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42643-9-II  
~~No. 858390~~

CLERK *Rjh*

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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KARL WOOLERY,

*Petitioner,*

v.

STATE OF WASHINGTON and COUNTY OF SPOKANE, a political  
subdivision of the State of Washington,

*Respondents.*

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APPEAL FROM THE THURSTON COUNTY SUPERIOR COURT  
Honorable Paula Casey, Judge

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*APPELLANT*  
**BRIEF OF PETITIONER**

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## I. INTRODUCTION

On July 24, 2006, Plaintiff Karl Woolery was rear-ended by a City of Spokane garbage truck resulting in serious personal injuries, over \$175,000 in economic damages, and significant noneconomic damages. Woolery sued the City of Spokane in Spokane County Superior Court. Woolery has had a total of seven trial dates. CP 45. The Amended Complaint states that the first trial was continued due to lack of courtroom availability. CP 43. This was an error and in the interest of accuracy, Woolery would like to clarify that the first trial date was continued at the request of the City of Spokane. Continuances two through six, however, were due to inadequate judicial resources and courtroom congestion, a situation directly caused by the Defendants State of Washington and County of Spokane's failure to fully and adequately fund the Superior Court of Spokane County so it can meet its constitutional mandate. CP 45.

Article 1, Section 10 of the Washington State Constitution provides that "justice in all cases shall be administered . . . without unnecessary delay." After having his trial continued five times due to lack of judicial resources, Woolery sued Defendants in Thurston County Superior Court for violating his right to justice without unnecessary delay. CP 42-52. He requested that the court compel Defendants to adequately fund the Superior Court of Spokane at a level that would enable the court to fulfill its

constitutionally mandated duties. CP 51. The State of Washington and Spokane County brought 12(b)(6) motions to dismiss all of Woolery's claims. CP 27; CP 35. The Thurston County Superior Court granted the Defendant's motion and dismissed Woolery's case with prejudice. CP 84-86.

The lack of adequate and necessary funding of Washington courts has reached a crisis point. Woolery alleged in detail why the State and Spokane County's refusal to adequately fund the courts has resulted in an unconstitutional delay of obtaining justice. CP 45-49. Given the deferential 12(b)(6) standard, this dismissal means that there is no hypothetical theory or set of facts that would ever entitle a civil litigant relief for a violation of the right to justice without unnecessary delay. If this dismissal stands, it would mean that the unnecessary delay clause is a dead letter for civil litigants and not judicially enforceable. Private citizens would be without any remedy when access to the courts and justice are unconstitutionally delayed. Woolery therefore petitioned the Washington State Supreme Court for discretionary review so that these important questions of public concern can be resolved.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in finding that there is no constitutional right to have a civil trial heard within any particular time frame. RP 28.
2. The trial court erred by finding that only the Spokane County Superior Court has standing to obtain an order compelling the

legislature to fund the Spokane County Superior Court at a constitutionally adequate level, that an individual does not have any such right, and that the Thurston County Superior Court does not have authority to hear that claim. RP 29.

3. The trial court erred by finding that Woolery had an adequate remedy at law with regard to his constitutional claims by appealing the continuances or joining the County and State within his tort case in Spokane County Superior Court. RP 29.
4. The trial court erred by failing to accept Woolery's claims of unnecessary delay as true under the CR 12(b)(6) standard. RP 28-30.
5. The trial court erred by dismissing Woolery's claim with prejudice, which given the 12(b)(6) standard, means that Woolery has no claim for relief for a violation of unnecessary delay clause in any forum. CP 84-86.

#### **Issues Pertaining to Assignment of Errors**

1. Article 1, Section 10 of our state Constitution provides that "justice in all cases shall be administered . . . without unnecessary delay." Woolery's complaint, alleging violations of this clause, was dismissed with prejudice for failure to state a claim, which given the 12(b)(6) standard, means that there is no set of facts or theory that would entitle Woolery to relief. Is the trial court correct that the unnecessary delay clause is not judicially enforceable? **[NO]** (Assignment of error 1, 4)
2. It is well established that a superior court has the inherent authority to compel funding necessary to fulfill its constitutionally mandated duties. Does a civil litigant have standing to request this relief, when his right to justice without unnecessary delay has been violated by the legislative branch's refusal to adequately fund the judicial branch? **[YES]** (Assignment of error 1, 2, 3, 4)
3. The Rules of Appellate procedure do not provide any avenue for appealing a continuance based on an alleged violation of Article 1, Section 10. Additionally, the State of Washington and County of Spokane, the parties that Woolery wants to sue for violating his

constitutional rights, were not parties to the underlying tort action in Spokane. Given this, does Woolery have an adequate remedy at law in his tort case in Spokane County Superior Court? [NO] (Assignment of error 3)

### III. STATEMENT OF THE CASE

The following facts were alleged in the Amended Complaint filed by Plaintiff, from which Woolery's claim was dismissed. On July 24, 2006, Plaintiff was rear-ended by a City of Spokane garbage truck resulting in serious personal injuries, over \$175,000 in economic damages, and significant noneconomic damages. CP 43. Plaintiff filed suit against the City in late 2008 and an initial trial date was set for October 12, 2009. *Id.* Plaintiff was ready for trial, however, no courtroom was available so trial was continued to January 11, 2010. *Id.* The initial trial date was continued to January 11, 2010 at the request of the City of Spokane. However, the court indicated that other cases were on the docket that day and there was no assurance that the trial would not be continued. The parties, therefore, agreed to have the case heard by a Pro Tem Judge on February 16, 2010. *Id.* Unfortunately, the Pro Tem Judge program was terminated as a result of Spokane Superior Court budget cuts, ordered by the Spokane County Commissioners. *Id.* Due to budget cuts, the trial date was continued to October 2010. *Id.* Plaintiff, however, requested an earlier trial date and the court set trial for June 7, 2010. RP 44.

At the pre-trial conference, both parties were ready for trial, however, the court indicated that due to lack of funding, no courtroom was available. *Id.* Defendant Spokane County had by then eliminated funding for the Ex-Parte program, which increased the workload on sitting judges, further decreasing the amount of courtroom time available to civil litigants. *Id.* The parties were advised by the court that, due to lack of available courtrooms and the inability to “broker” a trial that was longer than four judicial days to any other available judges, the case would be continued to September 13, 2010. *Id.*

The parties were again ready for trial on that date, but the court explained that critical needs of the courts were being reduced due to budget cuts, and that inadequate funding, that demand of criminal, parental termination cases, and civil cases that pre-dated Plaintiff’s case, meant that Plaintiff would be limited to two weeks to try his case, *if* a courtroom could be found and strict timelines were imposed on the parties to call their witnesses within a given timeframe. *Id.* No courtroom was available, and the case was continued again. *Id.*

In total, Plaintiff’s case was continued five times due to lack of an available courtroom. RP 45. Each continuance has increased Plaintiff’s expenses in preparing for trial and the cost of prosecuting his case. *Id.* Additionally, with every continuance, it has been more difficult for him to

obtain his witnesses, as some have moved, and some are reluctant to testify after already making themselves available on several previous occasions only to have trial continued. *Id.* Multiple delays have caused evidence to become stale, which has prejudiced Plaintiff's ability to try his case. *Id.*

Plaintiff's Amended Complaint sets forth a detailed factual basis for why the lack of funding by the State and Spokane County of the Spokane County Superior Court has resulted in a violation of Plaintiff's constitutional right under Article 1, Section 10 of the State Constitution, and an inability by the Spokane Superior Court to meet its constitutional mandate under Article 1, Section 10. RP 45-49. Plaintiff has a fundamental right to a jury trial under Article 1, Section 21 of the State Constitution. *Id.* Plaintiff alleges that five continuances of his trial date due to the unavailability of courtrooms constitute a violation of his right to justice without unnecessary delay under Article 1, Section 10 of the State Constitution. *Id.*

Subsequent to filing this lawsuit, Plaintiff was given another trial date of June 20, 2011 for his tort claim, and his claim was now finally tried to a jury verdict on his seventh trial date. However, this fact does not moot his claim, given the unnecessary delay, and since this is an issue of substantial public interest that will re-occur given the ongoing lack of funding to the courts.

