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NO. 96821-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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.

CORRECTED BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal arises from a summary judgment order that was granted to the Judges in their mandamus action against Clerk Killian. Clerk Killian's opposition to the Judges' summary judgment motion properly relied upon the existence of contested facts regarding the manner in which Local General Rule (LGR) 3 was adopted, the factual basis for the rule, and the costs of complying with the rule. *See* CP 289-305. The trial court's ruling on summary judgment did not address any of these issues. *See* CP 232-35.

The Judges concede that they adopted LGR 3 to control the discretion of a single, separately elected, constitutional officer: Franklin County Clerk Killian. *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."). It is questionable whether judges can properly adopt court rules to control the actions of others that they disagree with, rather than submitting the disagreement to a neutral and disinterested judicial officer. *See generally* *Hurtado v. California*, 110 U.S. 516, 536, 4 S. Ct. 111, 28 L. Ed. 232 (1884) (while each state "prescribes its own mode of judicial proceeding," due process forbids states from adopting "special rules for a particular person or a particular case;" rather they must regulate rights and remedies in a "general way," conducive to the "public good," ensuring space for courts to "hear" before "condemning"). It is extremely troubling that the judges sought to enforce such a special rule against a person who was not provided with prior notice or an opportunity to be heard regarding its adoption. *See Matter of Deming*, 108 Wn.2d 82, 96-97, 736 P.2d 639

(1987) (procedural due process requires that a party whose rights are to be affected is entitled to be heard).

Clerk Killian's due process rights have been violated to the extent Judge Sparks accepted the Judges' claim that the "findings" in their resolution, most of which are more properly labeled "conclusions of law," should be treated as verities in their mandamus action. *See, e.g.*, CP 270. These findings cannot be used against Clerk Killian in this action. *See, e.g.*, 1 Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, at 194 (8th ed. 1927) (a recital of facts in the preamble of a statute cannot be used as evidence against the parties in a lawsuit).

Superior courts have a constitutional right to enact uniform rules of practice to govern their proceedings. *See* Const. art. VI, sec. 24. *Accord* RCW 2.08.230. Local judges are authorized to enact local rules. *See* GR 7.

Local rules must be consistent with rules adopted by the supreme court. *State v. Chavez*, 111 Wn.2d 548, 554, 761 P.2d 607 (1988); RCW 2.04.210; GR 7(b); CR 83. Local rules must also be consistent with statutes. *Harbor Enters., Inc. v. Gudjonsson*, 116 Wn.2d 283, 293, 803 P.2d 798 (1991). LGR 3 conflicts with both statutes and court rules. Accordingly the writ of mandamus that compels Clerk Killian to comply with LGR 3 must be vacated.

Local rules must also comply with the Washington constitution. *See, e.g., Auburn v. Brooke*, 119 Wn.2d 623, 632-34, 836 P.2d 212 (1992) (court rules cannot contravene the constitution nor derogate the constitutional rights of any person). A court rule may violate the constitution in a number of

ways. First, the rule might violate the authority of executive branch officers by usurping their authority. Second, the rule might violate the authority of the legislative branch by adding staff or mandating additional services for which no appropriation has been made. LGR 3 suffers from both infirmities, necessitating the vacation of the superior court's writ of mandamus.

While the constitutional issues presented in this appeal are intriguing, this Court may reverse the writ of mandamus and dismiss this appeal solely upon non-constitutional grounds. *See* sections V. A. 1. and V. C. *infra*. This Court "will avoid deciding constitutional questions where a case may be fairly resolved on other grounds." *Cnty. Telecable of Seattle, Inc. v. City of Seattle, Dep't of Exec. Admin.*, 164 Wn.2d 35, 41, 186 P.3d 1032 (2008).

II. ASSIGNMENTS OF ERROR

1. The trial court erred by entering the Writ of Mandamus, CP 239.
2. The trial court erred by entering the Order Granting Summary Judgment, CP 236.
3. The trial court erred by entering the Order Denying Defendants' Motion for Reconsideration of Order Granting Summary Judgment, CP 287.

