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NO. 95945-5

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,

Petitioners,

vs.

The Judges of the Benton and Franklin County Superior
Court: Judge Joe Burrowes, Judge Alex Ekstrom, Judge
Cameron Mitchell, Judge Carrie Runge, Judge Jacqueline
Shea-Brown, Judge Bruce Spanner and Judge Sam Swanberg,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FRANKLIN

REPLY BRIEF

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I. INTRODUCTION

Traditionally the brief of respondent contains rebuttal argument to the petitioner's assignments of error and legal analysis. Largely rejecting this convention, the brief submitted by the Judges of the Benton and Franklin Counties Superior Court (hereinafter "Judges") contains instead a renewal of their argument that the manner in which they entered the Order of Appointment renders it unreviewable by this Court. Their request to dismiss this discretionary review is accompanied by a request for sanctions and for a declaratory judgment.

This reply brief will identify the errors that the Judges have conceded by their silence. The brief will also address the procedural and jurisdictional bars to the new relief being sought.

II. COUNTER STATEMENT OF ISSUES RAISED BY RESPONDENTS

1. Is an adjudicative order issued by the superior court reviewable by this Court?
2. Must an adjudicative order issued in secret be vacated as a violation of article I, section 10's open court provision?
3. Is an appointment of an independent prosecuting attorney pursuant to RCW 36.27.030, prohibited when the ethics rules do not prevent the prosecuting attorney from performing his mandatory functions?
4. May the county legislative authority refuse to appropriate public funds to compensate an attorney who is appointed as an independent prosecuting attorney pursuant to RCW 36.27.030 to perform non-mandatory duties?

5. Must this Court deny review of the Judges' request for declaratory relief where necessary parties are not before the Court?

6. Must the Judges' request for attorney fees and costs be denied?

III. RESPONSE TO JUDGES' STATEMENT OF THE CASE AND SUPPLEMENTAL STATEMENT OF THE CASE

RAP 10.3(b) and 10.3(a)(5) require that the statement of the case contained in the respondent's brief include a reference to the record for each factual statement. The record on appeal is limited by RAP Title 9 to (1) clerk's papers, a report of proceedings, and exhibits that were introduced in or created from the trial court's record, RAP 9.1(a), and (2) additional evidence on review accepted by this Court pursuant to RAP 9.11. Facts not included in the record on appeal must be disregarded by an appellate court. *See generally State v. Stevenson*, 16 Wn. App. 341, 345, 555 P.2d 1004 (1976), *review denied*, 88 Wn.2d 1008 (1977) (matters referred to in a brief but not included in the record cannot be considered on appeal).

The record in the instant case consists of four pages of clerk's papers that were transmitted to this Court pursuant to RAP 9.8, the 289 pages that were the subject of the County's RAP 9.11 motion, and the three pages that were the subject of the Judges' RAP 9.11 motion. *See* November 20, 2018, Letter Ruling Granting Judges' Motion to Supplement the Record; September 20, 2018, Amended Order granting the County's RAP 9.11 Motion to Supplement the Record. The record does not include the appendices that were attached to the motion for discretionary review, the response to the motion for discretionary review, or the reply to the motion for discretionary

review. *See* November 28, 2018, e-mail from Supreme Court Clerk Susan L. Carlson.¹

The Judges' statement of the case relies extensively upon extra-record documents. *See* Brief of Respondents at 7 (citing to declaration of Judge Bruce Spanner and Court Administrator Patricia Austin), 9-11 (same). These portions of the Judges' statement of the case may not be considered by the Court in passing upon the merits of this discretionary review.

Prosecutor Sant did not identify any conflict that prevented him from discharging his mandatory function of providing legal advice to the Judges prior to the Judges' entry of the Order of Appointment. *See* ACP 133, ¶ 11 ("I was at all times and continue to be able to discharge my mandatory duties under RCW 36.27.020(2) and continue to provide both the Clerk and the Judges with legal advice."); ACP 197 ("my office remains willing and available to provide advice to the superior court judges"). Prosecutor Sant's communications with Mr. Kamerrer do not contain any statement that Prosecutor Sant appointed Mr. Kamerrer due to a disqualifying conflict of interest. *See* ACP 145, 147, 184, 189, 197. Mr. Kamerrer's appointment was done as a courtesy to the Judges, in the hopes that a resolution could be reached regarding the Judges' demand for paper records. ACP 9; 133 ¶ 11. Prosecutor Sant's comments before the Franklin County Board of County Commissioners ("BOCC") regarding a conflict related to discretionary duties—filing and representing the Judges in the mandamus action. *See* ACP 10; ACP 37-40.

