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STATE OF WASHINGTON  
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BY SUSAN L. CARLSON  
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NO. 96821-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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THE JUDGES OF THE BENTON AND FRANKLIN  
COUNTIES 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,

vs.

MICHAEL J. KILLIAN, FRANKLIN COUNTY CLERK  
AND CLERK OF THE SUPERIOR COURT,

Appellant.

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REPLY BRIEF

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## I. INTRODUCTION

This appeal stems from an action between the Franklin County Clerk, Michael Killian, and the Judges of the Benton and Franklin Counties Superior Court (collectively “Judges”). No one else is a party to the lawsuit. The Judges, nonetheless, ask that this Court require non-parties to pay their attorney’s fees and costs incurred in both the trial court and the appellate court.

This brief responds to the Judges’ request for attorney’s fees and costs. This brief also explains that the Judges’ failure to acknowledge or distinguish the only Washington Supreme Court case that addresses the limits placed upon superior court judges with respect to the county clerk’s extra-courtroom duties requires reversal of the trial court’s order granting summary judgment in favor of the Judges and the vacation of the writ of mandamus.<sup>1</sup>

## II. ARGUMENT

### A. **Binding Precedent Establishes that the Judges’ Exceeded Their Authority in Enacting LGR 3**

This mandamus action was filed by the Judges to compel Clerk Michael Killian to maintain two sets of records – one electronic and one paper. The claimed authority for the Judges’ actions is a Clerk Killian-specific special local court rule. *See* CP 169. This rule, LGR 3, seeks to control the performance of Clerk Killian’s extra-courtroom duties.

This Court has issued a single opinion regarding a superior court judge’s authority to meddle in the county clerk’s non-courtroom duties. In

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<sup>1</sup>Clerk Killian’s decision not to address certain arguments made by the Judges in the Brief of Respondent should not be considered as an acknowledgment of the validity of their analysis. Clerk Killian merely believes that the matters have already been fully addressed in the Corrected Brief of Appellant.

*State ex rel. Gordon v. Superior Court of Jefferson County*, 3 Wash. 702, 704, 29 P.2d 204 (1892), this Court held that apart from a specific proceeding, “neither the court nor the judge can interfere with the ministerial duty of the clerk.” This holding is consistent with the history and the language of article XI, section 5 and article IV, section 26 of the Washington Constitution. See Corrected Brief of Appellant at 6-13.

The Judges do not ask this Court to overrule *Gordon*. The Judges do not claim that subsequent amendments (there are none) to article XI, section 5 or article IV, section 26 have abrogated *Gordon*. The Judges do not distinguish *Gordon*. The Judges simply ignore the existence of *Gordon*, claiming that this case is controlled by *Matter of Recall of Riddle*, 189 Wn.2d 565, 583, 403 P.3d 849 (2017). See generally Brief of Respondent at 2, 12-16.

The issues in *Recall of Riddle* were (1) whether the charges in the amended ballot synopsis were factually and legally sufficient to move forward with a recall in accordance with RCW 29A.56.140, and (2) whether the amended ballot synopsis was adequate. *Recall of Riddle*, 189 Wn.2d at 570. *Recall of Riddle* does not address the superior court’s authority to control the county clerk’s extra-courtroom duties. The only discussion of the superior courts’ authority vis-a-vis Clerk Riddle appears with respect to “Charge Three: refusal to perform in-court duties.” *Id.* at 579-584.

Charge three involved Yakima County Superior Court Local Administrative Rule (LAR) 3.<sup>2</sup> LAR 3 “describes actual current courtroom

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<sup>2</sup>Yakima County Superior Court LAR 3 may be found at <http://www.yakimacounty.us/DocumentCenter/View/1906/LAR-3-Courtroom-Responsibilities-and-Procedures-Assigned-to-Clerk-PDF> (last visited Jul. 10, 2019).

procedures and the responsibilities of the Clerk of the Court while in court.” LAR 3 further provided that the “Clerk of the Court does not have the authority to modify or regulate these procedures without the express, written permission of the Presiding Judge.”

Clerk Riddle disputed both the factual and legal sufficiency of charge 3. In response to her claim that she had no obligation to perform in-court duties and that the Yakima County Superior Court exceeded their authority in enacting LAR 3, this Court noted that the county clerk also served as clerk of the superior court. *Recall of Riddle*, 189 Wn.2d at 583. This Court held that “LAR 3 is within the scope of the court’s rule making authority,” and that when acting as the clerk of the superior court, the county clerk must perform his or her duties as set out in court rule or court orders. *Id.* at 583-84.

