

NO. 87823-4

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IN THE 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 C. CLARKE,

Appellant,

v.

KIM WYMAN, THURSTON COUNTY AUDITOR, AND
CHRISTINE SCHALLER-KRADJAN, CANDIDATE FOR
THURSTON COUNTY SUPERIOR COURT, POSITION 2,

Respondents.

RESPONDENT KIM WYMAN'S BRIEF

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 ORIGINAL

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I. INTRODUCTION

On August 31, 2012, the Honorable Sally F. Olsen, Kitsap County Superior Court Judge, acting as a visiting judge for Thurston County Superior Court, ordered that Respondent Christine Schaller's name appear on the November 2012 general election ballot as a candidate for the Thurston County Superior Court Position 2. CP 254.

The Appellants had sought to have Christine Schaller, a Thurston County Court Commissioner, removed from the ballot because she resides in Pierce County. Appellants argued that RCW 42.04.020, a statute relating to public officers and agencies, required superior court judges to be electors of the county.

Respondents Wyman and Schaller argued that the Washington State Constitution, Article IV, § 17 establishes the exclusive qualifications for the office of superior court judge and that absent an express grant of power to the Legislature, the Legislature is prohibited from imposing additional qualifications.

Judge Olsen, in a written opinion, held that the Constitution does not require superior court judges to be citizens or electors of the county and that RCW 42.04.020 does not apply. CP 245-254.

Appellants have appealed Judge Olsen's decision and this case has been retained for hearing and decision by this Court.

II. COUNTER STATEMENT OF THE ISSUES

1. Was the trial court's decision arbitrary, capricious or contrary to law?
2. Does Article IV, § 17 of the Washington State Constitution state the exclusive qualifications for superior court judges?

III. COUNTER STATEMENT OF THE CASE

On December 19, 2011, Christine Schaller, through her attorney Shawn Newman, sent a letter to Kim Wyman, the Thurston County Auditor, asking if her declaration of candidacy would be accepted for the position of Thurston County Superior Court Judge. Ms. Schaller, a Thurston County Superior Court Commissioner, resides in Pierce County, but was born and raised in Thurston County and has been in private practice in Thurston County or employed as a Thurston County Superior Court commissioner most of her professional career. CP 181-186.

Because Ms. Schaller's eligibility involved the interpretation of statutory and constitutional provisions, Kim Wyman referred Mr. Newman's letter to the Thurston County Prosecuting Attorney's Office. On January 10, 2012, Mr. Newman was advised by the Chief Civil Deputy of the Prosecutor's Office that Ms. Schaller's declaration of candidacy would be accepted by the Auditor. CP 328. This decision was supported by a 1986 opinion by then Chief Civil Deputy W. Dale Kamerrer that

concluded there was no residency requirement for the position of superior court judge and subsequent case law. CP 268-274.

On May 14, 2012, Christine Schaller filed her Washington State Declaration of Candidacy for the Thurston County Superior Court Judge Position 2 with the Thurston County Auditor's Office. Appellants Clarke and Johnson along with Victor Minjares also filed for Position 2. CP 269.

On May 29, 2012, in an attempt to have Christine Schaller's name removed from the primary ballot, Appellant Parker filed a declaratory judgment action in Thurston County Superior Court under Cause No. 12-2-01115-7. Respondents Schaller and Wyman each filed motions to dismiss based primarily on the failure of Appellant Parker to comply with the time requirements of RCW 29A.68.011. CP 301.

On July 13, 2012, Judge Larry McKeeman, a visiting judge from Snohomish County Superior Court, heard oral argument and rendered an oral opinion. Judge McKeeman granted Respondent Schaller's and Respondent Wyman's motions to dismiss. Judge McKeeman ruled that a declaratory judgment action was improper because there was an adequate statutory remedy in RCW 29A.68.011 and that Appellant Parker had failed to comply with the time requirements of that statute.¹ CP 301.

¹ An attempt to intervene by Appellant Johnson filed on June 28, 2012, was denied by Judge McKeeman as untimely.

Christine Schaller was on the primary ballot along with Jim Johnson, Marie Clarke and Victor Minjares. On August 21, 2012, the results of the primary elections were certified. Christine Schaller received the greatest number of votes with 48.42% of the total votes. Jim Johnson received the second greatest number of votes with 21.97% of the total votes. Pursuant to RCW 29A.36.171 Ms. Schaller and Mr. Johnson advanced to the general election. *See* Declaration of Kim Wyman. CP 269.