¹A copy of this e-mail is attached to the County's contemporaneous motion to strike four of the appendices to the Brief of Respondent.

The hearings before the BOCC regarding the Judges' request for funds to pay for their mandamus action against Clerk Killian occurred in public on five separate days. *See* ACP 1-131. Judge Spanner or Mr. Killian were provided with an opportunity to address the BOCC at three of the hearings. *See* ACP 1-72. Clerk Killian, who was performing military service when at least one hearing occurred, *see* ACP 62-63, only attended the May 8, 2018, BOCC session. Although the issue of the "Funding Request for Superior Court Claim" appeared on the public agenda for the May 8, 2018 meeting,² neither Mr. Kamerrer nor any of the Judges attended the public BOCC hearing. *See* ACP 73-126. The Judges' written rebuttal to Clerk Killian's presentation was considered by the BOCC. The BOCC was not, however, persuaded to change its position. *See* ACP 128-29, 192-95.

The Order of Appointment attached to Franklin County and Prosecutor Sant's (collectively the "County") "Notice of Appeal/Notice of Discretionary Review to the Washington Supreme Court" has no cause number printed upon it. *See* ACP 2. The three page Order of Appointment does not cite to, mention, or reference LGR 3. *See* CP 1-4. The County's

²The agenda for the BOCC's regular May 8, 2018, board meeting is available at <http://www.co.franklin.wa.us/commissioners/pdf/minutes/2018/20180508-%20Commissioners%20Meeting%20Agenda%20and%20Minutes.pdf> (last visited Nov. 29, 2018).

Evidence rule 201 authorizes a party to request a court to take judicial notice of adjudicative facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ER 201(a), (b) and (d). This rule applies at all stages of proceedings, including appeals. ER 201(f); *State v. Royal*, 122 Wn.2d 413, 417-18, 858 P.2d 259 (1993). "Facts which a court may judicially notice are those 'facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty.'" *CLEAN v. State*, 130 Wn.2d 782, 809, 928 P.2d 1054 (1996), quoting *State ex rel. Humiston v. Meyers*, 61 Wn.2d 772, 779, 380 P.2d 735 (1963). The County respectfully submits that the agenda, with respect to its contents, satisfies the requirements of ER 201. *See, e.g., Cedar Fair, L.P. v. City of Santa Clara*, 123 Cal. Rptr. 3d 667 (Cal. App. 2011) (judicial notice of city council's agenda); *Foland v. Jackson County*, 792 P.2d 1228, 1232 (Ore. App. 1990) (judicial notice of an agenda prepared by a government agency).

motion for discretionary only sought review of the Order of Appointment. *See* RAP 2.3(b) Motion for Discretionary Review (Contingent), at 2 (“The only questions presented for review in this case involve the validity of this order.”); *Id.* at 1 (“Resolving the dispute between the bench and the clerk, however, is not before this Court in the instant case.”). The Judges did not file a notice of cross review³ and did not ask this Court to accept review of the validity of LGR 3 in their answer to the County’s motion for discretionary review. *See* 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 (hereinafter “Answer.”).

IV. ARGUMENT

This case is an appeal from the 3-page Order of Appointment. This case does not involve the merits of the mandamus proceeding. This case does not involve the ability of the Judges to bring that proceeding. The sole issue is whether the Judges are entitled to expend public funds for the appointment of counsel in the mandamus proceeding. That means that the sole impact of this proceeding is monetary. Must the Judges pay their own legal counsel in this dispute, or can they force the taxpayers of Franklin County to pay it?