III. STATEMENT OF ISSUES

The Washington Constitution provides for the direct election of executive branch county clerks. *See* Const. art. XI, sec. 5. The duties of county clerks are established by the legislature. *Id.* The legislature has made county clerks the guardian of superior court records. The legislature has vested the county clerk with the power to destroy all paper records and documents in any superior court action upon producing an electronic reproduction of the record or document. *See* RCW 36.23.065. The

legislature does not require the county clerk to obtain permission from the courts or any other official before replacing paper records with electronic records. *Id.*

As a general rule, the duties assigned to a constitutionally created office may not be transferred to or performed by another person or officer. *See generally State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 179-180, 385 P.3d 769 (2016). This principle is incorporated into GR 29(f) which prohibits a presiding judge from exercising general administrative supervision over “those duties assigned to clerks of the superior court pursuant to law.”

1. Do superior court judges exceed their authority by enacting a local rule that conflicts with both statutes and the rules of this Court?
2. Do superior court judges unconstitutionally diminish the office of county clerk through the adoption of a local rule that strips the clerk of his authority to replace paper records with electronic reproductions?

The county legislative authority is responsible for determining how taxpayer funds will be allocated. One of the items the legislative authority must provide for is the maintenance of superior court records by the county clerk. RCW 36.23.030. The county legislative authority has provided the Franklin County Clerk with a sufficient appropriation to maintain electronic records of superior court proceedings. Maintenance of a duplicate set of paper records, which is not statutorily mandated, would require additional funds.

3. Must judges establish through clear, cogent, and convincing evidence that the superior court cannot fulfill its duties without duplicate paper files before compelling the county clerk to comply with a local rule for which no appropriation has been made?

A writ of mandamus is an appropriate means of compelling performance of a clear legal duty when the applicant does not have a plain, speedy, and adequate remedy. A writ of mandamus, however, may not be used to compel the performance of acts or duties that call for the exercise of discretion on the part of public officers. A writ of mandamus will also not issue to compel an officer to perform a non-constitutionally mandated act when the officer cannot comply due to a lack of budget.

The legislature has vested the decision of what format court records will be maintained in the county clerk. *See* RCW 36.23.065. The clerk's exercise of discretion is influenced by the funds appropriated by the county legislative authority. Local General Rule 3 usurps the Franklin County Clerk's discretion to determine the format in which to maintain court records by ordering the clerk to "keep and maintain paper files for all cases and file types... except as may be authorized in writing by the Court." LGR 3(a). This authorization will not be tendered until the clerk "shall work diligently, collaboratively and harmoniously with the Court to satisfy all of the conditions precedent to 'paperless' court" while "conform[ing] to the direction of the Court." LGR 3(c).

The Washington Constitution does not require the maintenance of duplicate court records. Clerk Killian's budget, as established by the county

legislative authority, does not include funds to maintain both paper and electronic court records.

4. Must the writ of mandamus, which strips the county clerk of discretion and compels him to maintain paper records despite the absence of an appropriation to do so, be vacated?

IV. STATEMENT OF CASE

A. Historical Background

Problems created by the failure to maintain accurate court records were recognized as far back as the thirteenth century. King Edward, upset by the unwarrantable practices of some judges who made false entries and erasures to cover their own misconduct, directed “that a record surreptitiously or erroneously made up, to stifle or pervert the truth, should not be a sanction for error; and that a record, originally made up according to the truth of the case, should not afterwards by any private erasure or amendment be altered to any sinister purpose.” Sir William Blackstone, *Commentaries on the Laws of England*, Book 3, Chapter 25 Of Proceedings, in the Nature of Appeals (1765-1769) (Longang Institute Vers. 2005).¹ Regrettably, this injunction led to some injustices. In the wake of prosecutions for corruption and perversion of judgments, judges became unwilling to correct even minor scrivener errors. *Id.*

American jurisdictions sought to avoid England’s unhappy experience. In California, the founding fathers provided for a county clerk who was selected by the voters, rather than appointed by the judges to serve

¹The Longang Institute’s version of Blackstone may be found at <https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-325/> (last visited Apr. 11, 2019).

as the custodian of the court records. Cal. Const. art. VI, sec. 7 (1849) (“The Legislature shall provide for the election, by the people, of . . . County Clerks... and shall fix by law their duties and compensation. County Clerks shall be, ex officio, clerks of the District Courts in and for their respective counties.”). The legislature promptly established the duties of the clerk. The legislature ordered the clerks to “take charge of and safely keep or dispose of according to law all books, papers, and records, which may be filed or deposited in his office,” Cal. Stats. 1850, ch. 110, § 7, p. 762, and to maintain various indexes of all suits, a docket for each case, and various other records. *Id.*, § 8, p. 262; Cal. Stats. 1851, ch. 1, § 128, p. 29; Cal. Stats. 1863, ch. 200, § 1, p. 260.

