

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Oct 08, 2012, 9:07 am  
BY RONALD R. CARPENTER  
CLERK

RECEIVED BY E-MAIL *bjh*

No. 87823-4

SUPREME COURT  
OF THE STATE OF WASHINGTON

---

VICKI LEE ANNE PARKER and JAMES S. JOHNSON, Appellants,  
v.  
KIM WYMAN, in her capacity as Thurston County Auditor, and  
CHRISTINE SCHALLER-KRADJAN, MARIE CLARKE, and VICTOR  
MINJARES, Respondents.

And

MARIE S. CLARKE, Appellant,  
v.  
KIM WYMAN, in her capacity as Thurston County Auditor, and  
CHRISTINE SCHALLER-KRADJAN, Respondents.

---

REPLY BRIEF OF APPELLANT JOHNSON

---

JAMES S. JOHNSON  
WSBA No. 23093  
PO Box 6024  
Olympia, WA 98507  
(360) 339-3130

 ORIGINAL

## Table of Contents

I. This case involves two different views of our Constitution.	1
II. Appellants interpretation of the Constitution is consistent with the history of residential requirements before statehood, the history of the constitutional convention, and the history of legislative enactments since statehood.	3
III. This Court should exercise its inherent power to review the trial court's decision.	7
IV. Sanctions should be denied	13
V. Conclusion	15
Appendix 1: Newspaper articles	
Appendix 2: Form letter	

## Table of Authorities

### Table of Cases

<i>Nielsen v. Washington State Bar Ass'n</i> , 90 Wn.2d 818, 585 P.2d 1191 (1978)	1-2
<i>Gerberding v. Munro</i> , 134 Wn.2d 188, 949 P.2d 1366 (1998)	1, 2
<i>State ex rel. Quick-Ruben v. Verharen</i> , 136 Wn.2d 888, 901, 969 P.2d 64 (1998)	2
<i>In re Bartz</i> , 47 Wn.2d 161, 163-64, 287 P.2d 119 (1955)	2
<i>Hatfield v. Greco</i> , 87 Wn.2d 780, 557 P.2d 340 (1976)	8
<i>Kreidler v. Eikenberry</i> , 111 Wn.2d 828, 837, 766 P.2d 438 (1989)	8
<i>Williams v Seattle School Dist. No. 1</i> , 97 Wn.2d 215, 218, 643 P.2d 426 (1982)	8
<i>Dumas v. Gagner</i> , 137 Wn.2d 268, 971 P.2d 17 (1999)	9
<i>Freund v. Hastie</i> , 13 Wash. App. 731, 537 P.2d 804 (1975)	9
<i>State ex rel. Ewing v. Reeves</i> , 15 Wn.2d 75, 129 P.2d 805 (1942)	11-12
<i>Foulkes v. Hays</i> , 85 Wn.2d 629, 636-37, 537 P.2d 777 (1975)	12

### Constitutional Provisions

CONST. Art. XXVII, sec. 2	2, 5, 6
CONST. Art. VI	4, 5
CONST. Art. IV, § 4	8
CONST. Art. IV, sec. 29	13

### Statutes

CODE OF 1881 § 1297	3
CODE OF 1881 § 3050	3
CODE OF 1881 § 3063	3, 6
CODE OF 1881 §§ 1689, 1691 & 1704	3
LAWS of 1854 ch. 2 § 2, at 74	3
LAWS of 1854-55, § 1, at 7	3
LAWS of 1887-88 at xiii	3
LAWS of 1907, ch. 209, § 4 at 458	6
LAWS of 1919 ch 139 § 1, page 390	7
RCW 1.04.021	7
RCW 29A.20.021	6
RCW 29A.20.021	7
RCW 29A.36.180	11
RCW 29A.52.231	11
RCW 29A.68.011	12
RCW 29A.68.011(3)	8

### **Statutes**

RCW 29A.68.011(6)	10
RCW 42.04.020	7
RCW 42.12.010	6
REV. STAT. § 1865 (1874)	3

### **Other Authorities**

<i>The Journal Of the Washington State Constitutional Convention 1889</i> (Beverly Paulik Rosenow, ed., Book Publishing Co. 1962)	4
---	---

**I. This case involves two different views of our Constitution.**

This case involves two very different views of our Constitution. Ms. Wyman and Ms. Schaller hold the view that the Constitution contains the exclusive qualifications for superior court judges, and thereby prohibits the Legislature from imposing a residency requirement on judges and candidates for judicial office.