This Court’s decision in *Recall of Riddle* is consistent with *Gordon*. Nowhere in *Recall of Riddle* did this Court state that a superior court has the authority to enact court rules that govern the county clerk’s out-of-court duties. Both pre- and post-*Recall of Riddle* it is improper for a superior court to interfere with the clerk’s performance of his out-of-court duties.

Franklin County LGR 3 differs dramatically from Yakima County LAR 3. Yakima County LAR 3 only addresses in-court duties. Franklin County LGR 3 only addresses extra-court duties. Yakima County LAR 3 relates to the clerk’s non-discretionary mandatory duty of attending court. *See* RCW 2.32.050. Franklin County LGR 3 relates to the clerk’s discretionary power to decide what should be done with paper copies of pleadings, orders, and other papers after they have been electronically

reproduced. *See* RCW 36.23.065.<sup>3</sup>

Franklin County LGR 3 exceeds the Judges' authority under the Washington Constitution, under *State ex rel. Gordon v. Superior Court of Jefferson County*, and under GR 29(f),<sup>4</sup> which prohibits judges from exercising general administrative supervision over "those duties assigned to clerks of the superior court pursuant to law."<sup>5</sup> The writ of mandamus and the order granting summary judgment must both be reversed as LGR 3, itself, is invalid under *Gordon* and inconsistent with the Washington Constitution. *See generally* Corrected Brief of Appellant at 29-33.

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<sup>3</sup>The Judges correctly point out that the most recent amendment to RCW 36.23.065 occurred in 1998, not 1989. *See* Brief of Respondent, at 17 n.9. Undersigned counsel apologizes for any inconvenience my transposition of numbers in the year may have caused the Judges or this Court. Laws of 1998, ch. 226 may be found at <http://lawfilesexternal.wa.gov/biennium/1997-98/Pdf/Bills/Session%20Laws/House/2402.s1.pdf> (last visited Jul. 10, 2019).

<sup>4</sup>The Judges erroneously claim that GR 29(f) was not cited in the superior court. *See* Brief of Respondent, at 18. GR 29(f) was cited in the Washington State Association of County Clerks' Amicus Curiae Memorandum, *see* CP 92, which was adopted by Clerk Killian in his Memorandum in Support of Motion for Reconsideration of Order on Summary Judgment and Issuance of Writ of Mandamus. *See* CP 254. The Judges either overlooked the citation or chose not to address GR 29(f) in their subsequently filed response to the amicus brief, CP 145-163, reply in support of summary judgment, CP 191-210, and response to Clerk Killian's motion for reconsideration, CP 268-286.

<sup>5</sup>In a footnote, the Judges cite a number of state court rules that they contend demonstrate the courts' power over county clerks' extra-courtroom activities. *See* Brief of Respondent, at 9 n. 7. The cited rules are consistent with *Gordon* and article XI, section 5 of the Washington Constitution because they are limited to case specific orders, only apply to clerks who "opt in," or relate to duties assigned to the clerks by the legislature. *See* GR 15(c)(4)-(5) and (h)(3) (duties of the clerk upon receiving a court order to destroy or seal court records in a specific case); GR 17(a)(1) ("the clerks of the court *may* accept for filing documents sent directly to the clerk or to another by electronic facsimile (fax) transmission" (emphasis added)); GR 17(a)(6) ("Nothing in this rule shall require an attorney or a clerk of a court to have a facsimile machine."); GR 30(b)(1) ("The clerk *may* accept for filing an electronic document" (emphasis added)); GR 30(c)(1) (clerk to designate the computer to which an electronic document may be filed); GR 30(d)(1)(A) (committee encourages local clerks and courts to develop a protocol); GR 30(e)(1) (decision whether to accept electronic documents that require a fee rests with the clerk); CR 79 (list of statutes identifying records the clerk is required to maintain); AR 5 (adopted in 1991, *see* 116 Wn.2d 1101, 1105 (1991), to implement Laws of 1989, ch. 252, § 3(9)'s new statutory requirement that the clerk provide the department of corrections "with written notice of payments by such offenders no less frequently than weekly").