The clerk was subject to the direction of the court with respect to the entry of judgment and which documents should be accepted for filing. In filing the documents and entering judgments, the clerk acted in a ministerial capacity only. *See Crane v. Hirshfelder*, 17 Cal. 582, 585 (1861). But, once a document was placed into the clerk’s custody, it could only be altered through the entry of subsequent orders obtained through regular proceedings before the court. *See Houston v. Williams*, 13 Cal. 24, 27 (1859). It was a “great abuse of its powers” for a court to “take, directly or indirectly, from the Clerk, the perquisites of his office for copies of opinions, and papers on file, nor authorize the destruction or mutilation of any of the records.” *Id.* at 28.

The clerk’s role as a bulwark against corruption proved so successful that the position was retained in California’s second constitution. *See* Cal. Const. art. VI, sec. 14 (1879) (“The County Clerks shall be ex officio Clerks of the Courts of record in and for their respective counties, or cities and

counties.); Cal. Const. art. XI, sec. 5 (1879) (“The Legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of ... County Clerks..., and shall prescribe their duties, and fix their terms of office.”).² This iteration strengthened the independence of the clerk’s office by moving its placement from article VI, the judiciary article, to article XI, the county government article. *Id.* When the 1879 constitution was adopted, the duties of the county clerk were located in sections of the 1872 Political Code, the Civil Code and the Penal Code. These provisions continued the clerk’s duty to enter orders, judgments and decrees, keep dockets, and index all cases. *See, e.g.*, Cal. Political Code §§ 4204-05 (1872); Penal Code §§ 1047, 1207 (1872).

Washington was still a territory when California adopted its second constitution. Its judicial needs were met by three territorial judges, each of whom was responsible for conducting trials in one of the three judicial districts. Washington Territory Organic Act, section 9; Laws of 1854, p. 448-49. The judges were appointed by the president and confirmed by the Senate, with virtually no local input. Charles H. Sheldon, *A Century of Judging: A Political History of the Washington Supreme Court* at 15, 17 (1988). The judges heard cases during two sessions a year. *Id.* They were assisted by court clerks whom they appointed and whose terms of service rested solely in the hands of the judges. *See, e.g.*, Code of 1881 § 2123; Laws of 1854, pg. 366, sec. 4. Once a year the three territorial judges met in Olympia to sit as the Supreme Court to hear appeals from their own decisions as district

²A copy of the 1879 constitution prior to any amendments may be found at <https://www.cpp.edu/~jlkorey/calcon1879.pdf> (last visited Apr. 11, 2019).

judges. *A Century of Judging*, at 15; Code of 1881 § 2113.

There was significant dissatisfaction with the territorial courts over a growing backlog of cases, and absenteeism of the territorial judges. *A Century of Judging* at 17. Residents were also resentful of how the judges were selected. *Id.* It was widely believed that statehood would correct this and other real and perceived faults associated with the territorial courts. *Id.*

The delegates who met for Washington's 1889 Constitutional Convention were selected by a populace which had a general distrust of representative government and a strong fear that government officials would be corrupted through bribes and other practices. Robert Utter and Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* at 11 (2002). The delegates began their work with copies of the Oregon, California, Wisconsin, Missouri, Colorado, and Indiana constitutions and a draft of a proposed constitution which had been prepared by W. Lair Hill. See Charles M. Gates, *Foreword to The Journal of the Washington State Constitutional Convention 1889*, at v (Beverly Paulik Rosenow ed., 1962); *A Century of Judging* at 20-21.