Appellants subscribe to the view that because territorial law required all holders of elective office to live in the district voting for the office at the time the Constitution was adopted, it is permissible today for the Legislature to impose on superior court judges and candidates for the office a requirement that they live in the county that elects them.

Ms. Wyman's and Ms. Schaller's position is not unreasonable. This Court has previously held in another context that the Constitution contains the exclusive qualifications for offices mentioned in it.<sup>1</sup> Moreover, this Court has in dicta previously suggested that there may be no other requirement for superior court judges than that they be lawyers. *Nielsen v. Washington State Bar Ass'n*<sup>2</sup> says being an attorney is the only qualification for superior court judges. The case dealt with the issue of

---

<sup>1</sup> *Gerberding v. Munro*, 134 Wn.2d 188, 208, 949 P.2d 1366 (1998).

<sup>2</sup> *Nielsen v. Washington State Bar Ass'n*, 90 Wn.2d 818, 825 fn 4, 585 P.2d 1191 (1978).

whether non-citizens could be admitted to the bar in Washington, and the Court's statement came in the context of dismissing an argument about non-citizens becoming judges as not relevant. 90 Wn.2d at 825. In *State ex rel. Quick-Ruben v. Verharen*<sup>3</sup> this Court noted that residency may not be required, but said, "we do not reach the issue of whether residency in a county is a qualification for the office of superior court judge."<sup>4</sup>

Our view is not unreasonable either. The argument that a qualification found in territorial law would survive adoption of the Constitution by virtue of Article XXVII, section 2, is not something we dreamed up. It is reasoning twice advanced by this Court in majority opinions.<sup>5</sup>

---

<sup>3</sup> *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 901, 969 P.2d 64 (1998).

<sup>4</sup> Ms. Schaller characterizes a third case, *In re Bartz*, 47 Wn.2d 161, 163-64, 287 P.2d 119 (1955), as noting the qualifications for superior court judges as "limited to those set forth in the Constitution." Brief of Respondent Schaller at 31. *In re Bartz* dealt with justices of the peace. The Constitution contains no language setting any qualifications for justice of the peace. This Court noted the requirement in Article IV, section 17, that superior court judges be lawyers in the opinion. 47 Wn.2d at 163. However, in doing so, the Court said nothing about that being the only qualification for superior court judges.

<sup>5</sup> See *Gerberding v. Munro*, 134 Wn.2d at 208-09, and *In re Bartz*, 47 Wn.2d at 167.

**II. Appellants interpretation of the Constitution is consistent with the history of residential requirements before statehood, the history of the constitutional convention, and the history of legislative enactments since statehood.**

The two interpretations of the Constitution are not equal. Ms. Wyman's and Ms. Schaller's is supported by constitutional doctrine found in cases that are distinguishable. Ours is supported not only by case law, but by the history of residential requirements in Washington both before and after statehood, and by the history of the constitutional convention itself.

We have shown that for the entire time Washington was a territory it required all holders of elective office to live in the district that voted for them, and declared their offices vacant if they ceased to reside in the district.<sup>6</sup> We have shown that throughout the territorial period, Washington applied this requirement to its elected judges,<sup>7</sup> and required its appointed judges to live in the district they served after taking office.<sup>8</sup>

---

<sup>6</sup> See Brief of Appellant Johnson at 1, 15-16, *citing* LAWS of 1854 ch. 2 § 2, at 74, codified as CODE OF 1881 § 3063, and LAWS of 1854-55, § 1, at 7, codified as CODE OF 1881 § 3050.

<sup>7</sup> See Brief of Appellant Johnson at 2, 16-17, *citing* CODE OF 1881 § 1297 (probate court judges); CODE OF 1881 §§ 1689, 1691 & 1704 (justices of the peace).

<sup>8</sup> See Brief of Appellant Johnson at 2, 16-17, *citing* REV. STAT. § 1865 (1874) *and* LAWS of 1887-88 at xiii.