#### IV. ARGUMENT

##### A. **Standard of Review.**

A trial court's dismissal on a 12(b)(6) motion is a question of law; this Court's review, therefore, is de novo. *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P. 2d 781 (1980). A complaint should be dismissed on a 12(b)(6) motion for failure to state a claim "only if 'it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff relief.' " *Id.* The Court should assume that all of the facts alleged in Plaintiff's Complaint are true. *Id.* Additionally, "a court may consider hypothetical facts not part of the formal record." *Id.*

The Court should "test" a 12(b)(6) motion in light of CR 8(a)(1), which only requires that the complaint contain " 'a short and plain statement of the claim showing that the pleader is entitled to relief . . . . ' " *Id.* While on its face, a 12(b)(6) motion would seem to challenge "both the sufficiency of the alleged facts and the legal theory relied upon by the plaintiff[.]" the case law has "so narrowed the function of a CR 12(b)(6) motion that it has been concluded that CR 12(b)(6) motions should be granted 'sparingly and with care.' " *Orwick v. Seattle*, 103 Wn.2d 249, 254-55, 692 P.2d 793 (1984). "[I]t has been said that the trial court has a duty to examine the complaint to determine if the allegations provide for relief under *any possible theory*, . . . and that 'it is unnecessary to set out

the legal theory upon which a claim is based.’ ” *Id.* (emphasis added) (internal citations omitted). Any hypothetical situation conceivably raised by the Complaint, or hypothetical facts not part of the record defeats a 12(b)(6) motion if it is legally sufficient to support Plaintiff’s claim. *Brown v. MacPherson’s, Inc.*, 86 Wn.2d 293, 545 P.2d 13 (1975).

**B. Woolery has a judicially enforceable right to justice without unnecessary delay under Article 1, Section 10; the trial court erred by dismissing his Complaint with prejudice on a 12(b)(6) motion.**

Woolery alleges in his Amended Complaint that his right to justice without unnecessary delay had been violated by Defendants. Given the deferential 12(b)(6) standard, if there was any theory or set of facts that would entitle him to relief, his Amended Complaint should not have been dismissed. By granting the 12(b)(6) motion, the trial court effectively ruled that there is *no* theory or set of facts that would entitle a civil litigant to justice for a violation of the unnecessary delay clause of Article 1, Section 10. If upheld, this means that the unnecessary delay clause is either a dead letter or merely aspirational; it is not judicially enforceable under *any* circumstances.

While there is little case law interpreting the unnecessary delay clause of Article 1, Section 10, given this Court’s pronouncements in *Rauch v. Chapman*, *infra*, and the critical role that this clause plays in the

rule of law and the protection of individual rights, it is unthinkable that this Court would uphold the trial court's ruling, which would effectively repeal this 800 year old right in the State of Washington.

1. *The lineage of the unnecessary delay clause.*

A civil litigant's right to trial without unnecessary delay traces from the Magna Carta, through the English Common law, to colonial America, through the earliest state constitutions, through the due process clause of the federal Bill of Rights, to the early constitutions of our sister states (preceding our state's formation), and finally, to the Washington State Constitution.

Chapter 29 of the Magna Carta proclaims "To no one will we sell, deny or delay right or justice." *In re Borchert*, 57 Wn.2d 719, 741 359 P.2 789 (1961). This pronouncement of the Magna Carta was forced upon King John by the Barons of old to end the tyrannical practice of requiring a party to pay a fine or face having proceedings delayed. *Harrison v. Willis*, 7 Heisk. 35, 19 Am. Rep. 604, 611 (Tenn. 1871). This "iniquity" was one of the practices that drove the Barons to " 'take an oath before the high altar to adhere to each other, to insist on their demands and to make endless war on the King till he should submit to grant them.' " *Id.* at 612.

Sir Edward Coke, the foremost expositor of the English Common Law, whose writings had an enormous influence on American law,<sup>1</sup> considered the Magna Carta one of the “fundamental bases of English liberty.” *Klopfers v. North Carolina*, 386 U.S. 213, 255. (1967). Coke viewed Chapter 29 of the Magna Carta as a “roote” from which “Many fruitful branches of the law of England have sprung.” *Smother v. Gresham Transfer*, 332 Or. 83, 95, 23 P.3d 333 (Or. 2001) (citing EDWARD COKE, *The Second Part of the Institutes of the Laws of England* (1779)). Coke explained that the “deny or delay” clause of Chapter 29 had evolved into a guarantee under English law that, when it came to the rights of subjects in their private relations with one another, “ ‘every subject of this realme, for injury done to him in *bonis, terris, vel persona*, by any other subject, be he ecclesiastical, or temporall, free, or band, man or woman, old, or young, or be outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice, and right for injury done to him, freely, without sale, fully without any denial, and speedily without delay.’ ” *Id.* at 96. Thus, the right justice without delay is an ancient one, which was applicable to civil litigants and criminal defendants alike with no exceptions.

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<sup>1</sup> In the colonial period, Coke’s treatise, “*Institutes*,” was read by every law student. Thomas Jefferson called them, “the universal elementary book of law students.” *Klopfers v.*

Since the American colonists “saw themselves as English subjects,” Coke’s exposition of the common law in England applies equally to the common law in the American colonies. *Id.* at 100. Thus, rights enjoyed in England under the Magna Carta “crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State.” *Hurtado v. California*, 110 US 516, 521 (1884). When King George denied the colonists their fundamental rights, including their due process deriving from Chapter 29 of the Magna Carta, history repeated itself; like the Barons of old, they rebelled against the King, pledging their lives in defense of liberty. DECLARATION OF INDEPENDENCE (“He has obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judiciary Powers. He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries. . . . And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.”) It comes as no surprise then that the earliest state constitutions contained speedy trial clauses right out of the Magna Carta. *E.g.*, MASSACHUSETTS CONST. OF 1780 PART 1, ART. XI (“Every subject of the commonwealth ought to find a certain remedy, by

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*North Carolina*, 386 U.S. 213, 255. (1967) John Rutledge of North Carolina considered Coke’s treatise “ ‘to be almost the foundation of our law.’ ”

having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; *promptly, and without delay*, conformably to the laws.”) (emphasis added). The civil litigants’ rights to trial without unnecessary delay can be traced all the way to the modern day through the contemporary state constitutions, 39 of which contain some form of “delay” clause whose wording borrows from Coke’s Institutes and the Magna Carta itself. *Smothers v. Gresham Transfer*, 332 Or. 83, 95, 23 P.3d 333 (Or. 2001); Appd’x I (surveying speedy trial clauses from 39 state constitutions).