³“A party seeking cross review must file a notice of appeal or a notice of discretionary review within the time allowed by rule 5.2(f).” RAP 5.1(d). No such notice was filed with the Franklin County Superior Court clerk.

A. THE COUNTY'S CHALLENGE TO THE ORDER OF APPOINTMENT IS PROPERLY BEFORE THE COURT

The Judges, repeating the same arguments tendered in their Answer, contend that this matter is not properly before this Court. *Compare* Brief of Respondents at 38-41, *with* Answer. The Judges contend that because the Order of Appointment was an “administrative act” or “administrative order” placed in an “administrative file” a challenge may only be “filed with a Superior Court in this state.” Brief of Respondents at 1, 38, 40. The Judges’ request for reconsideration must be denied for the reasons identified in the County’s Reply to the Answer and because the Judges have provided no citation of authority in support of their contention that the Order of Appointment is an “administrative order.” *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (grounds argued that are not supported by any citation of authority will not be considered by this Court).

Administrative duties of judges include the assignment of cases, setting of calendars, supervising court personnel, supervising the court’s accounts and auditing the procurement and distribution of appropriations, preparation of the annual budget request, and serving as a spokesman for the court. *See generally, Spokane v. Spokane County*, 158 Wn.2d 661, 678, 146 P.3d 893 (2006) (explaining administrative duties of a presiding judge); *Clerk of the Superior Court v. Freedom of Information Commission*, 895 A.2d 743, (Conn. 2006) (a judicial branch’s administrative functions consists of activities relating to its budget, personnel, scheduling, and facilities and physical operations).

A task does not become a judicial “administrative duty” simply because it is performed by a judge. The task must be within the real of authorized judicial conduct. “Administrative duties” do not include the performance of another branch of government’s duties. Thus, a court’s compelling expenditure of public funds that the legislative branch has not appropriated is not an administrative act. *See, e.g. Employees & Judges of Second Judicial Dist. Court, Second Div. v. Hillsdale County*, 378 N.W.2d 744, 749-50 (Mich. 1985) (trial court's administrative orders compelling their respective counties to pay the courts' employees' salaries and benefits in excess of appropriations were reversed because administrative orders could govern only internal court management). A court’s disenfranchisement of the voters by replacing a prosecuting attorney who declines to maintain a lawsuit on behalf of a county official with a more tractable attorney is not an administrative act. *State ex rel. Lambert v. King*, 538 S.E.2d 385, 388-89 (W. Va. 2000) (administrative order disqualifying prosecuting attorney and replacing with a special prosecuting attorney improper). Administrative functions do not include ruling on a question of law, such as the applicability of a statute. *See, e.g., Schoenhofen v. Wisconsin DOT*, 605 N.W.2d 249 (Wis. App. 1999).

An erroneously labeled “administrative order” must be treated as an “adjudicative order” for purposes of appeal. *See Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) (this Court is not confined by the lower court’s errors in labeling). That the Order of Appointment has erroneously been labeled “administrative” by the Judges is evident by the Order’s resolution of questions of law, including the applicability of RCW 36.27.030

and RPC 1.7. *See* CP 2, ¶ 1. The Order of Appointment, moreover, orders expenditure of public funds that have not been appropriated by the county legislative authority and supplants the duly elected and qualified prosecuting attorney with a private lawyer.

An adjudicative order or any superior court judicial order is subject to review by this Court. *See* Wash. Const. art. IV, sec. 4. Discretionary review supersedes the extraordinary writs of review, certiorari, mandamus and prohibition of any act of the superior court that is not appealable as a matter of right. RAP 2.1(b); RAP 2.3(a). Discretionary review is initiated by the filing of a notice with the trial court. RAP 5.1(a). The County filed the required notice of discretionary review with the trial court. *See* CP 1. Assuming *arguendo*⁴ that the Judges' contention that the Order of Appointment could be challenged in the superior court is correct,⁵ "the availability of one type of action does not preclude another action properly brought." *State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 169, 385 P.3d 769 (2016).