We have shown that examination of the surviving accounts of the constitutional convention and the writings of the principal architect of the Constitution show no intent to make a change to the existing residency requirement for judges.<sup>9</sup>

And thanks to the research of Ms. Clarke and the State of Washington, we now have a more complete picture of what happened than could be found in *The Journal Of the Washington State Constitutional Convention 1889*.<sup>10</sup> The working draft of the constitution contained a universal residency requirement in Article VI.<sup>11</sup> When the issue of a residency requirement for judges came up, motions were defeated with a specific reference made to the work of the committee dealing with Article VI.<sup>12</sup> The Article VI provision was later removed after some delegates expressed concern that it would prevent underage legislative pages and

---

<sup>9</sup> Brief of Appellant Johnson at 11, 17-18.

<sup>10</sup> *The Journal Of the Washington State Constitutional Convention 1889* (Beverly Paulik Rosenow, ed., Book Publishing Co. 1962) (hereinafter JOURNAL).

<sup>11</sup> JOURNAL at 290.

<sup>12</sup> See Brief of Appellant Clarke at 32-33. Attached as Appendix 1 is a copy of the *The Oregonian* from July 21, 1889, which contains the same account Ms. Clarke found in the *Spokane Falls Review*, albeit in a slightly more readable form.

female clerks from being appointed.<sup>13</sup> Thus, the historical record demonstrates no intent expressed by anyone at the constitutional convention to constitutionally bar the legislature from requiring superior court judges to live in the counties they serve, a requirement that at the time was in law and applied to all elected officials.

Absent the existing territorial statutes and Article XXVII, section 2 of the Constitution, the omission of a constitutional provision could have resulted in an unintentional barrier being erected to a residency requirement. But because there were territorial statutes requiring residency for all elected officials, and Article XXVII, section 2 allowed those laws to remain in force, no such barrier was erected.

We have also shown that since statehood, Washington's Legislature has acted consistently with view that superior court judges and candidates for the office are required to live in the county that votes for them, just the same as other officeholders. We have not found any enactments treating candidates for superior court differently than other candidates for elective office until 1907, and then we see them being treated differently not with

---

<sup>13</sup> Brief of Amicus at 25. For the Court's convenience, also included in Appendix 1 is a copy of the Tacoma Morning Globe that reports the deletion of the Article VI provision.

regard to residency, but by not having to declare a political party.<sup>14</sup> Since then, we have see election laws purporting to apply to all candidates not exempting superior court judges from residency requirements while exempting other offices.<sup>15</sup>

Thus, on the merits, this Court should conclude that at the time the Constitution was ratified, Washington territorial law required all elected officials to live in the county they serve. This Court should find that by operation of Article XXVII, section 2 of the Constitution, the territorial law that eventually became RCW 42.12.010<sup>16</sup> remained the law of Washington after the Constitution was ratified and and so applied to the newly created elective office of superior court judge. This Court should conclude that that law continues to apply to superior court judges to this day. This Court should find that RCW 42.12.010 establishes a residency requirement for superior court judges.

---

<sup>14</sup> LAWS of 1907, ch. 209, § 4 at 458.

<sup>15</sup> RCW 29A.20.021, for example, exempts municipal court judges, and candidates for the U.S. Congress.

<sup>16</sup> CODE OF 1881, § 3063.

This Court should conclude that when in 1919 the Legislature enacted what would become RCW 42.04.020,<sup>17</sup> it was not imposing a new residency requirement on anyone, it was simply restating a requirement that already existed: that anyone seeking to hold any elective office in Washington - including those seeking to be superior court judges - must live in the jurisdiction that votes for the office.

And this Court should conclude that when the Legislature required all candidates to certify that they lived in the jurisdiction voting for an office, and prohibited county auditors from placing on the ballot the names of candidates who did not satisfy this requirement,<sup>18</sup> it was not imposing a new requirement on candidates for superior court, but reinforcing a residency requirement that had always been the law: candidates for superior court must live in the county that elects them.

**III. This Court should exercise its inherent power to review the trial court's decision.**

The more difficult question this Court faces is whether it should reach the merits of this case.