On August 22, 2012, after the results of the primary election were certified, Appellants Parker and Johnson filed a Petition for Relief pursuant to RCW 29A.68.011, and Appellant Clarke filed a Petition in Support of Election Challenge under RCW 29A.68.011. CP 6-9 and CP 63-66. In addition to seeking to have Respondent Schaller's name removed from the general election ballot, Appellants Parker and Johnson sought to have Respondent Schaller's last name appear on the general election ballot as Schaller-Kradjan, her married name. CP 8.

The two petitions were consolidated and oral argument was heard on August 29, 2012, before the Honorable Sally F. Olsen, a visiting judge from Kitsap County Superior Court. On August 31, 2012, Judge Olsen rendered her written opinion finding that "the constitution does not require

superior court judges to be citizens or electors of the county and that RCW 42.04.020 does not apply.”² CP 52-61.

IV. ARGUMENT

A. Standard of Review.

RCW 29A.68.011 states:

Any justice of the supreme court, judge of the court of appeals, or judge of the superior court in the proper county shall, by order, require any person charged with error, wrongful act or neglect to forthwith correct the error, desist from the wrongful act, or to perform the duty and to do as the court orders or to show cause forthwith why the error should not be corrected, the wrongful act desisted from, or the duty or order not performed, whenever it is made to appear to such justice or judge by affidavit of an elector that:

(1) An error or omission has occurred or is about to occur in printing the name of any candidate on official ballots; or

...

(3) The name of any person has been or is about to be wrongfully placed upon the ballots; or

...

An affidavit of an elector under subsections (1) and (3) of this section when relating to a general election must be filed with the appropriate court no later than three days following the official certification of the primary election returns and shall be heard and **finally disposed of by the court** not later than five days after the filing thereof. . . .

(Emphasis added.)

² Appellants’ request to have Respondent Schaller’s last name appear on the general elections ballot as Schaller-Kradjan was denied and Appellants have not appealed that ruling. CP 60-61.

The Court in *Hatfield v. Greco*, 87 Wn.2d 780, 557 P.2d 340 (1976), held that the words “finally disposed of by the court” in RCW 29.04.030, the predecessor to RCW 29A.68.011, meant that the decision of the trial court was not appealable. The Court stated, “The language ‘finally disposed of’ is clear. It means no appeal is available in the special proceeding here involved.” *Id.* at 781.

RAP 2.3 provides for discretionary review by this Court unless otherwise prohibited by statute or court rule. Both Appellants brought their challenges to Christine Schaller’s candidacy under RCW 29A.68.011 which prohibits an appeal of Judge Olsen’s decision. Therefore, since review is prohibited by RCW 29A.68.011, this Court should deny their appeal.

In unusual circumstances, in the absence of discretionary review, the Court may exercise the Court’s inherent power of review to determine if the trial court’s decision is arbitrary, capricious or contrary to law. *Kreidler v. Eikenberry*, 111 Wn.2d 828, 837, 766 P.2d 438 (1989).

Therefore, should the Court exercise its discretion to review this matter, Judge Olsen’s determination that Christine Schaller could run for Thurston County Superior Court should be reversed only if this Court determines that Judge Olsen’s ruling was arbitrary, capricious or contrary to law.

“The fundamental purpose of the constitutional writ of certiorari is to enable a court of review to determine whether the proceedings below were within the lower tribunal’s jurisdiction and authority.” *Saldin Secs. Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1988). Arbitrary and capricious is defined as a “willful and unreasoning action, without consideration and in disregard of facts and circumstances.” *Kreidler* at 837. Judge Olsen’s well thought out written opinion certainly does not meet this definition.

Appellants’ contention that the Respondents must prove that RCW 42.04.020 is unconstitutional beyond a reasonable doubt is incorrect and based on a misrepresentation of Judge Olsen’s ruling. Judge Olsen, in her written opinion, did not declare that RCW 42.04.020 was unconstitutional, but simply held that it did not apply to candidates for superior court. CP 61.

B. Strong Public Policy Favors Eligibility for Office and an Unqualified Right of the People to Choose Who Shall Hold Office.

Courts are to exercise restraint in election contests, and there is a strong public policy which favors eligibility for public office. *Dumas v. Gagner*, 137 Wn.2d 268, 295, 971 P.2d 17 (1999). In ruling that the qualifications for state constitutional officers are exclusive, the Washington Supreme Court in *Gerberding v. Munro*, 136 Wn.2d 188, 949

P.2d 1366 (1998), reiterated that the people have an unqualified right to choose among aspiring candidates for public office.