**B. The Writ of Mandamus Should Not Have Issued Because the Judges' Had a Plain, Speedy, and Adequate Remedy at Law.**

Subsequent to the filing of the Corrected Brief of Appellant, this Court issued its opinion in *Riddle v. Elofson*, \_\_\_ Wn.2d \_\_\_, 439 P.3d 647 (2019) (hereinafter "*Elofson*"). In *Elofson*, this Court clarified what constitutes an "absence of a plain, speedy, and adequate remedy in the course of legal procedure" for the issuance of a writ of prohibition.

Although *Elofson* was only concerned with the common law writ of prohibition, 439 P.3d at 651, the Court relied upon RCW 7.16.300<sup>6</sup> and cases construing that statute or its predecessor. See *Elofson*, 439 P.3d at 652-654 (citing *Kreidler v. Eikenberry*, 111 Wn.2d 828, 838, 766 P.2d 438 (1989), and *State ex rel. O'Brien v. Police Court of Seattle*, 14 Wn.2d 340, 128 P.2d 332 (1942)). Despite the respondents' failure to address whether an alternative legal remedy existed, this Court raised the issue *sua sponte* and denied the writ finding that Riddle could have sought the plain, speedy, and adequate remedy of an injunction." *Elofson*, 439 P.3d at 654.

Recognizing that *Elofson* applies equally to writs of mandamus<sup>7</sup> as it does to writs of prohibition and that a challenge to an assertion of the lack of a plain, speedy, and adequate remedy may be raised by the Court *sua sponte*,

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<sup>6</sup>RCW 7.16.300 provides that:

It [a writ of prohibition] may be issued by any court, except district or municipal courts, to an inferior tribunal, or to a corporation, board or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested.

<sup>7</sup>RCW 7.16.170 limits the issuance of writs of mandamus to "cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." See also *Eugster v. City of Spokane*, 118 Wn. App. 383, 403, 76 P.3d 741 (2003) (quoting *River Park Square, LLC v. Miggins*, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001)).

the Judges devote multiple pages arguing that “No Plain, Speedy and Adequate Remedy Exists to Enforce the Mandate of LGR 3, Other than Mandamus.” *See* Brief of Respondent, at 29-33. Their arguments are unsupported by the record.

In the superior court, the Judges did not assert in their First Amended Complaint for Writ of Mandamus that they had no plain, speedy, and adequate remedy available. *See* CP 34-36. The Declaration of Judge Bruce Spanner in Support of Complaint for Writ of Mandamus also contained no allegation that they lacked a plain, speedy, and adequate remedy at law. *See* CP 25-28 (alleging only that this lawsuit is necessary because the Clerk formally refused to comply with LGR 3). The Motion for Summary Judgment asserts without elaboration that “No plain, speedy and adequate remedy exists in the ordinary course of law to obtain compliance with LGR 3 by the defendants.” CP 42.

Clerk Killian challenged the adequacy of the Judges’ claim in his response to the motion for summary judgment, *see* CP 292-293. In response, the Judges claimed that Clerk Killian’s failure to voluntarily comply with LGR 3 and his opposition to their petition for writ of mandamus “demonstrates that no remedy other than Mandamus will correct this Clerk’s defiance.” CP 200.<sup>8</sup>

Clerk Killian identified a declaratory judgment action as an adequate remedy at law during oral argument. *See* RP 39-40. In rebuttal, the Judges

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<sup>8</sup>Clerk Killian objected repeatedly, without success, to Judge Sparks considering new facts tendered and new arguments made by the Judges in their reply documents to which Clerk Killian had no opportunity to respond. *See* CP 294, n. 1 (“Unless the Judges argue outside of their limited Summary Judgment which is not permitted on Summary Judgment replies); 25RP 22-24, 27-28; CP 255-257.

stated that

a declaratory judgment would be a side show because if the Clerk will not abide by the clear direct and mandatory Local Rule 3, would he abide by a declaratory judgment? There's no ability to say that would have happened. We would be back with another action after that, and that's hardly efficient or speedy.

RP 44.