These delegates also had available to them the leading treatise of the day, Thomas Cooley, *A Treatise on the Constitutional Limitation Which Rest Upon the Legislative Power of the States of the American Union* (5th ed. 1883) (hereinafter "*Constitutional Limitations* (5th ed.)"),³ and the

³Decisions of the Territorial Supreme Court repeatedly cited this treatise. See, e.g., *Harland v. Territory*, 3 Wash. Terr. 131, 145-146, 13 P. 453 (1887) (Associate Justice Turner, who later served as a delegate to the Constitutional Convention, discussing Cooley's treatise); *Bloomer v. Todd*, 3 Wash. Terr. 599, 618, 19 P. 135 (1888) (citing to Cooley's treatise); *Maynard v. Hill*, 2 Wash. Terr. 321, 326, 5 P. 717 (1884) (Associate Justice Hoyt, who later served as president of the Constitutional Convention, citing to Cooley's treatise); *Maynard v. Valentine*, 2 Wash. Terr. 3, 9, 3 P. 195 (1880) ("Especially valuable we have found the observations of ... and those of Judge Cooley, in his work on Constitutional

interpretive decisions of the courts whose constitutions served as the model for Washington's constitution.

Article IV of the 1889 Washington Constitution was based in large part on various provisions of the 1879 California Constitution. *Compare* Cal. Const. art. VI (1879), *with* Wash. Const. art. IV. Throughout the debates on the judiciary article, delegates repeatedly expressed concern that the provisions adopted should be robust enough to protect against corruption, political pandering, and domination by one person. *See, e.g.,* Seattle Times, July 19, 1889, p.1, cols. 2-6, reproduced in Washington State Constitutional Convention 1889: Contemporary Newspaper Articles at 2-39 to 2-44 (William S. Hein & Co., 1999); Tacoma Morning Globe, July 19, p. 1, cols. 1-3, reproduced in Contemporary Newspaper Articles at 5-38 to 5-41. These concerns were addressed by increasing the number of supreme court justices from three to five, prohibiting judges from instructing juries on the facts, and adjusting the terms of offices. *See* Beverly Rosenow, *The Journal of the Washington State Constitutional Convention 1889*, at 593-629 (1962).

The delegates also largely followed California's lead with respect to court clerks. *See generally* *Journal of the Constitutional Convention* at 629 n. 58 and 718 n. 10. Judge Henry, who believed that a confidential and close working relationship must exist between a judge and his clerk, made an unsuccessful motion to allow judges to appoint all clerks. *See Journal of the Constitutional Convention*, at 625; Tacoma Daily Ledger, July 20, 1889, p.8, cols. 1-4, reproduced in Contemporary Newspaper Articles at 4-39 to 4-40. The Constitution as ultimately adopted authorizes the legislature to provide

Limitations”).

for the election of the clerk at the supreme court at any time. *See* Const. art. IV, sec. 22 (“The judges of the supreme court shall appoint a clerk of that court who shall be removable at their pleasure, but the legislature may provide for the election of the clerk of the supreme court, and prescribe the term of his office.”).

The delegates created the office of county clerk in article XI, section 5,⁴ with the understanding that the county clerk’s duties were to be similar to those of the California office. *See* Tacoma Morning Globe, July 25, P. 1, cols. 1-5, reproduced in Contemporary Newspaper Articles at 5-52 to 5-55. The holder of this office, who could only be selected by election, was “by virtue of his office, clerk of the superior court.” Const. art. IV, sec. 26. The duties of the clerks were to be “prescribe[d] by the Legislature.” Const. art. XI, sec. 5.

The duties prescribed by the legislature shortly after the constitution was ratified are largely the same as today. While acting as superior court clerk, the county clerk was not assigned any judicial duties and any attempts to perform duties that were assigned to the courts were swiftly prohibited. *See, e.g., Denny v. Holloway*, 17 Wash. 487, 49 P. 1073 (1897) (clerk prohibited from collecting a fee for examination of a guardian’s report and account as this was a duty assigned by statute to the judge of the superior court). His ministerial duties included the keeping of the seal of the court,

⁴These provisions apply to Franklin County as it has not adopted a home rule charter. Only seven Washington counties have successfully adopted home rule charters - King (1969), Clallam (1977), Whatcom (1979), Snohomish (1980), Pierce (1981), San Juan (2006), and Clark (2015). Municipal Research Services Center, County Forms of Government (Feb. 14, 2019) (available at <http://mrsc.org/Home/Explore-Topics/Governance/Forms-of-Government-and-Organization/County-Forms-of-Government.aspx> (last visited Feb. 25, 2019)).

