order was filed in Thurston County Superior Court on April 26, 2010. CP 1092. The order memorialized that all of West's non-PRA claims were dismissed on summary judgment, as well as the fact that the court had previously dismissed plaintiff's Public Records Act claim. CP 1094. In regard to the PRA claims, Judge Heller inserted handwritten language into the order stating "this order does not affect the Court's 9/3/08 deferral of certain PRA issues to the Mason County Superior Court." CP 1096.

On May 3, 2010, an order of recusal signed by Judge Heller was filed. CP 22-23. Judge Heller indicated that he had been advised that West had filed a legal action against him. *Id.* While Thurston County had been dismissed as a defendant, West's claims against the remaining defendants, Port of Olympia and the Association of Washington Cities, remained viable. Judge Heller advised the parties that the case would be reassigned to another Superior Court Judge. CP 22.

On the same day, an order of reassignment was filed reassigning the case to Judge Bruce Hilyer. CP 21. The Order was signed by Judge Mary Roberts, Chief Regional Justice Center Judge for King County Superior Court. *Id.* Presiding Judge Paula Casey of Thurston County

Superior Court signed a letter concurring with the reassignment to Judge

Hilyer:

Dear Mr. West and Counsel:

This case was declared a visiting judge matter on or about June 19, 2008 when the entire Thurston County Superior Court bench recused. Following standard procedure the Presiding Judge delegated responsibility to our nearby jurisdictions to take this matter and King County Superior Court Judge Bruce Heller agreed to take this matter. On April 28, 2010 Judge Heller recused from further proceedings. With the recusal of Judge Heller an Order of Reassignment was issued by the Judge Mary E. Roberts, Chief Regional Justice Center Judge of King County Superior Court, assigning this matter to the Judge Bruce Hilyer as the visiting judge.

As Presiding Judge for the Thurston County Superior Court I concur in the reassignment of Judge Hilyer. Thurston County Superior Court greatly appreciates the efforts of the judges and staff of the King County Superior Court in this matter.

Very truly yours,

Paula Casey,
Presiding Judge

CP 24.

On May 4, 2010, the day after Judge Heller recused himself, West filed a “motion to reconsider and vacate” the summary judgment order signed by Judge Heller in favor of Thurston County. CP 1100-1106.

On May 20, 2010, Judge Hilyer signed an order denying West’s motion to reconsider and vacate. CP 1789-90. Judge Hilyer’s order stated that the previous order (signed by Judge Heller) “shall not be modified”

and “All causes of action asserted by plaintiff against Defendant Thurston County are DISMISSED WITH PREJUDICE.” *Id.* The order denying West’s motion for reconsideration was filed in Thurston County Superior Court on May 27, 2010. *Id.*

IV. STANDARD OF REVIEW

Review of an order granting summary judgment is de novo, with the appellate court engaging in the same inquiry under CR 56 as the trial court. *Tyrrell v. Farmers Ins. Co. of Washington*, 140 Wn.2d 129, 132-33, 994 P.2d 833 (2000). The trial court can be affirmed on any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. *Piper v. Department of Labor and Indus.*, 120 Wn. App. 886, 890, 86 P.3d 1231 (2004). .

Review of agency action under the Public Records Act is de novo. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 344, 217 P.3d 1172 (2009).

V. SUMMARY OF ARGUMENT

First, the appointment of Judge Heller and, subsequently, of Judge Hilyer to act as visiting judges by the presiding judge of Thurston County Superior Court was proper. After West sued Thurston County and all sitting Thurston County judges had recused themselves, Thurston County Presiding Judge Gary Tabor reassigned the case to Judge Bruce Heller of

King County Superior Court as a visiting judge. The parties were notified of the case reassignment to Judge Heller by letter from Judge Tabor's judicial assistant. West voiced no objection to the appointment of Judge Heller.

Even if West could show that the appointment of Judge Heller was somehow defective (he cannot), Judge Heller's decisions would not be void. A judge whose appointment is in violation of the authorizing statute serves as a *de facto* judge. Thus, the decisions of that judge are still valid. Moreover, because West did not raise any objection to the appointment of Judge Heller until after Judge Heller had announced his decision to dismiss all claims against Thurston County, West's claim that Judge Heller's appointment was improper is barred under the equitable doctrine of laches.