Neither the Order Granting Summary Judgment, CP 237-38, nor Judge Spark's letter explaining his reasons for granting summary judgment to the Judges addresses Clerk Killian's challenge to the absence of an adequate remedy at law, CP 232-235. The Writ of Mandamus, itself, contains no finding that it is more likely than not that Clerk Killian would not abide by a judgment entered in a properly filed declaratory judgment action. CP 239-241. The Writ of Mandamus also does not contain a conclusion of law regarding the inadequacy of a declaratory judgment action, merely stating that "The requirements for issuance of a Writ of Mandamus under ch. 7.16 RCW are met in this action." *See* CP 239-241.

In this Court, the Judges again allege that seeking relief by way of declaratory judgment would be inadequate. *See* Brief of Respondent, at 31. The Judges identify three grounds in support of this claim: (1) "the Clerk's unprincipled refusal to comply with LGR 3;" (2) Clerk Killian did not "challenge [LGR 3] in his own action for a declaratory judgment, or other legal challenge;" and (3) Clerk Killian is "as likely to defy a judgment obtained under the UDJA as he has been to defy LGR 3 by refusal to comply with it." Brief of Respondent, at 31-32. The record does not support these claims.

Clerk Killian's refusal to comply with LGR 3 is principled. Clerk Killian's refusal to comply with LGR 3 is supported by legal precedent, the Washington Constitution, and RCW 36.23.065. Compliance with LGR 3, moreover, requires funds not included in Clerk Killian's budget. *See generally* Corrected Brief of Appellant, at 19-20, 22, 25-26. *See also* Section II. C., *infra*. Compliance with LGR 3 would also reduce, not enhance, public and judicial access to newly entered orders and filed pleadings. *See generally* Corrected Brief of Appellant, at 19.

Clerk Killian's refusal to comply with LGR 3 is also supported by the improper manner in which the rule was adopted. The Judges and Clerk Killian had a legal dispute over whether the Judges could order him to maintain a duplicate set of records. The Judges, rather than submitting the dispute to a neutral judge in a proceeding in which Clerk Killian would enjoy the basic due process rights of notice and an opportunity to be heard,<sup>9</sup> "resolved" the dispute themselves, "declaring" the law in Judicial Resolution No. 18-001. *See* CP 29-31. This violated the prohibition upon judges adjudicating an issue in which they have a personal interest. *See generally* *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1926) (Due Process Clause of the Fourteenth Amendment bars a judge from presiding over a case in which he has a personal interest); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) (same); *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1995) ("The CJC recognizes that where a trial judge's decisions are tainted by even a mere

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<sup>9</sup>The Judges failure to provide Clerk Killian with an opportunity to be heard on the disputed legal issue also violated CJC 2.6(A).

suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating"); CJC 2.11(A)(2)(a) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including" when the judge is "a party to the proceeding").

Due process also prohibits the adoption of a special court rule that applies to a particular person with respect to a particular dispute. The evil of this practice is that it condemns the person to whom the special rule applies without providing him with a chance to be heard. *See generally Hurtado v. California*, 110 U.S. 516, 536, 4 S. Ct. 111, 28 L. Ed. 232 (1884). The Judges, however, concede that this is exactly what they did when they adopted LGR 3. *See* CP 169 ("LGR 3 was a specific rule for a specific Superior Court Clerk, adopted for the specific reason that Mr. Killian would not abide the Court controlling its records by accepting the direction of the Court as to how that would be done.").

Clerk Killian's principled non-compliance with LGR 3 and his legal opposition to the Judges' instant lawsuit does not support the Judges' claim that he is "likely" to defy a judgment obtained by the Judges in a properly filed declaratory judgment action. Clerk Killian has taken an oath to faithfully discharge the duties of his office. *See* RCW 36.16.040. Clerk Killian's oath requires him to comply with any judgment obtained in a properly filed Chapter 7.24 RCW matter. The presumption is that he will honor his oath. *See, e.g., Hoquiam v. Public Employment Relations Commission*, 97 Wn.2d 481, 489, 646 P.2d 129 (1982) ("the presumption is that 'public officers will properly and legally perform their duties until the

contrary is shown”).

**C. The Judges Concede that Duplicate Paper Files Are Not Essential to the Performance of Their Duties.**

In his opening brief, Clerk Killian demonstrated that his budget is insufficient for him to keep paper files in addition to electronic records. *See* Corrected Brief of Appellant, at 19-20, 25-26. This lack of funds, by itself, renders the granting of the writ of mandamus improper. *See Id.* at 38-40. Clerk Killian also established that the Judges may only compel the funds necessary to maintain a second set of records by demonstrating by clear, cogent, and convincing proof that they cannot perform their duties without the duplicate paper records. *See Id.*, at 33-36, citing *In re Salary of Juvenile Director*, 87 Wn.2d 232, 552 P.2d 163 (1976).