It should be noted, however, that a civil litigant’s right to trial without unnecessary delay does not emanate from the state constitution; it is a due process right protected by the common law. It is axiomatic that our concept of “due process of law,” is “equivalent in meaning to the worlds ‘law of the land’ contained in [Chapter 29] of the Magna Carta . . . .” *Twinings v. New Jersey*, 211 U.S. 78, 101 (1908). Thus, the right to trial without unnecessary delay finds equal expression in the due process clauses of the state and federal constitution. And even then, the rights enumerated in the state and federal bill of rights were seen by the framers of those constitutions, not as being created by the constitutions, but rather as belonging to the people and predating those constitutions. *E.g.* Federalist

No. 84 (arguing that a bill of rights was “not only unnecessary in the proposed constitution, but would even be dangerous . . . .”); *Rauch v. Chapman*, 16 Wash. 568, 48 P. 253 (1897) (“ ‘What is a constitution and what are its objects? It is not the beginning of the community, nor the origin of private rights, it is not the fountain of laws, nor the incipient state of government; it is not the cause but the consequence, or personal and political freedom, it grants no rights to the people, but it is a creature of their power, the instrument of their convenience. Designed for their protection in the enjoyment of the rights and power which they possessed before the constitution was made . . . .’ ”) (citing JUDGE COOLEY, *Constitutional Limitations* 37). Thus, with or without our state and federal constitutions, a civil litigant has a right to trial without unnecessary delay under the common law. Nevertheless, Article 1, Section 10 of the Washington State Constitution mandates that “Justice in all cases shall be administered openly, and without unnecessary delay.”<sup>2</sup>

Plaintiff begs the Court’s indulgence in this short historical digression. However, the trial court’s dismissal of Woolery’s claim with prejudice indicates that a return “*ad fonts*” (to the sources) is necessary to

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<sup>2</sup> The drafters of Article 1, Section 10 borrowed this provision from the 1857 Oregon Constitution and the 1851 Indiana Constitution. ROBERT F. UTTER, HUGH D. SPITZER, *The Washington State Constitution, A Reference Guide* 24 (2002).

bring the pedigree of this fundamental right into clear focus. Surely, the framers of our constitution that ratified this clause understood its history, its importance to the rule of law, protection of individual rights, and the sacrifices that had been made to establish and protect this right. As this Court has noted, “The drafters of our constitution placed such great importance upon rights that they provided: ‘A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.’ ” *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 819 P. 2d 370 (1991) (citing Wash. Const. art. 1, § 32). Now is one of those times. In sum, whether from Article 1, Section 10 of our state constitution, from the due process clauses of the state and federal constitution, or from the common law itself, it cannot be doubted that a civil litigant has a right to trial, in the words of our constitution, “without unnecessary delay.”

2. *Article 1, Section 10 is mandatory and judicially enforceable*

Constitutional interpretation makes clear that a civil litigant has a right to justice without unnecessary delay. Article 1, Section 10 mandates that “[j]ustice in all cases shall be administered . . . without unnecessary delay.” Two aspects of the clause are unambiguous: “Justice in *all* cases *shall* be administered openly, and without unnecessary delay.” Const. art.

1, § 1 (emphasis added). “[I]f a constitutional provision is plain and unambiguous on its face, then no construction or interpretation is necessary or permissible.” *Anderson v. Chapman*, 86 Wn.2d 189, 191, 543 P. 2d 229 (1975). The word “all,” in Article 1, Section 10 indicates that it applies to *all* litigants—including, therefore, a civil litigant. The word “shall,” indicates that the provision is mandatory.<sup>3</sup> *See State v. Krall*, 125 Wn.2d 146, 148, 881 P. 2d 1040 (1994).

Admittedly, the meaning of the phrase “unnecessary delay” does require interpretation. Woolery contends that there is a distinction between unnecessary delay and *necessary* delay. Necessary delay is constitutional whereas unnecessary delay is not. The critical point the Court should consider in distinguishing necessary delay from unnecessary delay is whether or not the delay is due to controllable factors. Delay due to earthquake, fire, sickness, weather, or inadequate number of jurors may be uncontrollable in the short term and therefore good cause for a continuance until the system can remedy the situation. Delay caused by *controllable* factors, such as an inadequate number of judges or decades of inadequate funding by the legislature should not be considered “necessary” delay

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<sup>3</sup> Additionally, Article 1, Section 29 of our constitution removes any doubt about whether the provision is mandatory: “The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.”

because those factors are controllable. Woolery does not argue that he is entitled to trial without delay, but rather without “*unnecessary* delay.”

In the absence of any uncontrollable variables here or in any civil case, Woolery contends that the outer limit for hearing a civil case should be two years. The Spokane Superior Court agrees, as stated in its own local Administrative Court Rules:

(1) *General Civil*. 90% of all civil cases should be settled, tried or otherwise concluded within 12 months of the date of case filing; 98% within 18 months; and the remainder within 24 months, except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review will occur.

LAR 0.4(a)(1).

Here, Woolery’s case was filed July 14, 2008, and not finally heard until June 20, 2011—nearly 35 months after the date of filing. No exceptional circumstances exist and no continuing reviews occurred within the meaning of this rule. Woolery has alleged that the reason for unnecessary delay in this case was a controllable factor: lack of necessary and adequate court funding of the Spokane County Superior Court.

Given the above language from LAR 0.4(a)(1), the trial court respectfully erred when it found that a civil litigant has no right to a civil trial within any particular time frame. RP 28.

Moreover, the constitutional mandate does not end with the unnecessary delay clause. Similar mandates can be found elsewhere in our constitution. Article 4, Section 6 vests the courts with broad jurisdiction. Section 5 provides that “the business of the court shall be so distributed and assigned by law or in the absence of legislation therefore, by such rules and orders of court as shall best promote and secure the convenient and expeditious transaction thereof.” Article 4, Section 2(a) authorizes the use of sitting or retired judges for temporary service in the Supreme Court or Superior Court “[w]hen necessary for the prompt and orderly administration of justice.” Article 4, Section 20 requires superior court judges to decide every cause within 90 days of the submission thereof (as does RCW 2.08.240). Moreover, in the absence of legislation, the constitution vests the courts with the authority to promulgate “such rules and orders of court as shall best promote and secure the convenient and expeditious transaction thereof.” Const. art. III, § 5. Thus, our constitution mandates that justice be administered expeditiously, promptly, orderly, conveniently, and without unnecessary delay.

Additionally, this Court in *Rauch v. Chapman*, 16 Wash. 568, 575, 48 P. 253 (1897), declared that Article 1, Section 10 is mandatory.<sup>4</sup> The Court reasoned that core government functions that are mandated by the constitution must always be funded:

The objects of government have usually become multiplied with the development of complex and artificial conditions of society. There is much controversy at times among our statesmen as to the necessary and proper limitations upon the powers of government, both state and municipal, but all are agreed that certain necessary fundamental functions of government must always be expressed and exercised. The protection of life, liberty, and property, the conservation of peace and good order in the state, cannot remain in abeyance. These functions of government are elementary and indestructible. The constitutional convention which framed, and the sovereign people who adopted, a republican form of government for the state of Washington, had these known principles in mind. Section 10 of the declaration of rights prescribes: "Justice in all cases shall be administered openly and without unnecessary delay;" . . . . "Provision is also made in the constitution for the organization and maintenance of the county government, and, as we have seen, its administration is ancillary to that of the state. *All these provisions of their organic law are alike declared to be mandatory. It would make these various provisions of the constitution contradictory, and render some of them nugatory, if a construction were placed upon the limitation of county indebtedness which would destroy the efficiency of the agencies established by the constitution to carry out the recognized and essential powers of government. It cannot be conceived that the people who framed and adopted the constitution had such consequences in view.* The judicial power was vested in the courts; the law must be administered through them; the jury is an essential part of the judicial procedure; justice must be

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<sup>4</sup> *Rauch v. Chapman* was decided 9 years after our constitution was ratified and therefore reflects a contemporary understanding of the meaning of Article 1, Section 10. *Sofie v. Fibreboard*, 112 Wn.2d 636, 645, 771 P. 2d 711 (1989).

administered without unnecessary delay between the citizens of the state . . . . All these provisions of their organic law are alike declared to be mandatory.