“[A]ny doubt as to the eligibility of any person to hold an office must be resolved against the doubt.” *Id.* at 202 (quoting *State v. Schragg*, 158 Wash. 74, 78, 291 P. 321 (1930)). “[T]he constitution, where the language and context allows, should be construed as to preserve [eligibility for office].” *Id.* at 202 (quoting *State ex rel. O’Connell v. Dubuque*, 68 Wn.2d 553, 566, 413 P.2d 972 (1966)).

Christine Schaller received more votes in the primary election than the two Appellants who ran against her combined. She was within less than two percentage points of being elected in the primary. Any doubt as to Christine Schaller’s eligibility for the position of superior court judge should be resolved in favor of letting the voters decide.

C. The Washington State Constitution, Article IV, § 17 Establishes the Exclusive Qualifications for the Office of Superior Court Judge.

The Washington State Constitution, Article IV, § 17 establishes the qualifications for the office of superior court judge. Article IV, § 17 states:

Eligibility of judges. No person shall be eligible to the office of judge of the supreme court, or judge of the superior court, unless he shall have been admitted to the practice in the courts of record of this state or of the territory of Washington.

Other than Article IV, § 3(a), which requires that judges of the superior and supreme court be less than 75 years old, no other constitutional provision establishes additional or different qualifications for the office of superior court judge.

This Court has, on three occasions, addressed the exclusiveness of the qualifications set forth in Article IV, § 17. In *In re Bartz*, 47 Wn.2d 161, 164, 287 P.2d 119 (1955), the Court stated:

[W]here the constitution has set forth qualifications for an office, either general or specific, in the absence of an express grant of power to the legislature, there is an implied prohibition against the imposition of additional qualifications by the legislature.

In *Nielsen v. Bar Association*, 90 Wn.2d 818, 585 P.2d 1191 (1978), the Court recognized the exclusiveness of the constitutional provision in a footnote by saying:

Under Washington's scheme the status of attorney is the only present criteria for membership in the judiciary of the superior court or supreme court.

Id. at 825 n. 4.

The Washington State Supreme Court most recently addressed the issue in a footnote in *Quick-Ruben v. Verharen*, 136 Wn.2d 888, 902, 969 P.2d 64 (1998). The Court stated as follows:

CONST. art. IV, § 17 (sets the qualifications for superior court judges, but does not include county residency). See also *The Journal of the Washington State Constitutional*

Convention 1889, at 623 (Beverly Paulik Rosenow ed., 1962) (noting "qualified elector" and two year residency (in Washington state or territory) requirements were debated as possible qualifications for superior court judges and rejected at the constitutional convention); *In re Bartz*, 47 Wn.2d 161, 164-67, 287 P.2d 119 (1955) (noting Legislature could not add to constitutional qualifications, and that CONST. art. III, § 25, requiring state officers to be citizens of the United States and qualified electors, did not apply to the judiciary); *Gerberding v. Munro*, 134 Wn.2d 188, 201-10, 949 P.2d 1366 (1998) (holding qualifications prescribed by the constitution for constitutional offices are exclusive and may not be added to by statute absent express constitutional authority to do so).

Quick-Ruben, 136 Wn.2d at 903 n. 11.

The qualifications for supreme court and superior court judges set forth in Article IV, § 17, of the Washington State Constitution are unambiguous. Nowhere in the Constitution is there an "express grant of power to the legislature" to add to those qualifications. *Bartz*, 47 Wn.2d at 164.

The framers of the Constitution were well aware of how to delegate to the Legislature the authority to set further qualifications for judges. In Article IV, § 1, they did so with inferior courts. In Article IV, § 10, they did so with justices of the peace. There is no similar provision in the Constitution authorizing the Legislature to add to the qualifications of supreme court justices or superior court judges. Thus, as the trial court

correctly held, the Constitution does not require superior court judges to be citizens or electors of the county.

D. The Qualifications Set Forth in RCW 42.04.020 Do Not Apply to Supreme and Superior Court Judges.

Appellants argue that RCW 42.04.020 applies to all public offices including superior court judges. RCW 42.04.020 provides as follows:

That no person shall be competent to qualify for or hold any elective public office within the state of Washington, or any county, district, precinct, school district, municipal corporation or other district or political subdivision, unless he or she be a citizen of the United States and state of Washington and an elector of such county, district, precinct, school district, municipality or other district or political subdivision.