---

<sup>17</sup> LAWS of 1919 ch 139 § 1, page 390. Ms. Schaller draws significance in this statute's placement in Title 42 of the Revised Code. Brief of Respondent Schaller at 34. The statute's codification in the Revised Code came some 30 years after its original enactment. Where in the code a statute was codified does not affect its meaning. *See* RCW 1.04.021.

<sup>18</sup> RCW 29A.20.021.

This case began as a pair of challenges to Ms. Schaller’s right to appear on the general election ballot, brought under RCW 29A.68.011(3). This Court has previously ruled that there is no statutory right to appeal the superior court’s final decision made under RCW 29A.68.011(3).<sup>19</sup>

Both Ms. Wyman and Ms. Schaller have acknowledged that this Court does have the inherent power to review the trial court’s decision if it finds the decision to have been arbitrary and capricious or contrary to law.<sup>20</sup> “A constitutional right to judicial review still exists notwithstanding a statutory bar.”<sup>21</sup> But saying this Court can review the Superior Court’s decision is not the same as saying this Court should review it.

On the merits, we have shown that the trial court’s decision was contrary to law. The circumstances surrounding this case demonstrate that this Court should exercise its inherent authority to review not just to correct the trial court’s legal error, but because of the error’s significance.

Generally, in cases involving candidate residency there is factual uncertainty about the residency issue, and the significance of the case is

---

<sup>19</sup> *Hatfield v. Greco*, 87 Wn.2d 780, 557 P.2d 340 (1976).

<sup>20</sup> *See Kreidler v. Eikenberry*, 111 Wn.2d 828, 837, 766 P.2d 438 (1989).

<sup>21</sup> *Williams v Seattle School Dist. No. 1*, 97 Wn.2d 215, 218, 643 P.2d 426 (1982). Our Constitution grants this Court “appellate jurisdiction in all actions and proceedings.” CONST. Art. IV, § 4.

limited by its peculiar facts.<sup>22</sup> Here we have undisputed facts and a fundamental question of constitutional interpretation that affects every superior court judge in this state. The scope of the trial court's ruling is breathtaking. If the ruling is allowed to stand not only will Clark County judges feel free to move to Oregon, and Spokane County judges to Idaho, but the Governor will feel free to fill superior court vacancies throughout the state with licensed attorneys from anywhere.

Moreover, the misinterpretation of the Constitution at issue in this case is not isolated. We don't just have a trial judge being led astray by a single candidate advancing a novel theory. We have a county prosecutor's office that reached the wrong conclusion 26 years ago and continues to hold to that view today. We have a candidate who is a respected court commissioner reaching the wrong conclusion when deciding whether to run, supported by numerous sitting and retired judges in the county. And we have the county's chief election officer placing someone on the ballot contrary to a specific statutory directive not to.

---

<sup>22</sup> *Dumas v. Gagner*, 137 Wn.2d 268, 971 P.2d 17 (1999), for example, involved a candidate whose residence sat on property straddling the line dividing two PUD commissioner districts. And *Freund v. Hastie*, 13 Wash. App. 731, 537 P.2d 804 (1975), involved a candidate for sheriff who did not move to the appropriate county soon enough.

While this case is argued, the election proceeds. With two candidates on the ballot, there are only two things that can happen. One is that Mr. Johnson will be elected. Should this Court choose not to exercise its inherent authority to review the trial court's decision, Mr. Johnson's election would leave uncorrected a widespread misunderstanding of what is required of Superior Court judges and candidates for the office. In fact, observers could read into a denial of this appeal approval of the trial court's decision. Sitting judges who could personally benefit from a "commuting compromise"<sup>23</sup> may act in reliance on the decision, only to find themselves accused of having vacated their offices. The next Governor may act in reliance and fill vacancies with attorneys who do not live in the counties they are appointed to serve. Other candidates could act in reliance and run for office in counties they do not live in. Denial of this appeal will not end this issue, it will only inspire actions that will guarantee future litigation that ultimately will need to be resolved by this Court.

And if Ms. Schaller receives the most votes, we will challenge her election under RCW 29A.68.011(6), which will put us all right back here

---

<sup>23</sup> Brief of Respondent Schaller at 3.

in a few months. Thus, as a simple matter of judicial economy, this Court should exercise its inherent authority and resolve this issue now.

There is another reason why this Court should exercise its inherent authority. This case presents this Court with an opportunity to instruct superior courts in how to deal with a gap in the law.