Second, Judge Heller's decision to appoint the Patterson Buchanan law firm as special attorneys for Thurston County was proper. West asserts that because Judge Heller was not legally occupying his office, his appointment of the Patterson Buchanan law firm to represent the County was also void. West argues that the Patterson Buchanan firm illegally represented the County. West's argument has no merit. The appointment of Judge Heller was not defective. Even if the appointment was somehow defective, Judge Heller acted as a *de facto* judge. Additionally, West did

not have standing to bring his claim for “illegal representation.” Finally, the appointments by Judge Heller were not necessary. The trial court correctly noted that the State Auditor’s Office has previously concluded that RCW. 36.32.200 applies to the County’s authority to directly employ or contract with special attorneys. However, the statute does not restrict a Risk Pool’s ability to retain private counsel to represent the County. In this case, it is undisputed that the County had a coverage agreement with the Washington Counties Risk Pool. It is undisputed that the Risk Pool retained the Patterson Buchanan firm. The trial court properly granted the County’s motion for summary judgment on West’s illegal representation claim. The trial court should be affirmed.

Third, the trial court’s ruling that West did not have standing to pursue his claim of “illegal representation” was proper. West asserted before the trial court that he had standing as a taxpayer. A condition precedent to taxpayer standing is that the Attorney General must first decline a request to institute the action. The trial court found that there was no evidence in the record to establish that West had asked the Attorney General to institute an action and that the Attorney General had refused. Applying CR 56(e), the trial court noted that a party opposing summary judgment cannot rely on mere allegations, but must set forth specific facts showing that he has met the requirements for standing. The

trial court properly granted summary judgment. On appeal, West's continuing assertion of standing, without citation to supporting evidence in the record, violates RAP 10.3(a)(6). The trial court's ruling that West did not have standing to pursue his claim of illegal representation was proper under CR 56(e). This Court should affirm.

Fourth, West's assertion that the trial court erred by improperly "delaying" its ruling is without merit. West challenges the legitimacy of the trial court's decisions because, in his view, it took "too long." West pontificates about the "lengthy, convoluted and tortuous proceedings" that "took nearly three years." West cites RCW. 2.08.240 as authority for his contention that an unreasonable delay is any period of time longer than 90 days. West takes RCW. 2.08.240 out of context. The text of the statute actually states that "every case submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof ... and upon *willful failure* of any such judge to do so, he shall be deemed to have forfeited his office." The fallacy in West's argument is that there was no "willful failure" on the part of Judge Heller to issue a ruling. Moreover, the County had no control over the trial court's speed in issuing decisions. As a policy matter, if a litigant could undo a decision against him simply because the decision took "too long", the finality of court decisions would be thrown into disarray. Finally, as a

practical matter, civil practitioners with even modest experience are familiar with the fact that many trial courts have very crowded dockets and that a three year process before a trial court is not unusual. West assignment of error that the trial court took too long and improperly delayed ruling is without merit.

Finally, the trial court's ruling on West's PRA claims was proper and should be affirmed.

VI. ARGUMENT

A. The appointment of Judge Heller and Judge Hilyer as Visiting Judges was proper.

1. The appointment of Judge Heller and, subsequently of Judge Hilyer, by the Presiding Judge of Thurston County Superior Court was proper and authorized under the State Constitution and by Supreme Court Administrative Rule.

The judiciary manages judicial assignments. The judicial power of the State is vested by the Washington State Constitution in the Supreme Court and the superior courts. Washington Constitution, Article IV, Section 1. The judge of any superior court may hold a superior court "in any county" at the request of the judge of the superior court of another county. Washington Constitution, Article IV, Section 7.

Consistent with its constitutional authority, the Washington Supreme Court has adopted its Administrative Rule (AR) 6. AR 6(b)

specifically authorizes the presiding judge of any superior court to assign another elected sitting judge to serve as a judge for that county. “Consent of the parties or attorneys is not required.” AR 6(b).

Here, after West sued Thurston County and all sitting Thurston County Superior Court judges recused themselves, Thurston County Presiding Judge Gary Tabor reassigned the case to Judge Bruce Heller of King County Superior Court as a visiting judge. The parties were notified of the case reassignment to Judge Heller by letter from Lyndsey Downs, Judicial Assistant to Judge Tabor. CP 1743; see also CP 24.

West’s contention that Lyndsey Downs herself made an unconstitutional appointment of Judge Heller is frivolous. See *Appellant’s Brief* at 38. Essentially, West argues that Downs acted as a rogue official, without the authority of Presiding Judge Tabor. West’s argumentative assertion is contrary to the record and should be rejected.

West voiced no objection to the appointment of Judge Heller. West did not file an affidavit of prejudice against Judge Heller. West did not file a pleading contending that the appointment of Judge Heller was improper until after Judge Heller had disposed of all claims by West against Thurston County.

2. Even if West could show that the appointment of Judge Heller was somehow defective (he cannot), West’s claim

nevertheless fails because Judge Heller's actions were made as a *de facto* judge.