The Judges tender three pages in response to these arguments. *See* Brief of Respondent, at 33-35. Their response is largely devoid of citations to the record or to legal authority. Their response urges this Court not to reach the merits of Clerk Killian’s budget-based arguments on the grounds that these issues were raised only by amicus curiae. *See* Brief of Respondent, at 34 n. 14. This argument is not supported by the record.

Clerk Killian’s response in opposition to the Judges’ motion for summary judgment contains both a citation to *Juvenile Director* and a claim that a lack of funding precludes him from complying with LGR 3. *See* CP 301-02. Clerk Killian supported his claim of insufficient funds with competent evidence. *See* CP 116-118, ¶¶ 5-10. Clerk Killian expanded upon his argument and tendered more competent evidence regarding the cost of complying with LGR 3 in his motion for reconsideration. *See generally* CP 242-249, 253-266.

The Judges also contend that LGR 3 is consistent with other superior court actions that may “incidentally and unpredictably affect clerks’ and counties’ budgets.” Brief of Respondent, at 34. They offer three examples: (1) overtime associated when a clerk must remain past normal work hours to attend to trial needs; (2) waiver of court fees; and (3) penalties awarded in Public Records Act cases. *Id.*, at 34-35. The Judges are comparing apples to parsnips.

A statute requires the clerk to attend all sessions of court. *See* RCW 2.32.050(5). A statute authorizes the superior court to hold sessions outside of “normal” hours. *See* RCW 2.08.030. A statute authorizes the waiver of filing fees for parties who are unable to pay the fee due to financial hardship. *See* RCW 36.18.022. A statute authorizes the imposition of penalties against a county in a Public Records Act case. *See* RCW 42.56.550(4). No statute, however, requires the county clerk to maintain paper records in addition to electronic records. Moreover, no statute requires a county legislative body to provide funding to maintain more than one set of court records. *See generally* Corrected Brief of Appellant, at 34-35 (citing RCW 36.23.030 and RCW 36.23.065).

When, as here, a local rule demands services or imposes duties not mandated by statute or constitution which will have a predictable and non-incidentally impact upon the clerk’s and county’s budget, the rule may only be enforced upon a showing that the court cannot fulfill its duties without the extra-statutory service or the funds to pay for the additional service. *See In re Salary of Juvenile Director, supra* (superior court could not order a higher salary for the juvenile director than that set by statute without establishing by

clear, cogent, and convincing evidence that qualified candidates are unavailable at the the statutorily authorized statute and/or that the court's ability to perform its duties is imperiled). The Judges have not made the required showing. LGR 3 is, therefore, without force or effect. The mandamus order compelling Clerk Killian to comply with LGR 3 must, therefore, be vacated.

### **III. RESPONSE TO JUDGES' REQUEST FOR ATTORNEY'S FEES AND COSTS**

The general rule in Washington, commonly referred to as the "American rule," is that each party in a civil action will pay its own attorney fees and costs. *See In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 160, 60 P.3d 53 (2002); *Mellor v. Chamberlin*, 100 Wn.2d 643, 649, 673 P.2d 610 (1983). This general rule can be modified by contract, statute, or a recognized ground in equity. *Chevrolet Truck*, 148 Wn.2d at 160; *Mellor*, 100 Wn.2d at 649.

The Judges request an award of trial and appellate attorney fees and costs based upon an alleged contract purportedly entered into by a non-party, the Franklin County Prosecuting Attorney. Brief of Respondent, at 35. Alternatively, they claim a right to attorney fees based upon an order issued in another proceeding. *See* Brief of Respondent at 35-37 (citing to "*In re the Appointment of a Special Deputy Prosecuting Attorney, vs. The Judges of the Benton and Franklin County Superior Court*, Supreme Court Number 95945-5").