The gap involves what should be done if one of the two candidates receiving the most votes in the primary is declared unqualified, as should have happened in this case. RCW 29A.52.231 lists the nonpartisan elective offices in this state. RCW 29A.36.180 says what to do if a candidate is declared unqualified, but it only applies to a subset of the partisan elective offices in this state. For the superintendent of public instruction, justices of the Supreme Court, and Court of Appeals, superior and district court judges, state election law has no express provision giving trial courts guidance.

This Court must decide between two possibilities. One is that trial courts should be told that they cannot fill the gap, with the result being that only one person's name will appear on the general election ballot. That seems to have happened in the case of *State ex rel. Ewing v. Reeves*.<sup>24</sup> In that case, a candidate for the Supreme Court declined his nomination

---

<sup>24</sup> *State ex rel. Ewing v. Reeves*, 15 Wn.2d 75, 129 P.2d 805 (1942).

after the primary election. An equally divided Supreme Court could not decide whether his name should remain the general election ballot.<sup>25</sup> But the Court was unanimous in deciding that the third-place finisher had no right to appear on the ballot. However, the issue arose in that case in the context of a mandamus action.<sup>26</sup> It could well be that in the context of a RCW 29A.68.011 proceeding, the authority of the courts to fashion a remedy is broader.<sup>27</sup>

The other possibility is that trial courts should be told that they can fill the gap, either by elevating the third-place finisher or by declaring the primary void, thereby allowing all qualified candidates to appear on the general election ballot.

This case presents the opportunity to address the issue in the court's holding because of the constitutional provision that entitles candidates for superior court to be issued a certificate of election if theirs is the only name to appear on the ballot. That provision makes deciding

---

<sup>25</sup> 15 Wn.2d at 86. While the Court could not decide what to do, the Court noted that the Attorney General had advised the Secretary of State that the declining nominee's name should not appear on the general election ballot. 15 Wn.2d at 87.

<sup>26</sup> 15 Wn.2d at 76.

<sup>27</sup> See, for example, *Foulkes v. Hays*, 85 Wn.2d 629, 636-37, 537 P.2d 777 (1975), in which this Court approved the calling of a special election, despite the statute containing no such provision.

what should have happened not merely an advisory opinion, but essential to resolving the case.

Saying that the trial court erred in allowing Ms. Schaller to appear on the ballot leaves Mr. Johnson as the only name that should have appeared on the ballot when Article IV, section 29 of our Constitution says that when only one name is entitled to appear on the ballot, that candidate is entitled to a certificate of election. This gives this Court the opportunity to address whether the trial court should have placed Ms. Clarke and Mr. Minjares on the general election ballot. If it should not have, then this Court should decide whether in these circumstances Mr. Johnson is entitled to a certificate of election under Article IV, section 29 of our Constitution. And if the trial court should have placed additional names on the ballot, this Court should decide what should happen given that the trial court did not do so and the election proceeded with Mr. Johnson's and Ms. Schaller's name on the ballot.

#### **IV. Sanctions should be denied.**

Ms. Schaller has asked this Court to award sanctions. Because we are right and this Court should exercise its inherent power to hear this case, the Court will not need to deal with the issue of sanctions.

Nonetheless, a couple of Ms. Schaller's statements made in support of her request should not go unanswered.

Ms. Schaller asserts that our reason for bringing this action "is nothing more than to harass their electoral opponent."<sup>28</sup> That, of course, assumes that not only are we wrong in our legal analysis, but that we know we are wrong and have pursued this case in bad faith. There is no evidence to support this assumption, and we deny it.

She has accused us as having "pummeled Commissioner Schaller both publicly and in this litigation as a 'carpet bagger.'"<sup>29</sup> She has characterized the residency issue as being one for the voters to decide,<sup>30</sup> so surely there can be nothing wrong with bringing the issue to the public's attention. Yet she cites as her evidence of this pummeling statements on Mr. Johnson's website that accurately point out that Ms. Schaller lives in Pierce County and thinks it is unconstitutional to require her to live in Thurston County.<sup>31</sup> Her brief puts in quotes the phrase carpet

---

<sup>28</sup> Brief of Respondent Schaller at 46.