16 Wash. 568, 575 48 P. 253 (1897) (emphasis added).

Not only is Article 1, Section 10 mandatory, it is also judicially enforceable. If this Court were to read Article 1, Section 10 as not judicially enforceable, it would render that provision “nugatory.” *Id.* As this Court reasoned in *Rauch*, “[i]t cannot be conceived that the people who framed and adopted the constitution had such consequences in view.” *Id.*

This Court’s reasoning in *Seattle School Dist. v. State*, 90 Wn.2d 476, 502, 585 P. 2d 71 (1978), is also instructive. The plaintiffs in *Seattle School Dist.* argued that the State’s reliance on special excess levy funding for funding education violated Article 9, Section 1. The State argued that Article 9, Section 1 does not impose a judicially enforceable duty, arguing that it is directed solely at the legislative branch and therefore “the sole remedy for its breach lies with the voters.” *Id.* at 501. This Court disagreed citing *Gottstein v. Lister*, 88 Wash. 462, 153 P. 595 (1915), for the proposition that “the judiciary has ample power to protect constitutional provisions that look to protection of personal ‘guaranties.’ ” *Id.* at 502. This Court further opined that while *Gottstein* enumerated certain judicially enforceable personal guarantees, there are many others, *including* Article 1,

Section 10.<sup>5</sup> “At this late date in our judicial history[,]” the Court concluded, “we doubt that one could seriously contend any of the foregoing do not set forth judicially enforceable affirmative duties of the State. . . . If our exception in *Gottstein* stands for anything, it recognizes the need to protect those constitutional guaranties of a personal nature.” *Id.* at 502-03.

The trial court’s dismissal of Woolery’s Complaint with prejudice is contrary to *Rauch*, *Gottstein*, and *Seattle School Dist.* If Article 1, Section 10 is mandatory and judicially enforceable and since the trial court is required under the 12(b)(6) standard to assume Woolery’s allegations are true, then, at a minimum there must be *some* hypothetical theory or set of facts that would entitle Woolery to relief. The trial court erred, therefore, when it dismissed Woolery’s Complaint with prejudice. The trial court also erred, therefore, when it held that there is no right to have a civil claim heard within a particular time frame, since his claim *must* be heard without unnecessary delay.

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<sup>5</sup> Admittedly, the Court referred to Article 1, Section 10 as “entitlement to public trial.” *Seattle School Dist. v. State*, 90 Wn.2d 476, 502, 585 P. 2d 71 (1978). However, there is no principled reason why the open court guarantee would be enforceable but not the unnecessary delay guarantee.

**C. Woolery has standing to obtain an order from the Thurston County Superior Court compelling Defendants to provide constitutionally adequate funding to the Superior Court of Spokane.**

The trial court erred by ruling that “an individual does not have standing to bring [a] claim for funding” and that the Thurston County Superior Court does not have authority “to order the Legislature to fund the Superior Court in Spokane County at a different level[.]” RP 29. This error encompasses three different issues:

- (1) Does Woolery have “standing” in the constitutional sense?
- (2) If so, is he entitled to the relief that he requests?
- (3) Is that relief available in the Superior Court of Thurston County?

Woolery has standing (in the constitutional sense) to raise the constitutional claim, because he has a “ ‘personal stake in the outcome of the controversy.’ ” *Marchioro v. Chaney*, 90 Wn.2d 298, 303, 582 P.2d 487 (1978). Because the unnecessary delay clause is judicially enforceable and he has standing, he is therefore entitled to some form of relief, which in this case is an order compelling Defendants to adequately fund the Superior Court of Spokane. This is so because (1) that is the only relief that will remedy the constitutional violation; and (2) because once the trial court finds that inadequate funding is preventing the Superior Court from meeting its constitutionally mandated duties, the court is *obliged* under

*Zylstra v. Piva*, 85 Wn.2d 743, 748, 539 P. 2d 823 (1975), to remedy the violation by compelling the defendants to adequately fund the Superior Court of Spokane. Finally, Woolery is entitled to obtain that relief in Thurston County because his constitutional claim is separate and distinct from his tort claim and can therefore be brought wherever venue is proper, and regardless, there is no procedural vehicle for bringing his constitutional claim within his tort claim in Spokane County, as the trial court erroneously held. RP 30.

1. *Woolery has “standing” in the constitutional sense.*

The trial court ruled that “an individual does not have standing to bring [a] claim for funding” RP 29. This finding conflates two concepts: standing and relief. Standing is a constitutional doctrine that concerns whether a person has a “ ‘personal stake in the controversy’ ” that would entitle them to raise a constitutional issue. *Marchioro v. Chaney*, 90 Wn.2d 298, 303, 582 P.2d 487 (1978). Relief is a separate and distinct concept. It is a fallacy to hold, as the trial court did, that a party does not have standing because the *relief* he requested is allegedly not available. Moreover, given the 12(b)(6) standard, it was premature for the trial court to decide the issue of relief; the only relevant issue at this stage is whether Woolery stated a *claim* for relief.

In fact, Woolery does have standing to raise the constitutional issue “ ‘A person has standing to raise constitutional questions when his interest is a ‘personal stake in the outcome of the controversy.’ ” *Marchioro*, 90 Wn.2d at 303. “Further, when a controversy is of substantial public importance, immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture, this court has been willing to take a ‘less rigid and more liberal’ approach to standing.” *Grant County Fire Prot. Dist. v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P. 3d 419 (2004). Woolery has standing to raise the court funding issue because he has a personal stake in the controversy, i.e., constitutionally adequate funding would ensure that his case can be heard with unnecessary delay. Additionally, as the Chief Justice of this Court has observed in her 2011 State of the Judiciary Address, the current level of court funding has stretched the judiciary thin, resulting in “injustices” and threats to public safety. The Hon. Barbra Madsen, Chief Justice of the Wa St. Sup. Ct., 2011 State of the Judiciary Address (Jan 12, 2011). It cannot be doubted then that the court funding controversy is of substantial public importance affecting every interest in our state, which implicates the liberal standing rule articulated in *Grant County Fire Prot. Dist.* The trial court erred, therefore, by finding that Woolery did not have standing to bring his constitutional claim.

While it was premature for the trial court to rule on what relief Woolery is entitled to, given the urgency of the court funding issue and in the interest of judicial economy, this Court should decide the question to avoid delay in resolving this important issue.

2. *The Superior Court of Thurston County has the authority to compel Defendants to adequately fund the Superior Court of Spokane County and Woolery has standing to obtain this relief.*

The question of relief encompasses two sub issues: (1) does the Thurston County Superior Court have the authority to compel funding; and if so, (2) is an individual entitled to obtain an order compelling the legislature to fund the Superior Court of Spokane? Woolery argues below that the Thurston County Superior Court has constitutional and statutory authority to compel funding and that under the circumstances presented in his case, an individual does have a right to obtain this relief.

- a. Constitutional basis for court's authority

It is well established that our courts have the inherent authority to compel funding in order to perform a constitutionally-mandated function. *In Re Juvenile Director*, 87 Wn.2d 232, 252, 552 P.2d 163 (1976) (discussed below) *Zylstra v. Piva*, 85 Wn.2d 743, 748, 539 P. 2d 823 (1975) (discussed below); *State v. Perala*, 132 Wash. App. 98, 118, 130 P. 3d 852, *cert denied*, 158 Wn.2d 1018, 149 P.3d 378 (2006), (holding that

when the legislature has not appropriated sufficient funds, a court has the inherent authority to award compensation to appointed counsel in order to fulfill the court's constitutionally mandated duties); *see also Seattle School District v. State*, 90 Wn.2d 476, 503 n.3, 585 P. 2d 71 (1978) ("The power of the judiciary to enforce rights recognized by the constitution, even in the absence of implementing legislation, is clear. Just as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail mandatory provisions by its silence.") (internal citations omitted).<sup>6</sup>

In *Zylstra*, this Court held that even though for the purposes of wage bargaining, employees in juvenile court facilities are employees of the county, the Court was not relinquishing "its inherent power to control and administer its functions."

The court cannot, of course, relinquish either its power or its obligation to keep its own house in order. In the unlikely event that the county refused adequate salary funds, the court would be both *obliged and empowered* to protect its proper functioning and see to the effective administration of justice. The legislature may provide by statute for the compensation of judicial employees. However, such a legislative enactment does not in any way impair the *inherent power of the judiciary to require payment of necessary funds for the efficient administration of justice*.

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<sup>6</sup> This is also the rule in the majority of foreign jurisdictions that have considered the question. Appd'x II (surveying authority from foreign jurisdictions).