Even if West could prove that Judge Heller's appointment to the position of Thurston County visiting judge suffered some technical defect, Judge's Heller's decisions would not be void. A judge whose appointment is in violation of the authorizing statute serves as a *de facto* judge. *Barrett-Smith v. Barrett-Smith*, 110 Wn. App. 87, 90-91, 38 P.3d 1030 (2002). Thus, the decisions of Judge Heller are valid.

A *de facto* judge is defined in Washington case law:

A *de facto* judge may be defined as one who occupies a judicial office under some color of right, who exercises the duties of the judicial office under color of authority pursuant to an appointment or election thereto, and for the time being performs those duties with public acquiescence, though having no rights in fact because the judge's actual authority suffers from some procedural defect.

Id. at 91 (citing *Cotton v. City of Elma*, 100 Wn. App. 685, 700, 998 P.2d 339, *review denied*, 141 Wn.2d 1039, 11 P.3d 824 (2000) (quoting 46 Am. Jur. 2d, *Judges*, § 242 (1994) (footnotes omitted). In 1947, the Washington Supreme Court held that "an officer *de facto* must be submitted to as such until displaced by a regular direct proceeding for that purpose." *State v. Britton*, 27 Wn.2d 336, 178 P.2d 341 (1947). "[H]e is a legal officer until ousted." *Id.* Washington courts have long

held that the actions of *de facto* judges are valid. *Barrett-Smith*, 110 Wn. App. at 91.

To hold that an irregular appointment of a judge renders that judge's subsequent official actions null and void would unduly disrupt the orderly function of the judicial process. *Id.* Necessity and public policy have long compelled Washington courts to hold otherwise. *Id.* (citing *State v. Franks*, 7 Wn. App. 594, 596, 501 P.2d 622 (1972)). It is not difficult to contemplate that the judicial system would be thrown into disarray if the system gave credence to assertions that a particular judge need not be submitted to because the judge is not properly in office.

West should not be permitted to invalidate the judge's decision after the judge had already ruled by asserting, after the fact, that the judge's appointment was improper. Even if Judge Heller's appointment was somehow technically deficient, his decisions were made as a *de facto* judge. Despite West's protestations to the contrary, Judge Heller's decisions as a visiting Thurston County judge are valid.

3. West's claims that Judge Heller's appointment was improper are barred under the equitable doctrine of laches.

Laches is an implied waiver arising from knowledge of a given state of affairs and acquiescence in it. Tegland, 15 Wa. Prac., Civil Procedure § 44.15. The elements of laches are (1) knowledge or

reasonable opportunity for discovery of the cause of action; (2) an unreasonable delay in commencing the action; and (3) damage to the defendant resulting from the unreasonable delay. *Lopp v. Peninsula School Dist. No. 401*, 90 Wn.2d 754, 585 P.2d 801 (1978). Here, all of these elements exist.

First, plaintiff received notice on or about June 19, 2008, that his case had been assigned to King County Superior Court Judge Bruce Heller. CP 1743. Yet, plaintiff voiced no objection. Plaintiff did not file an affidavit of prejudice. Plaintiff acquiesced to the authority of Judge Heller.

Second, plaintiff unreasonably delayed in raising any concerns about Judge Heller's appointment. Plaintiff filed motions, briefing, and argued before Judge Heller without raising any concerns about the legitimacy of Judge Heller's appointment. The County prevailed in obtaining dismissal of plaintiff's Public Records Act claim. CP 612-13; 675-79. Plaintiff did not voice concerns about Heller's appointment at that time. Then, in January 2009, the Patterson Buchanan firm prevailed before Judge Heller on plaintiff's claims of unconstitutional expenditure of public funds, fraud, and negligence. CP 672. The court orally ruled that it was dismissing those causes of action. *Id.* Plaintiff again failed to raise any concerns about Judge Heller's appointment. In the following

weeks, the parties submitted additional briefing on the issue of whether plaintiff had standing to bring a claim of “illegal representation” by a private law firm. Plaintiff still raised no concerns about the legitimacy of Judge Heller’s appointment. Finally, on March 31, 2010, Judge Heller announced his decision that plaintiff did not have standing to pursue a claim for illegal representation. CP 1085-89. Thus, Judge Heller had disposed of all of West’s claims against Thurston County, although a final order had not yet been signed.