B. THE JUDGES CONCEDE THAT THEY VIOLATED THE PUBLIC'S RIGHT TO OPEN COURTS

The Judges do not dispute that the Order of Appointment was not entered in a public hearing. Their brief contains no response to the County's contention that the secrecy surrounding the entry of the Order of

⁴The superior court's appellate jurisdiction, which includes the authority to issue "writs of mandamus, quo warranto, review, certiorari," only extends to "cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law." Wash. Const. art. IV, sec. 6. The superior court's authority to issue statutory writs is similarly limited to "inferior courts." *See* RCW 7.16.040; RCW 7.16.160; RCW 7.16.300.

⁵*See* Brief of Respondent, at 40.

Appointment violated article I, section 10 of the Washington Constitution. The Judges' failure to provide any argument on this point constitutes a concession that the Order of Appointment must be vacated. *See In re Cross*, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it."); *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) ("The State does not respond and thus, concedes this point."). This Court must vacate the Order of Appointment on this ground alone. *See, e.g., In re Detention of Reyes*, 184 Wn.2d 340, 348, 358 P.3d 394 (2015) (any order that is not separable from a violation of the public right of access must be vacated).

C. THE RULES OF PROFESSIONAL RESPONSIBILITY DO NOT REQUIRE THE COUNTY TO FUND THE JUDGES' LAWSUIT

The Judges contend that Prosecutor Sant could not terminate his RCW 36.27.040 appointment of Mr. Kamerrer. The Judges argue that once Mr. Kamerrer was appointed, Prosecutor Sant and the County must underwrite any and all legal services the Judges desire. The Judges' legal citations, however, do not support their thesis.

The Judges primarily rely upon *Westerman v. Cary*, 125 Wn.2d 277, 892 P.2d 1067 (1994). *See* Brief of Respondent at 26-32. In *Westerman*, the prosecuting attorney appeared on behalf of the district court judges in an action filed by the county public defender. The prosecuting attorney disagreed with his clients' objectives and sought to control the litigation. *Id.* at 299-300. This Court rightly determined that the prosecuting attorney was bound by RPC 1.2(a), and he must withdraw when his personal views or interests will adversely impact his ability to abide by his clients' decisions

concerning the objectives of representation. *Id.* (citing RPC 1.7(b)).

This case is significantly different from *Westerman*. Prosecutor Sant has never appeared in the mandamus action filed by the Judges. He represents neither the clerk nor the Judges in that matter. The Judges in the mandamus action, moreover, are the plaintiffs rather than the defendants. The Judges in the mandamus action are not being sued for an official action they took within their powers. The case that disposes of this appeal is *Hoppe v. King County*, 95 Wn.2d 332, 622 P.2d 845 (1980). See *Westerman*, 125 Wn.2d at 300 (*Hoppe* is dispositive when the prosecuting attorney denied a duty to represent the official in an action that the official wishes the prosecuting attorney to commence).

In *Hoppe*, the county tax assessor initiated a lawsuit against the county. When the prosecuting attorney refused to appear for or represent the tax assessor in the case, the tax assessor sought recovery of his attorney fees from the public. This Court denied an award of attorney fees, holding that RCW 36.27.020 does not require a prosecuting attorney to bring suit at the request of a county official. *Hoppe*, 95 Wn.2d at 339-40 (“nothing in the duties of the prosecuting attorney (RCW 36.27.020) requires that officer to bring an action simply because a request is made by another county officer or to provide legal representation”).

Prosecutor Sant appointed Mr. Kamerrer with the expectation that a resolution to the records issue would be reached through mediation. In doing so, Prosecutor Sant was heeding the words of former President Abraham Lincoln:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

ABRAHAM LINCOLN, NOTES FOR LAW LECTURE (July 1, 1850), reprinted in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 142 (John G. Nicolay & John Hay eds. 1894). Prosecutor Sant never anticipated or expressly authorized the initiation of a lawsuit. Prosecutor Sant's discretionary allocation of funds from his existing budget to pay an outside lawyer to provide the Judges with independent legal advice to mediate an outcome advantageous to all involved, including the taxpayers, does not obligate him to underwrite the Judges' mandamus action.

