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No. 95945-5

Franklin County Superior Court Cause No. 18-2-50522-11
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE APPOINTMENT OF A SPECIAL DEPUTY
PROSECUTING ATTORNEY, SHAWN P. SANT AND FRANKLIN
COUNTY,

Appellants/Petitioners

ANSWER TO APPELLANTS/PETITIONERS' MOTION FOR STAY
OF MANDAMUS PROCEEDING UNDER FRANKLIN COUNTY
CAUSE NO. 18-2-50285-11, ANSWER TO STATEMENT OF
GROUNDS FOR DIRECT REVIEW, ANSWER TO MOTION FOR
DISCRETIONARY REVIEW, ANSWER TO MOTION TO ESTABLISH
APPEALABILITY, ANSWER TO MOTION TO CONFIRM IDENTITY
OF RESPONDENT, AND MOTION FOR AWARD OF ATTORNEY'S
FEES AND COSTS FOR FRIVOLOUS AND IMPROPER APPEAL

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A. INTRODUCTION TO ANSWER

The Judges of the Benton and Franklin Counties Superior Court (hereafter “Judges”) answer the Motion of the Appellants/Petitioners (hereafter “Petitioners”) for a Stay of Proceedings in the action under Cause Number 18-2-50285-11, in the Franklin County Superior Court, and move the Court to revoke the Court Commissioner’s Ruling dated June 12, 2018, which imposed a Temporary Stay in said proceeding pending receipt of this Answer. This is also the Judges’ Answer to all other pending petitions and motions herein. The Judges further move the Court for a finding that this proceeding is frivolous and improper, and for an award of attorney’s fees and costs incurred in responding to it.

This Answer is supported by the Declaration of Judge Bruce A. Spanner in Response to Petition/Motions for Supreme Court Review Including Motion to Stay and Motion for Accelerated Consideration of Stay, and the exhibits thereto. It is also supported by the Declaration of Patricia Austin, Court Administrator, Benton and Franklin Counties Superior Court and the exhibit thereto. Those materials plainly show that the Franklin County Clerk created a false legal instrument in order to produce an unauthorized and invalid “proceeding” which misrepresents the status of Petitioners, the status of others and the appealability of the Order of Appointment which is central to this matter. The Court should

not countenance such an improper and manipulative effort, particularly where the Order of Appointment imposes no immediate cost; where such an order is contemplated by RCW 36.27.030; where the appointed attorney's representation of the Judges is not dependent on that Order; and where this appeal is truly aimed at thwarting the Judges' separate Mandamus action (Franklin County Cause Number 18-2-50285-11), which seeks enforcement of a duly-enacted and lawful local court rule governing the Superior Court Clerk's maintenance of Court records.

B. FACTS

As set forth in detail in Judge Spanner's declaration, this matter relates to a dispute between the Judges of the Benton and Franklin Counties Superior Court and the Franklin County Superior Court Clerk, Michael Killian. In a nutshell, the Court and the Clerk have been working toward full implementation of the Odyssey electronic court-record filing and retrieval system. It is intended to provide a fully "paperless" environment for the filing and use of court records state-wide. Local superior courts and clerks have substantial involvement in developing the procedures and systems that will be utilized on the local level within the Odyssey paperless system, and the Judges are supportive of that development. (Spanner declaration, at 8-9, ¶11.)

In late 2017, the Judges did not believe the paperless process had developed to a sufficient degree to support conversion to that environment in Franklin County. The Clerk disagreed and announced that he would institute a fully paperless court-record environment in 2018. The Court then adopted Local General Rule, LGR 3, which required the Clerks of Benton and Franklin Counties to maintain paper files of all cases, pending Court agreement to transition to a paperless environment. The Franklin County Clerk alone refused to abide by that rule. (Spanner declaration, at 10-11, ¶¶13-15.)

Due to the conflicting positions of the Judges and the Clerk, and the need for legal advice by the Board of County Commissioners of Franklin County, the Franklin County Prosecuting Attorney appointed separate independent attorneys to advise and represent the Judges and the Clerk. The undersigned attorney was appointed to represent the Judges. (Spanner declaration, at 2, and Exhibit A.)

Attempts at securing the Clerk's agreement to comply with LGR 3 were unsuccessful. The Judges then commenced a Writ of Mandamus action in the Franklin County Superior Court, under Cause No. 18-2-50285-11 (Spanner Declaration, ¶4, and Exhibit D.) That action seeks to compel the Clerk to comply with LGR 3. The Chief Judge of the Supreme

Court appointed Judge Scott Sparks of the Kittitas County Superior Court to preside over the case. A motion for summary judgment has been filed and scheduled for hearing before Judge Sparks on July 13, 2018. (Spanner declaration, at 11-13, ¶¶15-17.)