Later that same day, March 31, 2010, at 5:41 p.m., plaintiff sent an email to the court and to counsel for all parties asserting, for the first time, that Judge Heller had been exercising judicial power unlawfully. CP 1785-86. Specifically, the email stated “Please regard this as a formal protest concerning the unlawful exercise of judicial powers by the Honorable Judge Heller, in violation of RCW. 2.08.140-50.” *Id.*; CP 19. On the next morning, West sent another email referring to Judge Heller as “an entity unlawfully exercising the office of a Thurston County Judge.” CP 1787-88. West threatened that “Bar complaints, Tort claims, and judicial conduct commission complaints will issue all around.” *Id.*

On April 2, 2010, Judge Heller issued an “Order Regarding Email Communications With The Court.” CP 19-20. In the order, Judge Heller memorialized the two emails from West. Judge Heller directed:

Email communications with the Court are appropriate if they pertain to scheduling and other non-substantive issues. However, it is a violation of court rules for a party to make legal arguments to the Court by email. The Court orders Mr. West to cease and desist from such improper communications. If Mr. West wishes the Court to consider whether this case was improperly transferred from Thurston County, he should file and note a motion, and the matter will be heard.

CP 20.

The apparent impetus for West's objection to Judge Heller's appointment was that Judge Heller did not rule in West's favor. Judge Heller had dismissed all of West's claims. West did not like the outcome. So, West claimed that the judge hearing his case was unlawfully appointed.

Third, plaintiff's delay in raising concerns about Judge Heller's appointment damaged defendant Thurston County. If plaintiff had raised legitimate concerns early in the litigation before Judge Heller, any legitimate problems could have been corrected. Conceivably, a different judge could have replaced Judge Heller. Instead, because plaintiff did not raise such concerns, Thurston County invested many hours of attorney time and incurred related litigation expenses. The damage to Thurston County if the outcome of the case before Judge Heller is now somehow declared void is apparent.

B. Judge Heller’s decision ratifying the appointment of the Patterson Buchanan law firm as special attorneys for Thurston County was not improper and plaintiff’s claim of “illegal representation” is without merit.

West’s fourth assignment of error includes, among other assertions, an assertion that the court improperly issued a commission to the Patterson Buchanan law firm to act as deputy prosecutors for Thurston County. *Appellant’s brief* at 36-37. The argument at pages 36-47 of West’s opening brief is so obtuse the issue might easily be missed. However, the issue is more clearly stated in West’s Introduction/Summary of Argument at page 9 where West states that because Judge Heller’s appointment was invalid, Judge Heller could not have properly ratified the appointment of Mr. Patterson. *Appellant’s brief* at 9. Under West’s logic, because Judge Heller was not legally occupying his office, Heller’s appointment of the Patterson Buchanan law firm to represent Thurston County was also void. The claim, as asserted before the trial court in plaintiff’s complaint, was for “illegal representation” of the County by an unlawful private entity.

First, as argued above, the appointment of Judge Heller was not defective.

Second, even if the appointment of Judge Heller was somehow defective, Judge Heller acted as a *de facto* judge.

Third, as also noted by Judge Heller, West did not have standing to bring a claim for “illegal representation.” CP 1087-89. Specifically, West failed to establish (1) that he asked the Attorney General to institute an action, and (2) that the Attorney General refused. West alleged in paragraph 4.3 of his complaint that “he filed a request for investigation and/or action with the County Prosecutor and the Attorney General regarding [unconstitutional] expenditure of funds. CP 1088 at lines 17-19. However, as Judge Heller noted, CR 56(e) provides that a party opposing summary judgment cannot rely on mere allegations, but must set forth specific facts showing that he has met the requirements for standing. CP 1088. Mr. West had not alleged, let alone established through admissible evidence, that the Attorney General declined his request. *Id.* Therefore, the trial court concluded, Mr. West lacked standing to bring his illegal representation claim. CP 1089.

Fourth, the appointments were not necessary. That is, even if West had standing, the trial court properly ruled that it would have dismissed West’s illegal representation claim. As noted by Judge Heller in his memorandum decision, the County did not directly hire the Patterson Buchanan firm. CP 1089. Rather, the county had a contract (coverage agreement) with the Washington Counties Risk Pool which, in turn, retained the Patterson Buchanan firm. CP 1089. As noted by Judge

Heller, this is not a mere technical distinction. *Id.* As also noted by Judge Heller, the State Auditor's Office concluded on September 3, 2008, that RCW. 36.32.200 applied to the County's authority to directly employ or contract with special attorneys. *Id.* However, Judge Heller ruled that RCW. 36.32.200 does not restrict the Risk Pool's ability to retain private counsel to represent the County.¹ *Id.*

The trial court properly granted the County's motion to dismiss West's illegal representation claim. The trial court should be affirmed.