To the extent that the letter of engagement authorized "litigation if necessary," Prosecutor Sant had the right to terminate the appointment and withdraw from the representation of the Judges in the mandamus action provided he did so in a manner that did not have a material adverse effect on their interests. *See* RPC 1.16. Withdrawal of support for the Judges' mandamus action was proper as representation of the Judges in the mandamus action would result in a violation of the Rules of Professional Conduct. RPC 1.16(a)(1). Withdrawal was also proper as Prosecutor Sant has a fundamental disagreement over the action, RPC 1.6(b)(4), and the representation would result in an unreasonable financial burden on the lawyer, RPC 1.16(b)(6), as the appropriation for independent counsel in Prosecutor Sant's budget is insufficient to pay for the lawsuit and Prosecutor Sant would be personally responsible for any expenditures in excess of his budget. *See* ACP 184; RCW 36.40.130 (a county officer is personally

responsible for expenditures made or liabilities incurred in excess of the budget).

Prosecutor Sant's termination of his RCW 36.27.040 special deputy appointment of Mr. Kamerrer was not accompanied by any motion or request that Judge Sparks dismiss the mandamus action. Prosecutor Sant's termination of his RCW 36.27.040 special deputy appointment allowed the mandamus action to proceed, albeit at the Judges' own expense. The termination of the RCW 36.27.040 special deputy appointment, moreover, occurred at the infancy of the mandamus action when its impact upon the Judges' case would be slight. There is no basis, therefore, for the Judges to compel the County to pay the cost of prosecuting their mandamus action.

D. THIS COURT'S ORIGINAL JURISDICTION DOES NOT EXTEND TO DECLARATORY JUDGMENTS

The Judges acknowledge that the "legality of LGR 3 is not challenged in this action." Brief of Respondent at 14. The legality of LGR 3 is not before this Court in this action, which is an appeal from the three page Order of Appointment. *See* CP 1-4. Nonetheless, the Judges request that this Court "unequivocally" rule upon the issues pending in their mandamus action against Clerk Killian. *Compare* Brief of Respondent at 3, 14-21, and 46 with ACP 150-183. The Judges' request must be denied.

The Judges, who never filed a cross-notice of appeal or a cross-petition for discretionary review, apparently are asking this Court to assume original jurisdiction of their declaratory judgment request. This Court's original jurisdiction is governed by the constitution. The plain language of Article IV, section 4, which states that the "supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state

officers,” does not include original jurisdiction over a county clerk or to a declaratory judgment action. *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994).

This Court’s original jurisdiction, moreover, cannot be invoked by argument tendered in a respondent’s brief. An original action is initiated by the filing of a petition in this Court and filing proof of service of the petition on the proper parties. *See* RAP 16.2(b).

The proper parties to a declaratory judgment action are all persons, including municipal corporations, “who have or claim any interest which would be affected by the declaration.” RCW 7.24.110; RCW 7.24.130. With respect to LGR 3, the Benton County Clerk, the Franklin County Clerk, Benton County, and Franklin County all have interests which could be affected by the Judges’ declaratory judgment action as LGR 3 requires the maintenance of duplicate court records – paper and electronic – which carries a greater cost than the statutorily mandated single record.⁶ The Judges have

⁶The Legislature expressly authorizes the county clerk, “notwithstanding any other law relating to the destruction of court records,” to only maintain an electronic record of “all documents, records, instruments, books, papers, depositions, and transcripts, in any action or proceeding in the superior court.” RCW 36.23.065. The Secretary of State Archivist, who is authorized by the legislature to adopt schedules and standards governing the maintenance of public records maintained by state and local agencies, RCW 40.14.020(6), authorizes the county clerk to destroy the original document upon verifying that the electronic copy was successfully made. *See* Office of the Secretary of States, Washington State Archives, County Clerks and Superior Court Records Retention Schedule Version 7.0, 2.1 Records Conversion, Disposition Authority Number CL2010-085 (June 26, 2014) (hereinafter “Court Records Retention”) (all of the local government records retention schedules may be found at <https://www.sos.wa.gov/archives/recordsmanagement/local-government-records-retention-schedules---alphabetical-list.aspx> (last visited Dec. 19, 2018)). The “Washington State Archives (WSA) strongly recommends the disposition of public records at the end of their minimum retention period for the efficient and effective management of local resources.” Court Records Retention, at 1.