After the Mandamus action was filed, the Prosecuting Attorney announced that he did not have funds in his budget to support prosecution or defense of the Mandamus action. (Spanner declaration, at 11-12, ¶¶15-16.) Attempts were made to secure the commitment of the Board of County Commissioners to pay the fees and costs of that litigation. *Id.* The undersigned attorney met with the Board by telephone on April 17, and May 1, 2018, and no decision was made. (See Appendices B, and B-part 2, to Petitioners' RAP 2.3(b) Motion for Discretionary Review (Contingent), transcripts of April 14 and May 1, 2018 meetings.)

Another meeting was held by the Commission on May 8, 2018, at which the Clerk and his Prosecutor-appointed attorney were present, as well as the Prosecuting Attorney. The Judges did not attend the May 8, meeting, nor did their Prosecutor-appointed attorney. At the meeting, the Clerk told the Board that he would print any files the Judges wanted. (Appendix B-part 2 of Petitioners' RAP 2.3(b) Motion for Discretionary Review (Contingent), transcript of May 8, 2018 meeting at p. 43.) This

was not an agreement to comply with LGR 3. Therefore, the Judges proceeded with their Mandamus action, and so informed the Board by their attorney's letter on May 21, 2018. (Exhibit H to Appendix D of Petitioners' RAP 2.3(b) Motion for Discretionary Review (Contingent); and Spanner declaration, at 13, ¶17.)

On May 22, 2018, the Prosecutor revoked the appointment of the undersigned attorney, whom he had earlier appointed to represent the Judges. (Exhibit I to Appendix D of Petitioners' RAP 2.3(b) Motion for Discretionary Review (Contingent).) At that time, the Judges had already approved their Order of Appointment, and the same was filed in the Court's Administrative File on May 22, 2018 at 3:32 p.m., as described in Judge Spanner's declaration at 2, ¶3. (And see the Patricia Austin Declaration at 1, and Exhibit A thereto.)

After the unnumbered Order of Appointment was filed in the Court's Administrative File, the Clerk took a copy of it and stamped it with a unique civil action cause number: 18-2-50522-11. He then filed that altered instrument in the Clerk's file for civil actions on May 24, 2018, without changing the May 22, 2018 at 3:32 p.m., date and time stamp which had been placed on the Order as it was filed in the Administrative File (an alteration by omission). Within the Odyssey

system, the Clerk designated the Judges' attorney as the "plaintiff," and the Franklin County Prosecutor, Shawn Sant, as the "defendant." Neither of those designations was accurate. (Spanner declaration, at 2-3, ¶3, and 4-7, ¶¶5-7.)

The false instrument in Cause No. 18-2-50522-11, is claimed by the Petitioners to be the basis for this appeal/review proceeding.

C. ARGUMENT

The filing of the Order of Appointment in the Administrative File on behalf of the Judges on May 22, 2018, was not the commencement of a civil action under CR 3. To commence a civil action, a summons or complaint must be filed. CR 3. The absence of either a summons or complaint means that no civil action was commenced by the Judges' filing of the Order of Appointment. *Id.* Moreover, no cause number was affixed to the Order submitted to the Administrative File. The Order simply provided notice of the Judges' action and authority for the appointed attorney to proceed with their representation in the Mandamus action, with the future possibility of receiving compensation for such services from Franklin County, assuming Court approval. Further, the Order of Appointment is not essential to the attorney's representation of the Judges.

They have a separate agreement for that representation which does not depend on the Order. (Spanner declaration, at 14, ¶18.)

The Clerk's improper alteration of the Order of Appointment and its filing under Cause No. 18-2-50522-11, also did not commence a civil action. No complaint or summons was issued or filed under that cause number. No filing fee was paid. No party was served. That filing was entirely improper, as is the Petitioners' reliance on it. (Spanner declaration, at 3-4, ¶¶3-4, and at 14, ¶19.)

Given the illegitimate form into which the original, administrative Order of Appointment was converted by the Clerk, the form of the Order for which review is sought is not a "trial court decision," as that term is used in RAP 1.1(a), describing the scope of proceedings governed by the Rules of Appellate Procedure. Nor is it a decision of the superior court described in RAP 2.2, defining decisions of the court which may be appealed. It is also not a decision of the superior court contemplated by RAP 2.3 (discretionary review) because it does not arise from "judicial proceedings," as that term is used in RAP 2.3(b)(3) or RAP 2.3(d)(4).

The Clerk and the Petitioners have utilized the unauthorized, altered and misfiled Order of Appointment under Cause No. 18-2-50522-

11, to create the current Appeal, Petition and Motions. These proceedings are as unlawful as the altered document itself.