C. The trial court's ruling that West did not have standing to pursue a claim for "illegal representation" was proper.

West's fifth assignment of error includes an argument that the court improperly ruled that he did not have standing to pursue his claim for "illegal representation." *Appellant's brief* at 47-49. West claims that as a taxpayer he was adversely impacted by the "scorched earth" tactics of the Patterson Buchanan law firm. *Id.* at 47-48. He asserts that, as a taxpayer, he has standing. *Id.* at 48. West then asserts, without foundation or support in the record, that he requested action from the Attorney General. *Id.* at 48.

¹ The trial court noted in its March 31, 2010, ruling that "the result might be different if Mr. West had shown that the prosecutor's office routinely defended the County in civil actions. If under those circumstances, the County had hired Mr. Patterson as special counsel without demonstrating some disability preventing the prosecutor's office from handling the matter, perhaps RCW. 36.32.200 would be implicated. *Those, however, are not the facts presented to this Court.*" *Memo Ruling* at 5:13-17 (emphasis added). Given that the necessary facts were not present before the trial court, it necessarily follows that the necessary facts are not part of the record on this appeal.

A condition precedent to taxpayer standing is that the Attorney General must first decline a request to institute the action. *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114 (1975); *Kightliner v. P.U.D. No. 1*, 119 Wn. App. 501, 508, 81 P.3d 876 (2003).

As has already been addressed in the preceding section, West's standing argument was squarely addressed by Judge Heller in his March 31, 2010, ruling. Judge Heller properly ruled that West did not have standing to bring a claim for "illegal representation." CP 1087-89.

Now, on appeal, West continues to make unsubstantiated assertions without foundation. There is no evidence in the record to support any assertion by West that he has established the two *Kightlinger* criteria. West's failure to cite to the record violates RAP 10.3(a)(6). Given that admissible evidence was not present before the trial court, it necessarily follows that no admissible evidence in support of West's position is part of the record on this appeal. West's conclusory and argumentative assertion, without foundation in the record, should be stricken and disregarded.

The trial court's ruling that West did not have standing to pursue his claim of illegal representation was proper under CR 56(e). This court should affirm.

D. West's assertion that the trial court erred in improperly delaying ruling is without merit.

West's third and fifth assignments of error both assert that the trial court erred by improperly delaying ruling. This twice stated assignment of error is without merit.

West challenges the legitimacy of the trial court's determinations because, in his view, it took too long. West complains about the "lengthy, convoluted and tortuous proceedings" that "took nearly three years." *Appellant's brief* at 34. As ostensible support for his position, West cites to Article I, Section 20 of the State Constitution, which provides that "justice shall be administered openly and without unreasonable delay," and RCW. 2.08.240, which, he contends, provides that in the case of matters submitted to superior Court judges, this is 90 days. *Id.* West's argument, in summary, is that he was entitled to have his case decided within 90 days and that the trial court's failure to issue a decision within that period of time voids the legitimacy of the judge's appointment.

West takes RCW. 2.08.240 out of context, quoting the text in an incomplete and misleading manner. The text of the statute actually states that "Every case submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof ...

and upon *willful failure* of any such judge to do so, he shall be deemed to have forfeited his office”

The fallacy in plaintiff’s argument is that there was no “willful failure” on the part of Judge Heller to issue a ruling. The best that plaintiff can show is that Judge Heller inadvertently delayed ruling on the issue of whether plaintiff had standing to bring a claim for “illegal representation.” Judge Heller acknowledged in the March 31, 2010, hearing that the illegal representation claim had “slipped through the cracks.” CP 1087 at 2:25-3:3. Judge Heller began the hearing by apologizing to the parties for the delay. *Id.* However, such inadvertence by a court does not establish “willful failure” to rule, as is necessary to establish violation of RCW. 2.08.240.

Moreover, the County had no control over the trial court’s speed in issuing decisions. Any assertion by West that the court’s decision should be rendered void because it took too long should be rejected because that would be patently unfair to the County.

As a policy matter, if a litigant could undo a decision against him simply because the decision took “too long,” the finality of court decisions would be thrown into disarray. Judges would be forced to issue rash decisions merely for the sake of complying with an arbitrary time schedule.

Finally, as a practical matter, West's assertion that the trial court proceedings were unreasonably long is incorrect. Civil practitioners with even modest experience are familiar with the fact that many trial courts have very crowded dockets and that a three year process before a trial court is not unusual, particularly in multi-party litigation as in this case.

West's challenge to the legitimacy of the trial court's decision because it took too long should be rejected.

E. The trial court's ruling on West's PRA claims, and its deferral of claims already under consideration by Mason County Superior Court, were proper.