Harmonious cooperation among the three branches is fundamental to our system of government. Only if this cooperation breaks down is it necessary for the judiciary to exercise inherent power to sustain its separate integrity. . . .

85 Wn.2d at 748-750 (internal citations omitted) (emphasis added).

In his concurrence, Justice Utter further expounded:

Having been given this power, the judicial branch is further entrusted with the duty to insure that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” . . . .

For the courts to effectively maintain their independence as a separate branch of government, they must have the power to do *all things that are reasonably necessary* for the proper administration of their office within the scope of their jurisdiction. This includes not only the power to control the decision making and the adjudicatory process, but also the ancillary functions which are subordinate to the decision making process.

. . . .

“The inherent power of the judiciary is a judicial power, but only in the sense that it is a natural necessary concomitant to the judicial power.

The inherent power of the Court is non-adjudicatory. It does not deal with justifiable matters. It relates to the administration of the business of the Court.”

*Even without statutory enactment, the judiciary possesses all powers necessary for the free and untrammelled exercise of its functions.* The constitutional provision in our state vesting judicial power in the courts carries with it, by necessary implication, the authority necessary to the exercise of that power. Such authority is not limited to adjudication, but encompasses certain ancillary functions, such as rule making and judicial administration, which are essential if the courts are to carry out their constitutional mandate. *To perform these functions courts must have the ability to determine and compel payment of those sums of money which are reasonable and necessary to carry out their mandate and duty to administer justice if they are to be in reality a coequal independent branch of our government.*

In the exercise of their power to determine and compel payment of sums of money “the inherent power of courts is not exhausted when the needs of administration of justice have been declared and urged upon the legislative councils. There remains a narrower area in which the courts have inherent power to go further than merely declare the existence of a need. It is an area in which the courts have inherent power to bind the State or the county contractually.”

*Id.* 754-756 (Utter, J. concurring) (emphasis added). Thus, this Court has made it abundantly clear that the Superior Court has the inherent authority to determine and compel payment of sums necessary to carry out their mandate and duty to administer justice. *Id.*

Similarly, in *In Re Juvenile Director*, 87 Wn.2d 232, 252, 552 P.2d 163 (1976), this Court declined to exercise its inherent power to increase the salary of the Director of Juvenile Services, because the evidentiary burden was not met. Nevertheless, the Court made clear that it *does* have the inherent authority to compel funding in order to perform a constitutionally-mandated function. The Court explained that the separation of powers doctrine should not be viewed as keeping the branches “ ‘separate and distinct’ ”; “[a] court’s authority ‘is not limited to adjudication, but includes certain ancillary functions, such as rule-making and judicial administration, which are essential if the courts are to carry out their constitutional mandate.’ ” *Id.* at 242.

While courts must limit their incursions into the legislative realm in deference to the separation of powers

doctrine, *separation of powers also dictates that the judiciary be able to insure its own survival when insufficient funds are provided by the other branches. To do so, courts possess inherent power, that is, authority not expressly provided for in the constitution but which is derived from the creation of a separate branch of government and which may be exercised by the branch to protect itself in the performance of its constitutional duties.*

It is axiomatic that, as an independent department of government, the judiciary must have adequate and sufficient resources to ensure the proper operation of the courts. *It would be illogical to interpret the Constitution as creating a judicial department with awesome powers over the life, liberty, and property of every citizen while, at the same time, denying to the judges authority to determine the basic needs of their courts as to equipment, facilities and supporting personnel.*

The doctrine's purpose is "to preserve the efficient and expeditious administration of Justice and protect it from being impaired or destroyed."

*Id.* at 245 (internal citations omitted) (emphasis added). The Court went on to cite authority as far back as 1838 showing that the "implied power to compel the expenditure of public funds" is not novel, and has been exercised by the courts of numerous states throughout history. *Id.*

While this Court noted that exercising this inherent authority *sua sponte* "could have an adverse effect on working relations between other branches of government and weaken public support for the judiciary[.]" here, it is a *citizen* demanding this relief. Thus, that concern is diminished. Additionally, that concern should be balanced with concern regarding the integrity of the judicial system. "[T]he confidence and trust of the public

and the bar . . . depends on the efficient, competent administration of justice secured through adequate funding of the courts.” *Id.* at 249 n.5. Moreover, while political implications are always a concern, the core functions of the judicial branch “must always be expressed and exercised.” *Rauch v. Chapman*, 16 Wash. 568, 574, 48 P. 253 (1897). Thus, when it comes to preserving its core constitutional functions, this Court cannot allow political concerns to interfere with judicial independence. The Court must protect its own integrity and exercise its inherent power to compel funding. The trial court erred, therefore, when it ruled that it did not have the authority to hear Woolery’s claim requesting the legislature to fund the Superior Court of Thurston County. RP 29.

b. Statutory basis for the trial court’s authority

The trial court also has the authority to compel funding under its statutorily implied powers provided in RCW 2.28.150 and RCW 2.08.160, and under its statutory authority arising from Initiative 62 (RCW 43.135.060). The legislature has vested the superior court with broad inherent powers:

When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer *all the means to carry it into effect are also given*; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.

“Implied Powers” RCW 2.28.150 (1891) (emphasis added). This statute is two-fold. It recognizes the courts power “to adopt suitable procedures to affect their jurisdiction when no procedures are specifically provided.” *In Re Cross*, 662 P. 2d 828, 99 Wash. 2d 373 (1983). However, it also concerns the courts “implied powers,” which include *all* of the powers “essential to due administration of justice.” *Seastrom v. Konz*, 86 Wn.2d 377, 379, 544 P. 2d 744 (1976). It was invoked to order a new election in *Foulkes v. Hays*, 537 P. 2d 777 (1975). It was invoked to order the sale of property to fund restitution in *State v. Nelson*, 53 Wn. App. 128, 766 P. 2d 471 (1998). It can be invoked by the trial court to compel funding that is essential to the administration of justice.

Yet another source of statutory authority for compelling funding can be found in RCW 2.08.160 (reiterating Article 4, Section 5), which mandates that “the business of the court shall be so distributed and assigned by law, *or in the absence of legislation therefore*, by such rules and orders of court as shall best promote and secure the convenient and expeditious transaction thereof.” (Emphasis added.)

In addition to vesting the court with inherent authority to “carry into effect its own powers,” the legislature also gave the judicial system a means to determine whether it is fulfilling its constitutionally mandated duties. In 1957 the legislature promulgated RCW chapter 2.56, creating

the position of Administrator for the Courts, which provides the judiciary with an administrative structure by which it can efficiently and expeditiously provide for the maintenance and operation of the judicial system by (i) continually assessing its operations, (ii) modernizing, (iii) responding to new, emerging and developing conditions and, of particular importance here, (iv) adapting to and accommodating increased case loads by, inter alia, adding judicial positions as necessary in order “to hear all the cases in a particular court.” RCW 2.56.030.

The trial court has a third source of statutory authority to compel funding, which arises from Initiative 62. Historically, the counties were responsible for providing one half of a superior court judge’s salary plus the cost of facilities and support staff. RCW 2.28.140 (“The county in which the court is held shall furnish the courthouse, a jail or suitable place for confining prisoners, books for record, stationery [sic], lights, wood, attendance, and other incidental expenses of the courthouse and court which are not paid by the United States.”) This arrangement, which dates back to territorial times when judges “rode the circuits,” made sense in the days when state government was skeletal and most services were delivered on the county level. However, in 1979 the people of our state changed that arrangement. Disenchanted with the legislature’s habit of creating “unfunded mandates,” the voters passed Initiative 62. That initiative,

codified as RCW 43.135.060, prohibited the state legislature from placing the burden of funding “new programs” or “increased levels of service” on the counties.