The Legislature assigns the cost of maintaining the clerk’s records upon the county. RCW 36.23.030 (“The clerk of the superior court at the expense of the county shall keep the following records”). No statute, however, requires the county to bear the expense of maintaining two sets of records. Where the county legislative authority only appropriates sufficient funds to maintain the statutorily authorized electronic set of records, a court may only compel funds to pay for a duplicate set of paper records upon proof by clear, cogent and

neither filed the required petition nor filed proof of service on all affected persons. Where parties whose rights would be affected are not joined, a declaratory judgment cannot be entered and the case must be either dismissed or remanded. *Williams v. Poulsbo Rural Tel. Asso.*, 87 Wn.2d 636, 643, 555 P.2d 1173 (1976), *overruled in part by Chemical Bank v. Washington Public Power Supply System*, 102 Wn.2d 874, 691 P.2d 524 (1984).

While this Court may render a declaratory judgement ancillary to an original action for mandamus, the Court will only do so when such a declaration necessarily underlies the writ of mandate. *Walker*, 124 Wn.2d at 411. The validity of LGR 3 is irrelevant to this case. That is a question properly being litigated against Clerk Killian in *The Judges of Benton and Franklin Counties Superior Court: Judge Joe Burrowes, Judge Alex Ekstrom, Judge Cameron Mitchell, Judge Carrie Runge, Judge Jacqueline Shea-[B]rown, Judge Bruce Spanner and Judge Sam Swanberg, Plaintiffs, vs. Michael Killian, Franklin County Clerk and Clerk of the Superior Court, Defendants*, Franklin County Superior Court No. 18-2-50285-11. The question here is only whether the prosecutor has a duty to prosecute the suit, not whether the suit has merit. *See Osborn v. Grant County*, 130 Wn.2d 615, 926 P.2d 911 (1996) (county clerk who prevailed on declaratory judgment was not entitled to attorney fees as the prosecuting attorney was not required to bring the action at the request of the county clerk). As the Judges do not dispute that Prosecutor Sant's mandatory duties do not extend to the filing of a lawsuit at the request of a county official, the Order of Appointment must

convincing evidence that it cannot fulfill its duties without the duplicate set of records. *In re Salary of Juvenile Director*, 87 Wn.2d 232, 252, 552 P.2d 163 (1976).

be vacated. The Order of Appointment must also be vacated because the Judges had a personal interest in shifting the cost of Mr. Kamerrer's services from their shoulders to the taxpayers' backs.

E. THE JUDGES ARE NOT ENTITLED TO ATTORNEY FEES

The Judges provide four separate arguments in support of attorney fees in connection with this appeal. All four grounds lack merit.

First, the Judges contend that there is a contractual right to appellate fees. *See* Brief of Respondent, at 41-42. The Judges support their contention by citing to a case in which the *parties* to the contract were before the appellate court. Assuming arguendo that Prosecutor Sant's terminated RCW 36.27.040 order appointing a special deputy prosecuting attorney and correspondence with Mr. Kamerrer could be viewed as a contract, the Judges are not parties to either document and Mr. Kamerrer is not a party to this appeal. *See In re Appointment of a Special Deputy Prosecuting Attorney*, Cause No. 95945-5, Order (Sep. 7, 2018) ("Mr. Kamerrer is not a party."). The "contract," moreover, was limited to "issues surrounding the Court's local rule requiring the County Clerk to maintain paper records of proceedings in the Franklin County Superior Court." ACP 145. This appeal involves the 3-page Order of Appointment, not LGR 3. The "contract," therefore, provides no basis for an award of attorney's fees on appeal.

Second, the Judges contend that the Order of Appointment requires the County to pay the attorney's fees and costs incurred in this appellate process. Brief of Respondent, at 42. The Order of Appointment, which only authorizes Mr. Kamerrer to represent the Judges in the mandamus action, is void for the reasons identified in this brief and in the Brief of Petitioner.