West's first, second, and third assignments of error all relate to his claim that the trial court improperly denied his PRA claim. Despite West's convoluted arguments, the trial court's rulings on West's PRA claims were proper and should be affirmed.

As an introductory matter, the scope of West's PRA request needs to be clarified. West's amorphous complaint alleged violation of the PRA, but failed to identify specifically what he had requested or what Thurston County had allegedly failed to produce. CP 172-177. Therefore, in order to find out exactly how it had allegedly violated the PRA, Thurston County served discovery requests on West for copies of the specific PRA request at issue in this lawsuit (CP 184) and for copies of any documents

West had received in response (CP 185). In response, West identified three sets of documents he was requesting: (1) attorney invoices for *Broyles v. Thurston County*, (2) attorney invoices for *West v. Thurston County*, and (3) records of any lawful appointment for representation of the County by anyone other than the Thurston County Prosecutor. CP 193.

Any assertion by West that he is entitled to documents other than these three sets of documents identified in discovery improperly expands the scope of his request and should not be permitted. For example, in addition to the attorney invoices he requested, West's brief makes repeated reference to requests for associated correspondence. However, West's discovery answer makes no reference to associated correspondence. Thus, this Court should disregard any assertion by West that the County failed to produce "correspondence." The County cannot be expected to produce documents that were not requested. Nor should the County be penalized for failing to produce documents that were not requested.

1. The trial court's deferral of the *Broyles* portion of West's PRA claim to Mason County Superior Court was proper.

West misleads this Court with regard to the facts of the deferral by Judge Heller of a portion of the PRA claim to Judge Sheldon of Mason

County Superior Court. Specifically, West claims that the trial court deferred his request for the *Broyles* invoices to Mason County at the request of defendants. *Appellant's brief* at 17-18. West further represents that defendants represented that they would bring this deferral to the attention of Judge Sheldon in Mason County. *Id.* West's argumentative assertion, without citation to any document of record in this case, is that the County failed to honor its commitment.

However, the premise of West's argument is unsupported by the record and is misleading. The Clerk's minutes for the September 3, 2008, hearing memorialize that the "respective parties agreed" to the deferral to Judge Sheldon. CP 612. West's disingenuous and misleading argument should be carefully noted. West accuses Thurston County of failing to do something that he himself had agreed to do.

The question of whether the County was obligated to produce attorney fee invoices regarding the *Broyles* case was already being litigated in Mason County. *West*, 144 Wn. App. at 576. It would have made no sense for Judge Heller, acting as a visiting Thurston County judge, to address matters that were already being litigated before Judge Sheldon of Mason County Superior Court. The trial court's decision to allow Mason County Superior Court to continue to handle the *Broyles* PRA matters already being handled by that court was reasonable, was

dictated by judicial economy, and avoided the possibility of two courts handling the same matter at the same time.

Mason County Superior Court has decided the controversy between the parties regarding the *Broyles* invoices. The case is currently on appeal to this Court under No. 41085-1-II. The parties have submitted briefing and oral argument is set to occur on October 18, 2011. This Court should not consider the same matter twice.

2. The trial court properly ruled that the County had no obligation to produce attorney invoices from *West v. Thurston County*.

In addition to requesting attorney invoices related to the *Broyles* case, the second category of records West requested in his PRA request was for attorney invoices related to *West v. Thurston County*, Cause No. 07-2-00108-9. CP 196. West's request was acknowledged by Donald Krupp, the County's Chief Administrative Officer, by letter dated September 7, 2007. *Id.* Significantly, when the County served discovery on West to confirm exactly what it was that he was alleging constituted violation of the PRA, West produced a copy of the September 7, 2007, letter from Krupp to identify what it was that he had asked for. CP 166 at ¶ 7.

In his September 7, 2007, letter, Krupp specifically stated:

We understand you are requesting all attorney fee invoices for Thurston County's defense in *West v. Thurston County*, Cause No. 07-2-00108-9, and continued Court of Appeals No. 36252-0-II. Attorney fee invoices that are not available to another party under the rules of pretrial discovery while a case is pending are exempt from disclosure pursuant to RCW. 42.56.290 (formerly RCW. 42.17.910(1)(j)), which states:

“Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter.”

CP 196.

In September 2007, when West made his PRA request, the matter of *West v. Thurston County* was being actively litigated in Mason County Superior Court under Cause No. 07-2-00108-9. Indeed, *West v. Thurston County* is the matter that is currently on appeal to this court under No. 41085-1-II in which the subject matter relates to the County's alleged failure to produce the *Broyles* invoices. Thus, the matter is still being litigated.