(1) After July 1, 1995, the legislature shall not impose responsibility for new programs or increased levels of service under existing programs on any political subdivision of the state unless the subdivision is fully reimbursed by the state for the costs of the new programs or increases in service levels. Reimbursement by the state may be made by: (a) A specific appropriation; or (b) increases in state distributions of revenue to political subdivisions occurring after January 1, 1998.

(2) If by order of any court, or legislative enactment, the costs of a federal or local government program are transferred to or from the state, the otherwise applicable state expenditure limit shall be increased or decreased, as the case may be, by the dollar amount of the costs of the program.

*Id.* Initiative 62 on its face, not only requires the state to pay for increased levels of service, but it also *vest the courts with the authority to order the cost of a local government program be transferred to the state.*

To remove all doubt regarding the application of RCW 43.135.060 to the creation of new judicial offices, State Senator Phil Talmadge requested an opinion on the matter from then Attorney General Ken Eikenberry. In an opinion dated January 17, 1980, Mr. Eikenberry opined that when the legislature authorizes a new judicial position, it has “increased levels of service” within the meaning of the statute. The AG further opined that RCW 43.135.060 therefore requires the State when it authorizes a new judicial office, to reimburse that county *all* resulting

expenses, including “increase in both payroll and other court costs, not the least of which might well be a necessity for additional courtrooms as well as added court personnel.” *Id.* Three times this Court has cited approvingly the AG’s opinion on this question. *Seattle v. State*, 100 Wn.2d 16, 24, 666 P.2d 351 (1983) (“the Attorney General concluded that reimbursement was required for the cost of new superior court judgeships added by the Legislature in its 1980 session. . . . The additional judges represented an additional service to the public.”); *State v. Howard*, 106 Wn.2d 39, 43, 772 P.2d 783 (1985) (“For example, the State would be required to reimburse counties if legislation required the addition of superior court judges because that would increase the level of judicial service provided to the public.”); *Tacoma v. State*, 117 Wn.2d 348, 358, 816 P.2d 7 (1991) (“In AGO 3 (1980), the Attorney General considered the costs imposed by legislation mandating the addition of superior court judgeships.”) The Attorney General stated if the legislation imposes an increased level of service through its legally mandated program with a resulting increase in costs, the State is liable to reimburse the taxing district. Because the addition of superior court judgeships increased the level of service to the public, the State was obligated to reimburse the taxing districts.”).

Nonetheless, since the enactment of Initiative 62, as a condition precedent to approval of new superior court judge positions, the State has required counties to fund all expenses of new judicial opinions beyond the State's one half share of the salary. *E.g.* RCW 2.08.061 (1996 c 208 § 4) (“The additional judicial position created by section 3 of this act shall be effective only if Spokane county [sic] through its duly constituted legislative authority documents its approval of the additional position and its agreement that it will pay out of county funds, without reimbursement from the state, the expenses of the additional judicial position as provided by statute.”) This “poison pill” requiring the county to pay for the cost of increased is contrary to Initiative 62, the AG’s opinion, and the opinions of this Court. It has prevented numerous authorized judicial offices from being filled. It is, in a word, unlawful.

The foregoing statutory scheme provides the judicial system a mandate to provide justice without unnecessary delay, the means to determine whether the judicial system is meeting that mandate, and the statutory authority to compel the funding required to meet those mandates. Additionally, the people, through Initiative 62, have mandated that the state legislature fund *all* of the expenses incident to new judicial offices created after July 1, 1995. The trial court therefore also has the authority under Initiative 62 to compel funding by ordering that the costs of new

programs for judicial offices be transferred to the state. The trial court erred, therefore, when it ruled that it did not have the authority to hear Woolery's claim requesting the legislature to fund the Superior Court of Thurston County. RP 29.

3. *A civil litigant is entitled to obtain an order compelling the Legislature to fund the Superior Court of Spokane.*

As shown above, the Thurston County Superior Court has statutory and constitutional authority to compel funding. It is well established that this authority can be invoked on behalf of an institutional litigant, i.e., a superior court. The issue here is whether a *non*-institutional litigant can obtain this relief. This is a case of first impression. The only foreign authority that addresses the issues is *O'Coin's, Inc. v. Treasurer of the County of Worcester*, 362 Mass. 507, 510, 287 NE 2d 608 (Mass. 1972). In *O'Coin's*, the Supreme Judicial Court of Massachusetts held that a retail appliance store can obtain an order compelling Worcester County to pay for goods that were purchased by the Superior Court and necessary to its operation.

Woolery contends that not only can this relief be obtained by a non-institutional litigant, but that a civil litigant is better situated to obtain this relief than an institutional litigant. Woolery's argument is based on the principles articulated by this Court in *Zylstra v. Piva*, 85 Wn.2d 743, 748,

539 P. 2d 823 (1975). As discussed above, in *Zylstra* this Court opined that it had an obligation to preserve its integrity if the legislature did not do so. “The court cannot relinquish its power or its obligation to keep its own house in order. In the unlikely event that the county *refused* adequate salary funds, the court would be both “*obliged and empowered* to protect its proper functioning and see to the effective administration of justice.” *Id.* (emphasis added).

Here, Woolery alleges that the circumstances warned of in *Zylstra* have come to pass. Instead of refusing to pay adequate salary funds, the legislature has refused to fund the Superior Court of Spokane at a level adequate for the court to fulfill its constitutionally mandated duties. If, as shown above, Woolery’s claim is properly before the trial court, and in meeting his burden of proof he proves that the Defendants’ inadequate funding is preventing the Spokane County Superior Court from fulfilling its constitutionally mandated duties, the trial court, as this Court said in *Zylstra*, is “*obliged and empowered* to protect its proper functioning and see to the effective administration of justice.” *Id.* (emphasis added). Once the claim is properly before the court, and the constitutional violation is proven, the trial court must remedy the full extent of the constitutional violation, i.e., grant the order to compel funding.

Moreover, this is the only relief that will redress the constitutional violation. While in theory, the trial court could compel only enough funding for Woolery's case to be heard without unnecessary delay, this would mean that every other aggrieved litigant in the same situation must come to the Superior Court requesting an order compelling its own appropriation. It would be the equivalent of the U.S. Supreme Court, having been confronted with 20 African American children in *Brown v. Board of Education*, who had been denied admission to the white school, saying "yes, this is a constitutional violation, but we will only remedy it with regard to these 20 children. All other similarly situated children must bring their own constitutional claim." The Court, once it identifies the constitutional violation, must remedy the full extent of the constitutional violation.

While such a ruling would require courage and judicial independence, never before in this nation has a legislature so starved a judicial system that it cannot fulfill its constitutionally mandated duties. This state ranks last in the nation in court funding and the budget is being cut further. The Hon. Barbra Madsen, Chief Justice of the Wa St. Sup. Ct., 2011 State of the Judiciary Address (Jan 12, 2011). This dubious ranking is not a recent phenomenon of the financial downturn, but a chronic problem that for decades has hampered our courts. While the judicial

branch must accept cuts in programs that are not constitutionally mandated, it cannot permit inadequate funding to impair its ability to fulfill its constitutionally mandated duties. *Rauch v. Chapman*, 16 Wash. 568, 574, 48 P. 253 (1897) (“[C]ertain necessary functions of government must always be expressed and exercised.”). With the integrity of the judicial system itself at stake, the Court must not evade the question on a technicality. If the legislature drops court funding below a constitutionally adequate level, the judiciary is obliged to act. *Zylstra v. Piva*, 85 Wn.2d 743, 748, 539 P. 2d 823 (1975). Inadequate court funding has reached the point that citizens in many cases cannot obtain access to the courts. With the rule of law, the protection of important individual liberties and serious access to justice issues at stake, this Court should not distinguish between a civil litigant whose rights were affected and the judiciary whose constitutional mandate is also affected.