RCW 42.04.020 is a general statute that makes no mention of superior or supreme court judges. The qualifications set forth in Article IV, § 17, of the Washington State Constitution are specific to supreme and superior court judges. As noted above, where the Constitution has set forth qualifications for an office, absent an express grant of power, the Legislature is prohibited from imposing additional qualifications. *In re Bartz*, 47 Wn.2d at 164.

Even if the Legislature was not prohibited from adding to the qualifications set forth in Article IV, § 17, any alleged conflict with RCW 42.04.020 can be reconciled. When statutes are in apparent conflict, courts should reconcile them so that each may be given effect. *In re*

Mayner, 107 Wn.2d 512, 522, 730 P.2d 1321 (1986). In this case, Article IV, § 17 of the Washington Constitution controls the qualifications for superior court judges and supreme court justices. RCW 42.04.020 can be given effect by applying it to all offices where the qualifications are not exclusively set forth in the Constitution.

Where a statute is open to more than one interpretation, and one will render it invalid, while the other would render it constitutional, the latter construction should prevail. *Woodson v. State*, 95 Wn.2d 257, 261, 623 P.2d 683 (1980). By finding that RCW 42.04.020 does not apply to the qualifications for superior court judges, it was unnecessary for Judge Olsen to find that statute unconstitutional.

No court has ever held that RCW 42.04.020 applies to superior court judges. As discussed above, on three occasions this Court has stated that the only qualifications for supreme court justice or superior court judge are those set forth in Article IV, § 17 of the Washington State Constitution.

The Legislature has been on notice from the Supreme Court since 1955 that there is “no express provision requiring that judicial officers be citizens and electors of this state.” *In re Bartz*, 47 Wn.2d at 164. If the Legislature meant for RCW 42.04.020 to apply to judicial officers, it could have easily added language to that effect. As Appellant Clarke points out,

RCW 42.04.020 has been reenacted as recently as 2012 and, yet the Legislature made no attempt to impose a residency requirement on superior court judges.

If the Legislature intended to require residency for superior court judges, the logical place to include that requirement would be Chapter 2.08 RCW which specifically deals with superior courts. Yet no residency requirement currently exists in Chapter 2.08 RCW.

In RCW 2.08.060 the Legislature addressed the election of superior court judges. The Legislature addressed when elections for superior court judges would be held, but added no additional qualifications beyond those set forth in Article IV § 17. Similarly, the Legislature made no attempt in Chapter 2.04 RCW regarding the supreme court to add to the qualifications of supreme court justices.

The Legislature clearly knew how to set qualifications for other judicial officers. In RCW 2.06.050 the Legislature required that a judge of the court of appeals must be admitted to the practice of law for not less than five years and must be a resident of the district for not less than one year. In RCW 3.34.060 the Legislature required that district court judges be registered voters of the district.

In this case there is a specific constitutional provision that sets the qualifications for superior court judges and a specific chapter of the

Revised Code of Washington for superior courts. Specific statutes prevail over general statutes when there is a conflict. *Flight Options LLC v. Dept. of Revenue*, 172 Wn.2d 487, 504, 259 P.3d 234 (2011). Judge Olsen was correct to find that a generic statute such as RCW 42.04.020, which makes no mention of judicial officers, did not apply to judicial qualifications when a specific constitutional provision addresses judicial qualifications for superior court judge.

E. The Territorial Laws Cited by Appellant do not Create a Residency Requirement for Superior Court Judges.

Appellants argue that residency requirements that can be traced to territorial law are not subject to the “exclusivity” doctrine of *Bartz* and *Gerberding*. As authority, Appellants point to the discussion in *Gerberding* of the statutory requirement in RCW 43.10.010 that the attorney general be required to be a qualified practitioner of the supreme court of this state, a requirement not found in the Constitution.

However, the office of attorney general existed prior to the adoption of the Washington State Constitution, as did a territorial law that required the attorney general to “be learned in the law and a qualified practitioner before the supreme and district courts.” *Gerberding*, 136 Wn.2d at 208-9. Unlike the office of attorney general, the position of superior court judge did not exist prior to adoption of the Washington

State Constitution and, therefore, no territorial law set qualifications for that position.