Before the trial court, in response to West's assertion that the County was obligated to produce the invoices from *West v. Thurston County*, the County disagreed. The County argued that when a person making a PRA request is also a party, the documents available through the PRA to that party is limited to that which is available under the Civil Rules. CP 1763-1765; 1773-74. As a litigant, the County argued, West

would not be able to discover the County's attorney fee invoices incurred in the defense of his case under the Civil Rules while his case remained pending.

The trial court agreed with the County's argument, and it should be affirmed.

(a) Discovery in civil actions is governed by the Civil Rules; only documents which are both relevant and non-privileged are available to litigants.

West requested the County's attorney invoices pertaining to the defense of *West* while he remained a litigant in the *West* case. The documents and information available to litigants while a controversy is pending is governed by the Civil Rules and, specifically, by CR 26. CR 26(a) provides methods of discovery and indicates that parties may obtain discovery by "deposition upon oral examination, or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission." CR 26(a). CR 26(b) provides the scope and limits of discovery, indicating, in part, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter of the pending action." CR 26(b)(1). Information is discoverable only if it is reasonably calculated to lead to the discovery of admissible evidence. *Id.*

Discoverable documents and information are limited to that which are (a) non-privileged and (b) relevant, or which is reasonably calculated to lead to the discovery of admissible evidence.

Attorney fee invoices are generally irrelevant in civil lawsuits. This is especially true in this case. West seeks to use the PRA to obtain defense documents related to a PRA claim that he brought. The issue in this case, and indeed in all PRA claims, is legal only, i.e., did the government defendant provide sufficient documentation in response to a request? No information contained in a defense attorney invoice could arguably lead to the discovery of admissible evidence in regard to that question. Nothing before the trial court, and nothing in the record before this court, establishes that the request for *West* attorney invoices was reasonably calculated to lead to the discovery of any admissible evidence. Thus, the attorney fee invoices were not discoverable. Given that the invoices were not discoverable by West as a litigating party, they were also not available to him under the PRA.

(b) The Civil Rules prevail if there is a conflict between the PRA and Civil Rules.

Since 1925 the legislature has declared and recognized that:

When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force and or effect.

RCW 2.04.200.

The Civil Rules effectively preclude discovery of the opposing party's attorney invoices. In addition to the fact that attorney invoices contain privileged information, it is also the case that discovery requests for attorney invoices, and the information contained therein, cannot lead to the discovery of any admissible evidence. Thus, attorney invoices generally may not be obtained under the discovery rules by a litigating party.

The Civil Rules take precedence over the PRA when the person utilizing the PRA attempts to circumvent the Civil Rules in a case in which the person is a litigant. Accordingly, because West cannot have discovery of the *West* invoices under the Civil Rules pertaining to discovery, he also cannot obtain the *West* invoices under the PRA.

The legislature has explicitly recognized that records which are not available to a party under the discovery rules are exempt from disclosure under the PRA:

Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter.

RCW 42.56.290. Thus, there is no conflict between the PRA and the court's discovery rules.

However, alternatively, even if the court were to find that there is a conflict between the legislative branch's PRA statute and the judicial branch's civil discovery rules, it would still be the case that West, as a party, was not entitled to the *West* invoices. As mentioned above, the legislature has declared that "all laws in conflict with the Civil Rules have no force and effect." RCW 2.04.200.

(c) Our Supreme Court has previously held that the civil rules are incorporated within the "other statute" provision of RCW 42.56.070(1).

RCW 42.56.070 requires agencies to make all public records available for inspection and copying unless the record falls within a specific exemption or "other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1). The Civil Rules apply to all lawsuits of a civil nature, and are incorporated into the "other statute" provision of RCW 42.56.070(1). *O'Connor v. Wash. St. Dep't of Social and Health Servs.*, 143 Wn.2d 895, 910, 25 P.3d 426 (2001); CR 1, 2.

(d) The PRA is not an alternative means of conducting discovery in a civil case.

Public records laws are not an alternative means for a litigant to conduct discovery in a civil case.

Washington State's PRA was modeled after the Federal Freedom of Information Act ("FOIA"). *Limstrom v. Ladenburg*, 136 Wn.2d 595, 608, 963 P.2d 869 (1998) (citing *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978)). Accordingly, Washington State courts look to judicial constructions of the FOIA in construing Washington State's PRA. *See Limstrom*, 136 Wn.2d at 608-09. "Cases interpreting FOIA are relevant when we are interpreting our state act." *Dawson v. Daly*, 120 Wn.2d 782, 791-92, 845 P.2d 995 (1993).