RCW 40.16.030 provides:

Every person who shall knowingly procure or offer any false or forged instrument to be filed, registered, or recorded in any public office, which instrument, if genuine, might be filed, registered or recorded in such office under any law of this state or of the United States, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than five thousand dollars, or by both.

This statute criminalizes the filing of a false instrument where a government office would justifiably rely on the submission. *State v. Hampton*, 143 Wn.2d 789, 798, 24 P.3d 1035 (2001). Obviously, the Supreme Court has relied on the false instrument created and filed by the Franklin County Clerk, because, as of this date, its Commissioner has issued a temporary stay on the separate Mandamus action in reliance on that instrument. Moreover, although a genuine complaint or petition challenging an administrative order might be filed with a Superior Court Clerk in this state, the Order of Appointment under Cause No. 18-2-50522-11, is not such a complaint or petition, nor has that cause produced any adjudication of the validity of the true Order of Appointment filed in the Superior Court's Administrative File on May 22, 2018.

This fraud upon the Court should be enough to lift the Temporary Stay and dismiss the Notice of Appeal, the Petition for Discretionary Review and all of the Petitioners' Motions pending before this Court. Any stay of the Mandamus proceeding impairs the Judges' right of access to a remedy for the Clerk's refusal to comply with LGR 3 – the real objective of the Petitioners.

However, there are other grounds for lifting the Temporary Stay and denying any review. First, the Order of Appointment imposes no immediate cost on Franklin County. Compensation of the appointed attorney is contingent on approval by the Superior Court of the charges and costs that may be incurred. At the time such compensation is sought, all of the legal and factual issues surrounding the validity of the Order and the reasonableness of the charges made can be litigated and made the subject of a court order that would be subject to appeal. It is premature for this Court to address those matters in an anticipatory manner without a judicial decision preceded by full development of the facts, arguments and authorities which apply to such matters.

Second, an order of the kind at issue here is contemplated by RCW 36.27.030. That statute provides:

When from illness or other cause the prosecuting attorney is temporarily unable to perform his or her duties, the court or judge may

appoint some qualified person to discharge the duties of such officer in court until the disability is removed.

When any prosecuting attorney fails, from sickness or other cause, to attend a session of the superior court of his or her county, or is unable to perform his or her duties at such session, the court or judge may appoint some qualified person to discharge the duties of such session, and the appointee shall receive a compensation to be fixed by the court, to be deducted from the stated salary of the prosecuting attorney, not exceeding, however, one-fourth of the quarterly salary of the prosecuting attorney: PROVIDED, That in counties wherein there is no person qualified for the position of prosecuting attorney, or wherein no qualified person will consent to perform the duties of that office, the judge of the superior court shall appoint some suitable person, a duly admitted and practicing attorney-at-law and resident of the state to perform the duties of prosecuting attorney for such county, and he or she shall receive such reasonable compensation for his or her services as shall be fixed and ordered by the court, to be paid by the county for which the services are performed.

Here, the Franklin County Prosecuting Attorney has an acknowledged “disability” arising from the Rules on Professional Conduct, RPC 1.7(a), Conflict of Interest: Current Clients. (Spanner declaration at 12-13, ¶¶16-17.) The Prosecutor cannot represent any combination of the Clerk, the County and the Superior Court Judges, given their conflicting positions and interests. He acknowledged this by appointing separate independent attorneys to represent the Clerk and the Judges in February of 2018. And, despite his revocation of the appointment of the attorney for the Judges, the Prosecutor continues to have the same conflict, hence a “disability,” as to any representation of those officers related to this matter or the Mandamus action.

The Prosecutor's disability gives rise to the authority of "the court or judge [to] appoint some qualified person to discharge the duties of such officer in court until the disability is removed." RCW 36.27.030.

Moreover, this same disability renders the Prosecutor

...unable to perform his or her duties at (a) session (of the Court hearing the Mandamus action, and therefore,) the court or judge may appoint some qualified person to discharge the duties of such session, and the appointee shall receive a compensation to be fixed by the court,...

RCW 36.27.030. The Order of Appointment follows the provisions of RCW 36.27.030, and is valid.

Third, representation of the Judges by the appointed attorney is not dependent on the Order of Appointment. As stated in the Declaration of Judge Spanner, the Judges have a separate agreement with this attorney to represent them in the Mandamus action. (Spanner declaration, at 14, ¶18.) Where such a separate agreement exists, the Mandamus action should not be stayed. Instead, the Judges should be allowed to pursue the legal remedy that is available to them to redress the violation of their right to direct the Clerk in the manner of maintaining the Court's files and records. *See* RCW 2.28.050(9) (clerks are required "to conform to the direction of the court.")