Moreover, due to the nature of this claim, it is likely that it can *only* be brought by a non-institutional litigant in a venue outside of Spokane County. Unlike an action regarding the funding of a discreet court program, like in *Juvenile Director*, the Spokane County Superior Court would risk the appearance of impropriety if it were to institute an action itself for its own funding. Furthermore, the Spokane County Superior Court would not be a disinterested fact finder in such an action, since it would have a stake in the

outcome. Additionally, the nature of claim would require the court to sit in judgment on itself, asking whether *it* was fulfilling its constitutionally mandated duties—what court wants to be in that position?

And then there is the “small change apathy” problem. In *The Mechanism of the Slippery Slope*, 116 HARV. L. REV. 1026, 1102 (2003), Eugene Volokh tells of how a frog will remain in a pot of water that is slowly brought to a boil until it dies, whereas a frog that jumps into boiling water will jump right out. The Superior Court of Spokane, after years of chronic underfunding, has acclimated to the anaerobic state of affairs and is unlikely to institute an action for funding, even though the circumstances have long been appropriate to do so. A non-institutional litigant, on the other hand, who has had his case continued five times, is not acclimated—he is keenly aware that the system is broken. Besides having his case heard, he is not self-interested in the outcome. He is therefore better situated to serve as the named plaintiff than the Superior Court of Spokane. Thus, not only is a non-institutional plaintiff entitled to obtain this relief, but also the nature of the litigation virtually *requires* a non-institutional plaintiff.

At this point, every other democratic avenue has been exhausted and litigation is the only realistic option left. Court funding does not have a political constituency. If this issue is left to the legislature, it will continue to languish as it has for decades. While a political solution would have been

preferable, the legislature has shown that, unless ordered otherwise, it will stand by while the judicial branch slowly suffocates. That it is a private citizen whose rights have been violated who brings this action should make no difference—the problem remains and the judiciary, whose constitutional mandate in a democratic society is to protect the individual rights of citizens and their access to justice, should do just that by permitting this action to proceed. By permitting access to the courts on this important issue, access to justice for all citizens is preserved.

**D. The trial court erred by finding that Woolery has an adequate remedy at law by appealing the continuances within the underlying tort case in Spokane County Superior Court.**

Defendant argued that Woolery had an “adequate remedy at law” within his tort case in Spokane County and that was the proper forum for the constitutional claim. RP 9. The trial court agreed and dismissed Woolery’s claim, in part, based on the finding that Woolery can appeal “in the Spokane County case regarding the denial of an earlier trial date.” RP 30. This is an error in three regards. First, this is the wrong standard for dismissing a case on a 12(b)(6) motion. Second, Woolery does not have an adequate remedy at law since the Rules of Appellate Procedure (RAP) do not permit him to appeal a continuance on the basis of a constitutional violation. Third, if, as the trial court ruled, Woolery does have an adequate remedy within his Spokane County tort case, his Thurston County case

should not have been dismissed with prejudice, because now he will be barred from pursuing this purported “adequate remedy.”

1. *A 12(b)(6) motion should not be granted unless the complaint fails to state a claim for relief.*

The trial court erred by dismissing Woolery’s case on a 12(b)(6) motion based on the fact that he purportedly could appeal the continuances within his Spokane County case. As stated above, a 12(b)(6) motion to dismiss for failure to state a claim should only be granted if “ ‘it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff relief.’ ” *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P. 2d 781 (1980). It is irrelevant on 12(b)(6) motion whether the plaintiff *could* have brought his case in a different forum. Moreover, the judge’s ruling was internally contradictory: if, as the trial court opines, Woolery is entitled to bring his constitutional claim in Spokane County, why then did the court dismiss his claim *with prejudice* (CP 85), which, due to principles of res judicata, will bar him from bringing his claim in Spokane County. *Krikava v. Webber*, 43 Wn. App. 217, 219, 716 P. 2d 916 (1986). Thus, the trial court erred by dismissing Woolery’s complaint for relief on the wrong standard.

2. *Woolery does not have an adequate remedy at law within his tort case in Spokane County because Rules of Appellate Procedure do not provide a vehicle for a party to appeal a continuance based on an alleged violation of the unnecessary delay clause.*

There is no vehicle under the RAPs to appeal a continuance based on a violation of the unnecessary delay clause. Review by the court of appeals is only available under two circumstances: review as a matter of right (RAP 2.2); or discretionary review (RAP 2.3). Review of a continuance was not available to Woolery as a matter of right under RAP 2.2 because at the time of the continuances there was no final judgment or decision determining the merits. Review was not available under RAP 2.3 because Woolery could allege: an error “which would render further proceedings useless[,]” (RAP 2.3(1)); an error that “substantially alters the status quo or substantially limits the freedom of a party to act[,]” (RAP 2.3(2)); that “[t]he superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court[,]” (RAP 2.3(3)); or that there is “a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.” RAP 2.3(4).

In short, the RAPs did not provide Woolery with any vehicle to appeal his continuance.

Furthermore, Woolery cannot bring his constitutional claim within the underlying tort case because the parties that injured Woolery, the State of Washington and County of Spokane, are not parties to the tort case in Spokane. Moreover, such an appeal would have stayed proceedings in his tort case and prolonged the delay, which is the antithesis of what Woolery wanted. If the remedy for a continuance that violates the unnecessary delay clause is to take an interlocutory appeal, then the medicine is worse than the disease. For these reasons, the trial court erred when it said he had an adequate remedy at law within his tort case in Spokane; Woolery had no vehicle to bring his claim within the Spokane County tort case, even if he had wanted to.

3. *Woolery's Constitutional Claim is separate and distinct from the underlying tort claim; it can therefore be filed in any forum in which venue is proper.*

While Woolery's constitutional case is tangentially related to Woolery's tort case, it is a separate and distinct claim involving different defendants, different facts, and different law. Thus, Woolery was not required to bring his constitutional claim within his Spokane County tort case; he can bring it wherever venue is proper.

Moreover, doing so would be impractical for numerous reasons. The constitutional claim may involve calling the Honorable Kathleen O'Connor, the trial judge in the tort case, as a witness. Judge O'Connor would have had to disqualify herself under CJC 2.11 further delaying proceedings. Moreover, as noted above, the nature of the claim would require the Spokane County Superior Court to sit in judgment of its own actions and decide whether it is fulfilling its constitutionally mandated duties. Respectfully, the Spokane County Superior Court cannot be a disinterested tribunal on a claim of this nature.

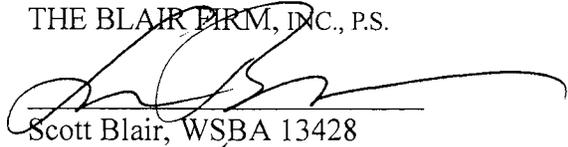
Additionally, Woolery's constitutional claim did not arise until long after suit had been filed in the tort claim. Thus, Woolery could not add the claim without leave from the court, which considering the issues, may have been denied due to concerns about jury confusion, introduction of remote issues, or a lengthy trial. *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 165, 736 P. 2d 249 (1987). Thus, not only is Woolery entitled to bring his constitutional claim separately from his tort claim, but as a practical matter, he had no other choice. Thus, the trial court erred by dismissing Woolery's claim on the grounds that he had an adequate remedy at law within his Spokane County tort case.

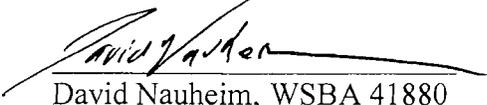
V. CONCLUSION

Article 1, Section 10 of the Washington State Constitution provides that “justice in all cases shall be administered . . . without unnecessary delay.” Given the deferential 12(b)(6) standard, Woolery’s Complaint should not have been dismissed since there is definitely a theory or set of facts that would entitle him to relief under the unnecessary delay clause. The Court should therefore reverse the trial court and remand Woolery’s case for trial. Furthermore, this case raises important questions of public concern regarding whether Defendants’ inadequate funding of the Superior Court of Spokane is preventing that court from fulfilling its constitutionally mandated duties. When the legislature fails to appropriate funds necessary for the judicial system to fulfill its constitutionally mandated duties, this Court is obliged and empowered to compel the necessary funding. In the interest of judicial economy, the Court should also provide the trial court guidance on what relief is available to Woolery.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of July, 2011.