The United States Supreme Court has consistently rejected construing the FOIA as a supplement to civil discovery. *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801, 104 S.Ct. 1488 (1984) (citing *Baldrige v. Shapiro*, 455 U.S. 345, 360 n. 14, 102 S.Ct. 1103 (1982); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10, 95 S.Ct. 1504 (1975); *Renegotiation Bd. v. Bannecraft Co.*, 415 U.S. 1, 24, 94 S.Ct. 1028 (1973)).

Consistent with federal case law, this court should recognize that a litigating party is not entitled to obtain documents via a PRA request that he is not entitled to obtain via a discovery request.

3. The trial court's decision regarding West's request for documents showing the "authority" of counsel to represent the County was proper.

In his third assignment of error, West also asserts that the trial court erred in its ruling regarding Mr. Patterson's authority to represent the County. *Appellant's brief* at 34. Again, the issue as articulated in West's brief is so obscure it can easily be missed. However, the nature of the dispute is reflected in the records of the trial court below. Specifically, West requested "[a]ny authority for Counsel other than the Thurston County Prosecutor to represent the County" in both *Broyles v. Thurston County* and *West v. Thurston County*. CP 676 at lines 18-20.

In response to the request for authorization regarding the *Broyles* case, the trial court noted that Thurston County had referred West to a March 13, 2007 letter it had sent him in response to another PRA request of March 7, 2007. CP 677 at lines 2-4. That letter enclosed a "Special Attorney Appointment for Michael A. Patterson and Lee, Smart, Cook, Martin & Patterson, P.S., Inc., dated January 24, 2003" authorizing Mr. Patterson and his firm to represent the County in *Broyles v. Thurston County*. CP 677 at lines 4-7. The trial court held that West had not requested other documents nor had he indicated any deficiency in the disclosure made by the County regarding the *Broyles* case. CP 677 at lines 8-10. The trial court concluded that "the County has complied with

the PRA requesting disclosure of records authorizing Mr. Patterson and his firm to represent Thurston County in *Broyles v. Thurston County*.” CP 677 at lines 10-12.

In response to *West v. Thurston County*, the County asserted that it did not have a Special Attorney Appointment (SAA) at the time of West’s PRA request. CP 677. The PRA request at issue here was made by West on September 4, 2007. *Id.* In January 2008, the Thurston County Board of Commissioners executed an SAA for Mr. Patterson and his firm regarding *West v. Thurston County*. *Id.* The SAA was not finalized until August 15, 2008, when the trial court signed it, at which point it was disclosed to West. *Id.*

The trial court framed the issue as whether plaintiff’s September 2007 PRA request obligated Thurston County to disclose documents that were created after the PRA request was submitted. CP 679. The trial court answered “no,” holding that requiring government agencies to disclose documents created after PRA requests are filed would place too heavy a burden on those agencies. The trial court noted that West was asking that Thurston County be held liable for failing to disclose a document pursuant to his PRA request, even though that document was created four months after the request was filed. CP 679. Concluding, the trial court held:

Government agencies receive many PRA requests. Requiring those agencies to check every new public record against all previously filed PRA requests would place a nearly impossible burden upon those agencies. An agency can only respond to a PRA request by disclosing the documents that exist at the time of the request. Thurston County was not obligated to disclose the SAA created in January 2008 in response to plaintiff's September 2007 PRA request."

CP 679.

The trial court's reasoning was sound and should not be reversed or modified. Existing precedent holds that an agency has no duty to create a record in response to a request; only existing records must be provided. *Smith v. Okanogan County*, 100 Wn. App. 7, 14, 994 P.2d 857 (2000).

The trial court's decision in favor of Thurston County on West's PRA claims was correct and its reasoning was sound. This court should affirm.

VII. CONCLUSION

Based on the foregoing reasons, Defendant/Respondent Thurston County respectfully asks that this Court deny the appeal of Plaintiff/Appellant Arthur West and affirm the trial court below.

RESPECTFULLY SUBMITTED this 22 day of Sept.,
2011.

PATTERSON BUCHANAN FOBES
LEITCH & KALZER, INC., P.S.

By: 
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CERTIFICATE OF SERVICE

I hereby declare on the date provided below, I caused to be delivered via Federal Express the foregoing RESPONDENT THURSTON COUNTY'S BRIEF to the following:

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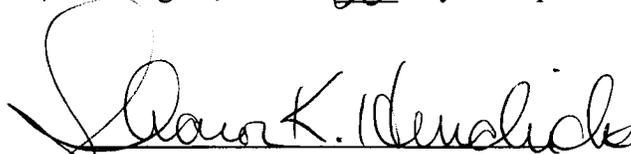
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STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS
DIVISION II

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, on this 22nd day of September, 2011.


Sharon K. Hendricks