Fourth, this appeal is truly aimed at thwarting the Judges' separate Mandamus action (Franklin County Cause Number 18-2-50285-11), which seeks to Compel the Clerk to abide by LGR 3, requiring the Clerk to "keep and maintain paper files for all cases and file types..." (Spanner declaration, at 7-8, ¶9, Exhibit E, Local General Rule LGR 3.) The Petitioners' RAP 8.3 Motion to Stay the Order of Appointment and RAP 18.12 Motion for Accelerated Consideration of Motion to Stay, demonstrate that it is the Mandamus action that is the objective of the current appellate proceeding, not the Order of Appointment, with its contingency of Court approval of fees and costs and its non-essential nature given the Judges' separate agreement for representation. Founded, as this proceeding is, on the improper Order of Appointment-based "action" under Cause No. 18-2-50522-11, this illegitimate proceeding should not be utilized to prevent the Judges from securing redress for the Clerk's refusal to comply with LGR 3.

D. MOTION FOR AWARD OF ATTORNEY'S FEES AND COSTS

The Judges hereby move the Court for an award of attorney's fees and costs incurred in defending this appeal/petition pursuant to RAP 18.1 and RAP 18.9(a), on condition of compliance with RAP 14.4. This motion is

based upon the Declaration of Judge Bruce Spanner, and the Declaration of Patricia Austin, filed herewith, and this brief.

RAP 18.1 generally authorizes awards of attorney's fees and expenses, when authorized by law and procedurally proper. RAP 18.9(a) authorizes sanctions, including attorneys' fees and costs, against parties who use the Rules of Appellate Procedure,

...for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court. The appellate court may condition a party's right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party....

Courts may award attorneys' fees for a frivolous or improper appeal.

Skilcraft Fiberglass v. Boeing Co., 72 Wn.App. 40, 48, 863 P.2d 573

(1993) (abrogated on other grounds by *Morin v. Burris*, 160 Wn.2d 745, 756, 161 P.3d 956 (2007)).

“An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal.”

Kinney v. Cook, 150 Wn. App. 187, 195, 208 P.3d 1 (2009) (quoting *Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899, 906, 151 P.3d 219 (2007)).

This appeal or review procedure is frivolous and improper because it is not based upon an appealable or reviewable decision of a lower court, and

because it is based upon a false instrument that has been presented to the Court by the Petitioners and relied on by this Court to its and the Judges detriment and expense. This proceeding has also been pursued for an improper purpose because its objective is to impair the Judges' separate Mandamus action. The Court should sanction the Petitioners and order them to pay the fees and costs incurred by the Judges in responding to this proceeding. It would also be well within the discretion of the Court to impose a fine on the Petitioners for their misconduct pursuant to RAP 18.9(a).

E. CONCLUSION

For the reasons given above, the Court should lift the Temporary Stay issued on June 12, 2018, deny the Motion for a Stay, and should dismiss the current petition, appeal and motions process in its entirety. Finally, the Court should grant the Judges' Motion for an Award of Attorney's Fees and Expenses, subject to compliance with RAP 14.4.

Respectfully submitted this 18th day of June 2018.

LAW LYMAN DANIEL KAMERRER
& BOGDANOVICH, P.S.

By: W Dale Kamerrer

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DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the date specified below, I served a copy of the following document upon Petitioner, via e-mail per service agreement of the parties:

Answer to Appellants/Petitioners' Motion to Stay of Mandamus Proceeding under Franklin County Cause No. 18-2-50285-11, Answer to Statement of Grounds for Direct Review, Answer to Motion for Discretionary Review, Answer to Motion to Establish Appealability, Answer to Motion to Confirm Identity of Respondent, and Motion for Award of Attorney's Fees and Costs for Frivolous and Improper Appeal

Declaration of Patricia Austin, Court Administrator, Benton & Franklin Counties Superior Court

Declaration and Exhibits of Judge Bruce A. Spanner in Response to Petition/Motions for Supreme Court Review Including Motion to Stay and Motion for Accelerated Consideration of Stay

As follows:

Pam Loginsky, pamloginsky@waprosecutors.org

Jennifer Johnson, jjohnson@co.franklin.wa.us

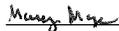
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Dated this 18th day of June, 2018 at Tumwater, Washington.



Marry Marze

LAW LYMAN DANIEL KAMERRER & BOGDANOVICH

June 18, 2018 - 12:29 PM

Transmittal Information

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Appellate Court Case Number: 95945-5
Appellate Court Case Title: In Re the Appointment of a Special Deputy Prosecuting Attorney
Superior Court Case Number: 18-2-50522-7

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