RCW 36.27.030 does not authorize a court to appoint an independent prosecutor to perform discretionary functions of the prosecuting attorney. *Osborn*, 130 Wn.2d at 624-25, 629 (appointment of independent prosecutor proper solely to provide legal advice to the clerk; appointment could not be extended to the filing of an action on behalf of the clerk).

Initiation of a lawsuit at the request of the Judges against the county clerk is not a mandatory duty. *See Hoppe*, 95 Wn.2d at 339-40 (“nothing in the duties of the prosecuting attorney (RCW 36.27.020) requires that officer to bring an action simply because a request is made by another county officer or to provide legal representation”); *Fisher v. Clem*, 25 Wn. App. 303, 307, 607 P.2d 326 (1980), *overruled on other grounds by Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990) (“the prosecutor’s maintenance of any civil proceedings under RCW 36.27.020 is discretionary”). The retention, at public expense, of an attorney to perform duties that the prosecuting attorney is not required to perform requires authorization from the county’s legislative authority. *See generally* RCW 36.16.070 (legislative body must authorize a position before a county official may hire a “necessary employee” at public expense). Here, the BOCC expressly denied the Judges’ request for funds to pay Mr. Kamarrer.

Third, the Judges contend that they are entitled to attorney fees because they are “the defending party in this action commenced originally in the Supreme Court.” Brief of Respondent at 42. The Judges misapprehend the nature of this action. This is an appeal from an action – *In re the Appointment of a Special Deputy Prosecuting Attorney* – that the Judges initiated in the superior court.

While a prosecuting attorney has a mandatory duty to defend the county in civil actions, he does not have a duty to defend a county officer who is being sued in his/her official capacity unless the county is the real party in interest.⁷ See *Bates v. School Dist. 10*, 45 Wash. 498, 88 P. 944 (1907) (prosecuting attorney had no duty to defend litigation on behalf of the school district when the school district was sued; duty to give legal advice to school directors did not include a duty to defend). Accord *Westerman*, 125 Wn.2d at 299 (“It is not clear from RCW 36.27.020 whether [the duty to appear for and represent the state and county in all proceedings in which they may be parties] extends to officials who are sued in their official capacity.”). Since Franklin County is the opposing party in this case,⁸ the Judges can hardly claim to be a proxy for the county. Moreover, since Prosecutor Sant has no ability or duty to represent someone in an action against Franklin County, the taxpayers of Franklin County are not responsible for the Judges’ attorney’s fees in this matter. See *Osborn*, 130 Wn.2d at 628 (reversing an

⁷The Judges take issue with this use of the phrase “the real party in interest,” contending that the phrase “is one that applies to plaintiffs, not defendants.” See Brief of Respondent at 37. This Court, however, employs the phrase when determining whether a county is responsible for the attorney fees of a county official who is a defendant in a lawsuit. See, e.g., *Grant County Prosecuting Attorney v. Jasman*, 183 Wn.2d 633, 647, 354 P.3d 846 (2015) (Here, we hold that the prosecutor did not have a duty to represent Coroner Morrison. This lawsuit was a quo warranto action against Jasman, not a suit for money damages against Coroner Morrison or a case in which the county was the real party in interest.”); *Westerman*, 125 Wn.2d at 299 (“It cannot be denied that the District Court and its judges are an arm of the County and that the County, while not named, is the real party in interest because it is the organ ultimately impacted by detention decisions.”).

⁸While Chapter 4.96 RCW may provide a duty to defend county officers in some tort actions, the duty imposed by that chapter does not extend to all types of proceedings. See generally *Colby v. Yakima County*, 133 Wn. App. 386, 136 P.3d 131 (2006) (county not obligated to provide an attorney to represent judge in a judicial disciplinary proceeding as a judicial disciplinary proceeding is not an action for damages). A county, moreover, may decline to cover the cost of a defense if it finds that the acts or omissions did not occur while the county officer or employee was not performing his or her official duties in good faith. Cf. *Sanders v. State*, 166 Wn.2d 164, 207 P.3d 1245 (2009) (supreme court justice was not entitled to a public defense pursuant to RCW 43.10.040, where the justice knew or should have known that the conduct of which he was accused was unethical).