The Judges's arguments in support of their request rely almost exclusively on facts outside this case's appellate record. Their reference to documents and arguments tendered in the separate, though related case, must

all be disregarded. *See generally In re the Adoption of B. T.*, 150 Wn.2d 409, 414-16, 78 P.3d 634 (2003) (an appellate court may not take judicial notice of the record of another independent and separate judicial proceeding; rule applies even when the separate proceedings involve the same parties); *Spokane Research v. City of Spokane*, 155 Wn.2d 89, 97-99, 117 P.3d 1117 (2005) (refusing to consider documents from a related proceedings where the party that asked the appellate court to consider the documents did not address RAP 9.11); *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 this case establishes that the Franklin County Prosecuting Attorney is not a party. *See* CP 3-4, ¶¶ 1.1-1.2 (complaint identifying the parties to this case as Clerk Killian and the Judges); CP 34-35, ¶¶ 1.1-1.2 (first amended complaint identifying the same parties); CP 239-40, FOF 1 (plaintiffs are the Judges of the Benton and Franklin Counties Superior Court) and FOF 2 (“Defendants are Michael Killian, the Franklin County Clerk and the Clerk of the Superior Court.”). The record in this case contains no evidence that the superior court obtained personal jurisdiction over the Franklin County Prosecuting Attorney, and a motion for attorney’s fees in a respondent’s brief is insufficient for this Court to gain personal jurisdiction over the Franklin County Prosecuting Attorney. *Cf. Eagles System, Inc. v. Employment Security Department*, 181 Wn. App. 455, 326 P.3d 764 (2014) (personal jurisdiction in civil cases is obtained by service of a copy of the summons<sup>10</sup> together with the filing of a complaint, not through the filing and

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<sup>10</sup>The only summons in the record is to Clerk Killian. *See* CP 1.

service of other motions); RAP 16.2(b) (personal jurisdiction in the Washington Supreme Court in an original action is obtained by service of a petition as provided in the superior court civil rules and statutes for service of a summons in a superior court action). A court may not order a non-party to pay the attorney's fees of a party. *See, e.g., Martin v. Wilks*, 490 U.S. 755, 761, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989) (the general rule is that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process); *Marley v. Dep't of Labor and Indus.*, 125 Wn.2d 533, 541, 886 P.2d 189 (1994) (a court enters a void order when it lacks personal jurisdiction); *Eagle Systems, Inc.*, 181 Wn. App. at 459 ("When the trial court lacks personal jurisdiction, any judgment entered is void.").

The record in this case contains no contract or other agreement in which Clerk Killian agreed to pay the Judges' attorney's fees and costs. A review of Washington statutes, moreover, establishes that Clerk Killian lacks the authority to contract with a private attorney to provide representation to another county official. *See generally* RCW 36.32.200 (only the county legislative authority may employ or contract with an attorney to perform any duty which any prosecuting attorney is authorized or required by law to perform); RCW 36.16.070 (only the board of county commissioners may authorize a county official to employ deputies and other necessary employees; only the board of county commissioners may set the salary for deputies and other necessary employees).

The record in this case also establishes that the Judges affirmatively disavowed *any* claim for a monetary award, including costs and fees, against

Clerk Killian. *Compare* CP 3, ¶ 3.7 (complaint requesting that the court “award plaintiffs their costs and disbursements herein, and grant such other and further relief”), *with* CP 3, ¶ 3.7 (first amended complaint with the phrase “award plaintiffs their costs and disbursements herein” removed. *See also* CP 39 (“A Writ of Mandamus is the sole relief requested in this action. No claim for damages exists and no claim for costs is made in the First Amended Complaint.”). Consistent with this position, neither the Judges’ proposed Writ of Mandamus nor their Order Granting Summary Judgment, both of which were signed by Judge Sparks, awarded them costs or fees or reserved the issue of whether costs or fees would be awarded at a later date. *See* CP 236-241. *See also* CP 287-88 (Judges’ proposed Order Denying Defendant’s Motion for Reconsideration of Order Granting Summary Judgment also contains no award of costs or fees or a reservation of either). It is inequitable to Clerk Killian to allow the Judges to change their position in this Court.