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## Appendix I

### A survey of “delay” provisions from state constitutions.

1. Alabama – “That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.” ALA. CONST. § 13.
2. Arizona – “Justice in all cases shall be administered openly, and without unnecessary delay.” ARIZ. CONST. ART. II, § 11.
3. Arkansas – “Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase; completely, and without denial; promptly and without delay; conformably to the laws.” ARK. CONST. ART. II, § 1.
4. Colorado – “Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.” COLO. CONST. ART. II, § 6.
5. Connecticut – “All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.” CONN. CONST. ART. I, § 10.
6. Delaware – “All courts shall be open; and every person for an injury done him or her in his or her reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense. Suits may be brought against the State, according to such regulations as shall be made by law.” DEL. CONST. ART. I, § 9.
7. Florida – “The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” FLA. CONST. ART. I, § 21.
8. Idaho – “Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay, or prejudice.” IDAHO CONST. ART. I, § 18.
9. Illinois – “Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.” ILL. CONST. ART. I, § 12.
10. Indiana – “All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.” IND. CONST. ART. I, § 12.

11. Kansas – “All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.” KAN. CONST. BILL OF RIGHTS § 18.

12. Kentucky – “All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.” KY. CONSTITUTION ART. I, § 14.

13. Louisiana – “All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.” LA. CONST. ART I, § 22.

14. Maine – “Every person, for an injury inflicted on the person or the person's reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay.” ME. CONST. ART. I, § 19.

15. Maryland – “That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.” MD. CONST. ART. I, § 19.

16. Massachusetts – “Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.” MASS. CONST. PART I, § ART. 6.

17. Minnesota – “Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.” MINN. CONST. ART. I, § 8.

18. Mississippi – “All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay.” MISS. CONST. ART. III, § 24.

19. Missouri – “That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.” MO. CONST. ART. I, § 14.

20. Montana – “Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer

provides coverage under the Workmen's Compensation Laws of this state. Right and justice shall be administered without sale, denial, or delay." MONT. CONST. ART. II, § 16.

21. Nebraska – "All courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay, except that the Legislature may provide for the enforcement of mediation, binding arbitration agreements, and other forms of dispute resolution which are entered into voluntarily and which are not revocable other than upon such grounds as exist at law or in equity for the revocation of any contract." NEB. CONST. ART. I, § 13.

22. New Hampshire – "Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws." N.H. CONST. PART 1, § 14.

23. North Carolina – "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. CONST. ART. I, § 18.

24. North Dakota – "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct." N.D. CONST. ART I, § 9.

25. Ohio – "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." OHIO CONST. ART. I, §16.

26. Oklahoma – "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice." OKLAHOMA CONST. ART. II, § 6.

27. Oregon – "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation." OR. CONST. ART. I, § 10.

28. Pennsylvania – "All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct." PENN. CONST. ART. I, § 11.

29. Rhode Island – "Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one's person, property,

or character. Every person ought to obtain right and justice freely, and without purchase, completely and without denial; promptly and without delay; conformably to the laws.” R.I. CONST. ART. I, §5.

30. South Carolina – “All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained. S.C. CONST. ART. I, § 10.

31. South Dakota - “All courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay.” S.D. CONST. ART. VI, § 20.

32. Tennessee – “That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay.” TENN. CONST. ART. I, § 17.

33. Utah – “All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.” UTAH CONST. ART. I, § 11.

34. Vermont – “Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person, property or character; every person ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformability to the laws.” VT. CONST. CHAP. I, § 4.

35. Washington – “Justice in all cases shall be administered openly, and without unnecessary delay.” WASH. CONST. ART. I, § 10.

36. West Virginia – “The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.” W. VA. CONST. ART. III, § 17.

37. Wisconsin – “Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.” WIS. CONST. ART. I, § 9.

38. Wyoming – “All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay.” WYO. CONST. ART. I, § 8.

## Appendix II

### **A partial survey of recent foreign state supreme courts opinions opining that the judicial branch has the inherent power to compel expenditures necessary to fulfill its constitutionally mandated duties**

*McCorkle v. Judges.*, 260 Ga. 315, 316, 392 SE 2d 707 (Ga. 1990) (“In *Grimsley v. Twiggs County*, 249 Ga. 632 (292 SE.2d 675) (1982), we acknowledged that the judiciary, as an independent and co-equal branch of government, must possess power that is concomitant with its duty to the public. That power includes the ‘. . . inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities. . . .’”) (internal citations omitted).

*Vondy v. Comm’ns Court of Uvalde County.*, 620 S.W.2d 104, 110 (Tex. 1981) (“The legislative branch of this state has the duty to provide the judiciary with the funds necessary for the judicial branch to function adequately. If this were not so, a legislative body could destroy the judiciary by refusing to adequately fund the courts. The judiciary must have the authority to prevent any interference with or impairment of the administration of justice in this state.”)

*Rose v. Palm Beach County*, 361 So.2d 135, 137 (Fla. 1978) (“very court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions. The doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounts to a threat to the courts’ ability to make effective their jurisdiction”).

*Webster County Board of Supervisors v. Flattery*, 268 NW 2d 869, 874 (Iowa 1978) (“From the basic premise just articulated it necessarily follows the judiciary is vested with inherent power to do whatever is essential to the performance of its constitutional functions.”)

*Commonwealth ex rel. Carroll v. Tate et al.*, 442 Pa. 45, 57 (Pa. 1971) (“A Legislature has the power of life and death over all the Courts and over the entire Judicial system. Unless the Legislature can be compelled by the Courts to provide the money which is reasonably necessary for the proper functioning and administration of the Courts, our entire Judicial system could be extirpated, and the Legislature could make a mockery of our form of Government with its three co-equal branches — the Executive, the Legislative and the Judicial.”)

*Wayne Circuit Judges v. Wayne County.*, 386 Mich. 1, 9, 190 NW 2d 228 (Mich. 1971) (“ ‘Expressed in other words, the Judiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government. This principle has long been recognized, not only in this Commonwealth but also throughout our Nation.’ ”)

*O'Coin's, Inc. v. Treasurer of the County of Worcester*, 362 Mass. 507, 510, 287 NE 2d 608 (Mass. 1972) (“We hold, therefore, that among the inherent powers possessed by every judge is the power to protect his court from impairment resulting from inadequate facilities or a lack of supplies or supporting personnel. To correct such an impairment, a judge may, even in the absence of a clearly applicable statute, obtain the required goods or services by appropriate means, including arranging himself for their purchase and ordering the responsible executive official to make payment.”)

*Smith v. Miller*, 384 P. 2d 738, 741 (Co. 1963) (“ ‘In Colorado there are repeated confirmations of the proposition that the courts have the inherent power to carry on their functions so that they may operate independently and not become dependent upon or a supplicant of either of the other departments of government, and may incur necessary and reasonable expenses in the performance of their judicial duties and, in cases such as this one, it is the plain ministerial duty of those who control the purse to pay such expenses except only where the amounts are so unreasonable as to affirmatively indicate arbitrary and capricious acts.’ ”).

*Noble County Council v. State ex rel. Fifer*, 234 Ind. 172, 181-82, 125 NE 2d 709 (Ind. 1955) (“These mandates necessarily carry with them the right to quarters appropriate to the office and personnel adequate to perform the functions thereof. The right to appoint a necessary staff of personnel necessarily carries with it the right to have such appointees paid a salary commensurate with their responsibilities. The right cannot be made amenable to and/or denied by a county council or the legislature itself. Our courts are the bulwark, the final authority which guarantees to every individual his right to breathe free, to prosper and be secure within the framework of a constitutional government. The arm which holds the scales of justice cannot be shackled or made impotent by either restraint, circumvention or denial by another branch of that government.”)