Appellants also cite territorial laws requiring probate court judges and justices of the peace to be county residents and argue that Article XXVII, § 2 of the Washington Constitution somehow incorporates these residency requirements into the qualifications for supreme and superior court judges set forth in Article IV, § 17. Appellants ignore the fact that these territorial laws predate the creation of superior courts and the fact that the Journal of the State Constitutional Convention reveals that motions to amend Article IV, § 17 to add a residency requirement were made and defeated. CP 157.

As Judge Olsen points out in her Memorandum Decision, territorial judges of general jurisdiction were appointed and not elected, and the subsequent laws governing eligibility for elected office would not apply to them. Judge Olsen notes that the only elected judges were probate judges and that probate courts were courts of limited jurisdiction and were considered inferior courts. CP 57-58. To suggest that the framers of the Constitution assumed that the residency requirements in territorial law would apply to the newly created superior court judges is not supported by any historical evidence.

Appellants discuss the arguments that were advanced at the Constitutional Convention in favor of some sort of citizenship or elector requirement for supreme court justices and superior court judges. While this is interesting from a historical perspective, the bottom line is that those making the arguments were in the minority and ultimately requirements of citizen or elector status were considered and rejected. CP 137.

Furthermore, the framers of the Constitution were well aware that they could impose residency requirements and did so for other offices. In Article II, § 7, the framers required that a legislator be a citizen and a qualified voter in the district. In Article III, § 25, in order to hold any state office, there is a requirement that the officer be a qualified elector of this state.

It is not necessary to resort to territorial laws or to amendment debates at the Constitutional Convention to determine the intent of the framers. No construction or interpretation is necessary or permissible if the constitutional language is plain and unambiguous on its face. *State ex rel. Anderson v. Chapman*, 86 Wn.2d 189, 191, 543 P.2d 229 (1975).

Article IV, § 17, clearly states that the only eligibility requirement for supreme court justices or superior court judges is admission to practice

law in this state. There is no need to resort to the strained and distorted interpretation of territorial law that is suggested by the Appellants.

V. CONCLUSION

RCW 29A.68.011 provides that the determination of the trial court is final and, therefore, not appealable. This Court may review the trial court's decision to determine if the decision is arbitrary, capricious or contrary to law. Since Judge Olsen had jurisdiction over this matter and her ruling was consistent with all previous case law on this issue, it cannot be said that her decision was arbitrary, capricious or contrary to law.

Article IV, § 17 of the Washington Constitution sets forth the only qualifications for superior court judges. Absent an express grant of power to the Legislature, the Legislature is prohibited from imposing additional qualifications. This Court has pointed out on three occasions that there are no additional qualifications outside of those set forth in § 17.

There is a strong public policy in favor of eligibility for office and an unqualified right of the people to choose who shall hold office. As the Court in *Nielsen v. Bar Association* pointed out, the electorate can, by refusing to vote for noncitizens (or in this case, nonresidents), effectively exclude such persons from public office. *Nielsen*, 90 Wn.2d at 826 n 5.

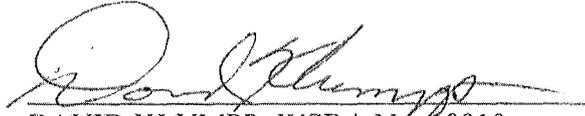
Christine Schaller has been admitted to practice law in the State of Washington and, therefore, meets the only qualification set forth in the

Washington State Constitution for the position of superior court judge. Ms. Schaller was the overwhelming favorite in the primary election and it should be up to the Thurston County voters in the general election to decide if she is their choice for Thurston County Superior Court Position No. 2.

Respectfully submitted this 1st day of October, 2012.

JON TUNHEIM

THURSTON COUNTY
PROSECUTING ATTORNEY

A handwritten signature in black ink, appearing to read "David Klumpp", written over a horizontal line.

DAVID KLUMPP, WSBA No. 10910
Chief Civil Deputy
Attorney for Respondent Wyman

DECLARATION OF SERVICE

A true and correct copy of this document was sent electronically, by agreement of all parties, to the e-mail addresses listed below to the following individual(s) on the date indicated below:

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed at Olympia, Washington.

Date: October 1, 2012

Signature: Linda K. Olsen

OFFICE RECEPTIONIST, CLERK

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Subject: Parker et al. v. Wyman et al. No. 87823-4

Attached for filing in the above-referenced matter is Respondent Kim Wyman's Brief. Thank you.

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