<sup>29</sup> Brief of Respondent Schaller at 44.

<sup>30</sup> Brief of Respondent Schaller at 47.

<sup>31</sup> CP 161.

bagger, as though her opponents have used that phrase against her. Yet the record shows that it is only her attorney who has used that phrase.<sup>32</sup>

Ms. Schaller also makes factual assertions about a letter Mr. Johnson sent to attorneys in Thurston County.<sup>33</sup> The authority for this statement is an assertion in a brief she filed below. The record shows that the assertion in the brief below was not supported by any evidence.<sup>34</sup> In fact, the letter did not urge the attorneys not to vote for Ms. Schaller as her brief claims. It merely advised them of the legal situation and arguments, recognizing that as lawyers in the county, they were likely to be asked about what was going on by their neighbors.<sup>35</sup>

## **V. Conclusion**

For the reasons stated, this Court should exercise its inherent power to review the trial court's decision, decide that the trial court erred in allowing Ms. Schaller's name to appear on the general election ballot, and take such further action as it deems appropriate.

---

<sup>32</sup> RP at 6, line 19; at 10, line 20; at 15, lines 13 & 23.

<sup>33</sup> Brief of Respondent Schaller at 4.

<sup>34</sup> CP 143.

<sup>35</sup> Attached as appendix 2 is a copy of the form letter. It is offered simply to counter the unsupported assertions Ms. Schaller's brief has made about it.

Respectfully submitted this 8th day of October, 2012.

A handwritten signature in black ink, appearing to read 'James S. Johnson', written over a horizontal line.

James S. Johnson

WSBA No. 23093

Appendix 1

From The Sunday Oregonian, July 21, 1889

From the Tacoma Morning Globe, August 13, 1889



case.

Mr. Kinneer favored the section just as the committee had reported it, and wanted to keep judges and juries each to their functions.

Mr. Jones objected to allowing the judge to state the testimony, for he could only state it as it appeared to him.

Mr. Dunbar thought if judges were to comment on facts, juries might as well be abolished, for the judge could carry into cases out of ten.

Mr. Moore said the law has been better administered in Washington and Idaho than in any state with which he was familiar, and that it was practically more dangerous to commit a crime than in any of the states, owing to the efficiency of the enforcement of the law, and this he attributed very largely to the power enjoyed by judges under the federal statutes, of commenting on the testimony in order to assist juries to arrive at a correct conclusion.

Mr. Griffiths believed that the gentlemen who opposed this amendment did so because, from their own experience, they were satisfied with the evil of allowing the judge to interfere in the facts.

Mr. Turner did not remember a case where a judge has induced a jury to render an erroneous verdict by what he had said on the facts, but he had known artful lawyers to try to get erroneous verdicts by false logic or misstatements, and seen the judge lead the jury back to the true position by a calm statement of the facts afterwards. He opposed the amendment, and wished the section left as the committee had left it.

Mr. Ayer said the jury system had been established as a protection from judges who attempted to carry out, through the courts, the corrupt desires of English kings. This course here proposed was both wise and necessary in California, and would be wise here.

Mr. Dyer's motion failed by ayes 10, noes too many to need counting.

Mr. Stiles moved that the word "disputed" be inserted, so that judges might be allowed to state the bearing of facts which were not disputed; lost by a decided vote.

The section was adopted without amendment.

#### SECTIONS 17 TO 23.

##### Some Amended, Others Adopted Without Change and One Stricken Out.

Section 17 requires candidates for judges to have been admitted to the bar of the state or territory of Washington.

Mr. Buchanan moved to add "and has been a citizen thereof for at least two years." He didn't think it would be right for a man to come to the state and be eligible to the supreme bench as soon as he was admitted to the bar.

Mr. Turner thought some provision for eligibility to office might be desirable.

Mr. Dunbar thought the words "shall be a citizen of the state," would be sufficient.

Mr. Power suggested the words, "qualified elector," and Mr. Dunbar accepted that form.

Mr. Goldman believed the committee on elections would arrange all these matters, and the subject should be left to them.

Mr. Dunbar was entirely willing, and had only made his amendment to avoid the chance of the two-year provision going in.

Mr. Dunbar's amendment was lost, and so was Mr. Buchanan's, and then section 17 was adopted.