The record in this case contains no order signed by Judge Scott R. Sparks<sup>11</sup> that provides counsel at public expense to the plaintiff Judges. While the plaintiff Judges did sign an order appointing a special deputy prosecuting attorney to represent them in the mandamus case at public expense, their order does not bear this matters cause number and does not bear this case’s caption. Presumably the Judges entitled their order of appointment as they did out of an awareness that it is improper for a judge to

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<sup>11</sup>Judge Sparks was appointed to preside over the mandamus action by Chief Justice Fairhurst pursuant to RCW 2.56.030 and article IV, section 2(a) of the Washington Constitution. *See* RP 5; CP 317. Chief Justice Fairhurst’s order of appointment does not authorize Joe Burrows, Alex Ekstrom, Cameron Mitchell, Carrie Runge, Jacqueline Shea-Brown, Bruce Spanner, or Sam Swanberg to issue orders or perform any judicial functions with respect to this mandamus action.

enter orders in a case that is not before him for a decision.<sup>12</sup>

The Judges filed a copy of their order of appointment as an exhibit to their reply in support of their summary judgment motion. *See* CP 207-09. Their order violates both due process and the Code of Judicial Conduct due to the Judges personal interest in shifting the cost of this mandamus action from their shoulders to the taxpayers' backs. *See generally Tumey v. Ohio, supra; Caperton, 556 U.S. at 876; Sherman, 128 Wn.2d at 205; CJC 2.11(A)(2)(a)*. An order entered by a judge whose impartiality may be questioned must be reversed. *See, e.g., Caperton, 556 U.S. at 890; Tumey, 273 U.S. at 535; Tatham v. Rogers, 170 Wn. App. 76, 108, 283 P.3d 583 (2012)*. The plaintiff Judges' order of appointment, therefore, cannot support their request for attorney's fees in this matter.

#### IV. CONCLUSION

Clerk Killian respectfully requests that this Court vacate the writ of mandamus and reverse the trial court's order grant of summary judgment to the Judges. Clerk Killian further requests that this Court direct summary judgment in favor of him. *See, e.g., In re Estate of Toland, 180 Wn.2d 836, 852-53, 329 P.3d 878 (2014)* ("Upon reversing summary judgment, we may direct summary judgment in favor of the nonmoving party if there are no disputed material facts and as a matter of law the nonmoving party is entitled

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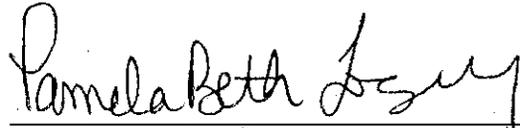
<sup>12</sup>The Judicial Conduct Commission recently filed charges against a judge for entering an order in a case that was not before him for a decision, and doing so on his own initiative and without giving notice or the opportunity to be heard prior to entering the order. *See In Re the Matter of: The Honorable Bruce A. Spanner, Superior Court Judge for Benton and Franklin Counties, Commission on Judicial Conduct, Cause No. 8899-F-186 (May 2, 2019)* (finding probable cause to believe that the respondent judge's conduct violated "Canon 1 (Rules 1.1, 1.2 and 1.3) and Cannon 2 (Rules 2.2, 2.3(A), 2.6(A) and 2.9) of the Code of Judicial Conduct") (available at [https://www.cjc.state.wa.us/materials/activity/public\\_actions/open\\_cases/8899SOCSigned.pdf](https://www.cjc.state.wa.us/materials/activity/public_actions/open_cases/8899SOCSigned.pdf) (last visited Jul. 9, 2019)).

to summary judgment.”).

Respectfully submitted this 12th day of July, 2019.

SHAWN P. SANT

Franklin County Prosecuting Attorney

Handwritten signature of Pamela B. Loginsky in cursive script.

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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 12th day of July 2019, pursuant to the agreement of the amici curiae, an electronic copy of the document to which this proof of service is attached was served upon the following individuals via the CM/ECF System and/or e-mail:

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On the 12th day of July, 2019, a copy of the document to which this proof of service is attached was placed in the United States Mails in an envelope, upon which first class postage was affixed, that was addressed to

W. Dale Kamerrer  
Attorney at Law  
P.O. Box 11880  
Olympia, WA 98508-1880

A copy of this document was also sent on July 12, 2019, to the following e-mail addresses via the CM/ECF System:

Dale Kamerrer at dkamerrer@lldkb.com and at lisa@lldkb.com

Signed under the penalty of perjury under the laws of the state of Washington this 12th day of July, 2019, at Olympia, Washington.

  
PAMELA B. LOGINSKY, WSBA No. 18096  
Special Deputy Prosecuting Attorney

**WASHINGTON ASSOC OF PROSECUTING ATTY**

**July 12, 2019 - 9:08 AM**

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