award of attorney fees because it was improper to appoint a special prosecutor to represent the clerk in an action against the county).⁹

Finally, the Judges request that this Court award them attorney fees and impose a fine upon the County on the grounds that this appeal is frivolous. Brief of Respondent, at 42-45 (citing RCW 4.84.185 and RAP 18.9). An award of sanctions for a frivolous appeal may only be made if, upon consideration of the entire record and resolving all doubts in favor of the petitioner, the Court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that the appeal is so devoid of merit that there is no possibility of reversal. *Boyles v. Department of Retirement Sys.*, 105 Wn.2d 499, 506-07, 716 P.2d 869 (1986). This test is not satisfied solely because the petitioner does not prevail on the merits. *Halvorsen v. Ferguson*, 46 Wn. App. 708, 723, 735 P.2d 675 (1986). An award of sanctions requires something more, such as a failure to accept a prior ruling from the appellate court in an action to which the appellant was a party. *Boyles*, 105 Wn.2d at 507.

The Order of Appointment at issue in this case was entered under highly atypical circumstances. The procedures utilized by the Judges as well as the contents of the Order raise serious constitutional questions. Some of

⁹The Judges characterize *Osborn's* holding that a prosecuting attorney may not represent a county officer in an action against the county as "dicta." See Brief of Respondent at 35. Where a statement of legal principle is necessary to the resolution of a case it is not dicta. See generally *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 88-90, 273 P.2d 464 (1954). The question of the prosecuting attorney's duty to be legal counsel for a party in a lawsuit against the county was necessary to the resolution of whether *Osborn* was entitled to her attorney fees. The rule laid down in *Osborn* that "the enumerated duties under RCW 36.27 cannot be read so broadly as to allow the prosecutor to be legal counsel for a party in a lawsuit against the county," 130 Wn.2d at 628, may only be cast aside if the Judges demonstrate that it is both incorrect and harmful. See, e.g., *State v. Barber*, 170 Wn.2d 854, 864-65, 248 P.3d 494 (2011) (this Court will only overrule its own precedent if the precedent is both incorrect and harmful).

the issues identified in this case are questions of first impression in Washington. An appeal that presents a question of first impression will not be treated as frivolous. *See Hoglund v. Omak Wood Prods., Inc.*, 81 Wn. App. 501, 508, 914 P.2d 1197 (1996) (“The questions presented here have not been resolved in Washington. The appeal is not frivolous.”).

The County’s instant appeal, moreover, cannot be frivolous as the Judges have conceded many of its arguments through their silence. The Judges acknowledge that it is improper for them to preside over a case that benefits them. The Judges admit that a prosecuting attorney’s mandatory duties do not extend to the filing of a lawsuit at the request of a county official. The Judges accept that they did not establish by clear, cogent and convincing evidence that they cannot fulfill their duties if public funds are not available to fund their mandamus action. The Judges grant that the Order of Appointment was not entered in a public hearing. The Judges’ request for sanctions and attorney’s fees must, therefore, be denied.

V. CONCLUSION

The Judges entered the Order of Appointment to appropriate public funds to finance their lawsuit against the clerk. Their personal interest in the subject matter of the order and the manner in which the Order of Appointment was entered, mandates the vacation of the order. The Judges are personally responsible for their attorney’s fees in both this appeal and the mandamus action.

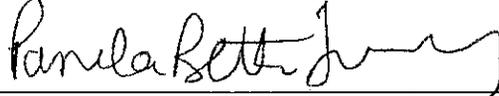
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Respectfully submitted this 19th day of December, 2018.

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PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 19th day of December, 2018, pursuant to the agreement of the parties, an electronic copy the document to which this proof of service is attached was served upon the following individuals via the CM/ECF System:

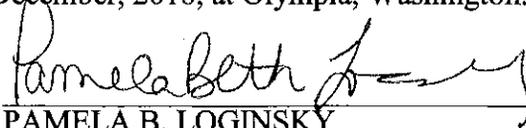
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Signed under the penalty of perjury under the laws of the state of Washington this 19th day of December, 2018, at Olympia, Washington.



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WASHINGTON ASSOC OF PROSECUTING ATTY

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