Section 18 (reports of the supreme court), 19 (no judge to practice law while on the bench), 20 (causes to be decided within ninety days), and 21 (publication of court opinions), were adopted without debate or amendment.

Section 22 provides that courts shall appoint their own clerks, but that the legislature may, if it choose, provide for the election of such clerks.

Mr. Henry moved to strike out this provision about the legislature. He claimed that the relation between judges and clerks was of such a personal nature that the judges ought to select their own assistants in these offices. The clerk had often, the gentleman said, almost to build up an entire opinion on the skeleton, on a few words which he could not read, owing to the peculiar orthography of judges.

The amendment was lost by ayes 24, noes 31.

Mr. Lindsay moved to amend by providing that clerks should be paid by salary only; carried, and the section was then adopted.

Section 23 provides for the selection of a member of the bar, to sit with the court as a judge, under certain circumstances.

On motion of Mr. Welschburger, and with the concurrence of Mr. Turner, who said it was an



# Evening

ITORY, TUESDAY, AUGUST 13, 1889.

y, ately preceding the election at which they offer  
5. to vote.

Sec. 3. The legislature may provide that there shall be no denial of the elective franchise at any school election on account of sex.

in Sec. 4. All idiots, insane persons, and persons  
n convicted of infamous crimes are excluded from  
e. the elective franchise.

Sec. 5. For the purpose of voting and eligi-  
r- bility to office no person shall be deemed to have  
1, gained a residence by reason of his presence or  
1, lost it by reason of his absence, while in the  
1, civil or military service of the state or of the  
1, United States, nor while a student at any institu-  
1, tion of learning, nor while kept at public ex-  
1, pense in any poor-house or other asylum, nor  
1, while confined in public prison.

Sec. 6. Voters shall in all cases except trea-  
7, son, felony, and breach of the peace be privi-  
7, ledged from arrest during their attendance at  
7, elections and in going to, and returning there-  
7, from. No elector shall be required to do mili-  
3, tary duty on the day of any election except in  
3, time of war or public danger.

Sec. 7. No person except a qualified elector  
3, shall be elected or appointed to any office, civil  
3, or military.

Section 7 was stricken out, on motion of  
7, E. H. Sullivan, as it might be construed  
7, to mean that no one could be appointed  
7, page by the legislature unless 21 years of  
7, age, and that no female clerks could be  
7, employed if woman suffrage is defeated.

Sec. 8. All elections shall be by ballot. The  
7, legislature shall provide for such method of vot-  
7, ing as will secure to every elector absolute se-  
7, crecy in preparing and depositing his ballot.

Sec. 9. The legislature shall enact a registra-  
7, tion law, and shall require a compliance with  
7, such a law before any elector shall be allowed to  
7, vote, provided, that this provision is not com-  
7, pulsory upon the legislature except as to cities  
7, and towns having a population of over 500 inhab-  
7, itants. In all other cases the legislature may or  
7, may not require...

## CHRONI

Four Men Cut

A San Luis

Su

The Daily Chapter

NEVADA CITY  
tragedy occurre  
saloon near You  
known Italian w  
another so badly  
will die, William  
Hodge dangero  
wounded men w  
when found. S  
reported he had  
and that he was

Appendix 2

Form letter

**Jim  
Johnson**  
for Thurston County  
Superior Court Judge, position 2  
PO Box 6024, Olympia WA 98507

July 13, 2012

Dear Mark:

We have an unusual primary election coming up for Thurston County Superior Court Position 2, and I would like a moment of your time to consider it. If you are like me, your non-lawyer friends and neighbors will be asking you about the judicial races, and I would like you to be as informed as possible.

I am one of four candidates running for the position. Also running are Marie Clarke, Victor Minjares, and Christine Schaller.

I have been opposing Ms. Schaller's candidacy because she lives in Tacoma. RCW 29A.20.021(3) says her name should not appear on the ballot. RCW 42.04.020 says that she is not "competent to qualify for or hold" the office she seeks.

I know Ms. Schaller thinks these statutes are unconstitutional. But when a voter filed a challenge to her candidacy, Ms. Schaller actively opposed having the court rule on the merits of the challenge. Today, the court granted her motion and dismissed the challenge without reaching the merits. Thus, the voters of Thurston County will now have to cast their ballots not knowing if Ms. Schaller will be able to hold the office she seeks.

If you are unfamiliar with this issue, or do not take it seriously, I urge you to spend a little time considering it. The pleadings in the voter challenge are on my website at [jimjohnsonforthurstoncounty.org](http://jimjohnsonforthurstoncounty.org). Or just read *Gerberding v. Munro*, 434 Wn.2d 188, 949 P.2d 1366 (1998). The question presented in that case was whether the legislature could establish qualifications for office not found in the constitution. In *Gerberding* the Court said generally no. But during the case, the issue of the qualifications for the attorney general came up. The Supreme Court specifically approved the statutory requirement that the attorney general be a lawyer because it was a qualification found in territorial law at the time the constitution was adopted.

Now consider that at the time the constitution was adopted, territorial law required candidates for all elective office including judges to live in the

county they served. Following the reasoning in *Gerberding*, requiring a judge or judicial candidate to live in the county is just as constitutional as requiring the attorney general to be an attorney.

If I am wrong and Ms. Schaller can legally hold the office she seeks, what happened in court today only hurt her because some voters may not want to risk voting for a candidate who may not be able to serve. But consider for a moment what will happen if I am right, the state laws are constitutional, and she finishes in the top two.

If I am right and she finishes first or second with less than a majority of the primary vote, the other candidate who finishes in the top two will have a strong argument that they should be considered elected. Our top-two primary law is very clear that only the names of candidates finishing first or second may appear on the ballot. See RCW 29A.36.171(1). There is a statute that provides for the third-place finisher to be placed on the ballot if one of the top two is disqualified, but by its own terms it only applies to candidates for office in a "city, town, or special purpose district." RCW 29A.36.180. RCW 29A.20.021(3) makes it clear that Ms. Schaller's name cannot appear on the ballot since she did not live in Thurston County at the time she filed her declaration of candidacy. Thus, in all likelihood only the name of the other candidate in the top two will be allowed to appear on the ballot. And Article IV, section 29 of our state's constitution specifies that when only one name is eligible to appear on the ballot, that person is deemed elected.

If I am right and Ms. Schaller finishes first with more than 50% of the primary vote, the primary election will in all likelihood be declared void. See RCW 29A.68.050. Probably all three qualified candidates will appear on the general election ballot. But perhaps no name will appear and the next Governor rather than the people will choose Thurston County's next judge.

Of course, if Ms. Schaller finishes third or fourth in the primary, all of this complexity can be avoided, and the voters of Thurston County will get to decide for themselves who their next judge will be.

I urge you to spend a little time considering this issue. As lawyers we have a special duty to help our neighbors understand judicial races. And in this case, they are going to need even more help than usual.

I thank you for your consideration,

Jim Johnson

## OFFICE RECEPTIONIST, CLERK

---

**To:** Jim Johnson  
**Subject:** RE: 87823-4 - Parker v Wyman and Clarke v Wyman; Johnson Reply Brief

Received 10-8-12

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

---

**From:** Jim Johnson [<mailto:onlyjimjohnson@comcast.net>]  
**Sent:** Monday, October 08, 2012 9:07 AM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Marie Clarke; [victorminjaresforjudge@gmail.com](mailto:victorminjaresforjudge@gmail.com); Phil Talmadge; [newmanlaw@comcast.net](mailto:newmanlaw@comcast.net) Newman; [klumppd@co.thurston.wa.us](mailto:klumppd@co.thurston.wa.us) Klumpp; Vicki Lee Anne Parker; [peterg@atg.wa.gov](mailto:peterg@atg.wa.gov); [JeffE@ATG.WA.GOV](mailto:JeffE@ATG.WA.GOV); [kristinj@atg.wa.gov](mailto:kristinj@atg.wa.gov)  
**Subject:** 87823-4 - Parker v Wyman and Clarke v Wyman; Johnson Reply Brief

Attached please find my Reply Brief with a 6 page appendix, in the matter of Parker v Wyman and Clarke v Wyman, No. 87823-4.

James S. Johnson  
WBSA No. 23093  
[onlyjimjohnson@comcast.net](mailto:onlyjimjohnson@comcast.net)  
360-339-3130