keeping the minutes, records, books and papers appertaining to the court, filing all papers delivered to him for that purpose, attending court, administering oaths, and receiving verdicts. Laws of 1891, ch. 57, sec. 3. *Accord* RCW 2.32.050. While performing these ministerial duties the clerk was “to conform to the direction of the court.” Laws of 1891, ch. 57, sec. 3(9). *Accord* RCW 2.32.050(9).

The duties related to the county clerk’s role as the guardian of the public trust and confidence were scattered throughout the early codes. Judges lacked the ability to interfere with clerk’s duties unrelated to a specific proceeding. *See, e.g. State ex rel. Gordon v. Superior Court of Jefferson County*, 3 Wash. 702, 704, 29 P. 204 (1892) (absent a proceeding to resolve conflicting claims relating to money in the clerk’s custody “neither the court nor the judge can interfere with the ministerial duty of the clerk”).

The county clerk’s role as custodian of the records was continued into statehood.⁵ *See* Code of 1881 § 2181 (now codified at RCW 36.23.040). Consistent with this position, the legislature rendered admissible as evidence only those superior court records that had been certified by the clerk. *See* Laws of 1891 ch. 57, sec. 3(7) (clerk responsible for authenticating the records, files or proceedings of the court); Code of 1881 § 430 (records and proceedings of a court admissible in cases when duly certified by the attestation of the clerk); Code of 1881 § 2356 (court records certified by the clerk and sent via electronic transmission admissible as evidence).

⁵All laws in force in Washington Territory which were not repugnant to the constitution, remained in force post ratification until they expired “by their own limitation, or are altered or repealed by the legislature.” Const. art. XXVII, sec. 2.

The legislature required the county clerk to maintain a variety of records that served as checks against the evils first addressed by King Edward. These records included a record of all appearances, the time of filing of all pleadings in any cause, a docket listing all pending causes of action with their titles, the names of the attorneys, and the nature of the proceedings, the names of witnesses and jurors with information necessary to make out a complete cost bill, a record of the daily proceedings of the court, an execution docket, a record of all orders, judgments and decrees entered in probate matters and a number of other records. *See generally* Code of 1881 §§ 305, 307, 309, 2109; Rem. Rev. Stat. §§ 75, 1427, 1442; Laws of 1917, ch. 156, sec. 2; Laws of 1923, ch. 130, sec. 1.⁶

The legislature did not specify whether the records would be handwritten or typed, whether the books be bound in leather or cloth, whether pleadings be kept in files sorted alphabetically by title or assigned a number based upon the date of filing, leaving these decisions and a myriad of other decisions to the clerk's discretion. The exercise of discretion was channeled, to some extent, by the budget allocated for this purpose. *See* Code of 1881 § 2179 (records kept at the county expense).

Judges lost control over the entries in these records upon the conclusion of the session in which the verdicts, orders, judgments, and decisions were entered. Code of 1881 § 2179 (now codified at RCW 36.23.030(4)). Once the court session ended, a judge could only make changes through the entry of a new order.

⁶These statutes have now largely been collected into RCW 36.23.030, with some located in elsewhere in the revised code of Washington. *See, e.g.*, RCW 2.40.030, 4.64.030-.050.

By 1957, the legislature realized that the number of paper records maintained by county government was exceeding the capacity of the various courthouses. In response, the legislature authorized the destruction of non-court public records pursuant to a schedule adopted by a records committee and to allow for paper records to be reproduced on microfilm or another medium. *See* Laws of 1957, ch. 246 (now codified in Chapter 40.14 RCW). Court records, however, were not subject to the records committee. *See* Laws of 1957, ch. 246, sec. 8 (now codified as RCW 40.14.080).

County clerks, rather than the record committee, decide when to destroy documents, books, papers, deposition, and transcripts from any action or proceeding in the superior court. *See* Laws of 1957, ch. 201. Clerks were authorized “[n]otwithstanding any other law relating to the destruction of court records” to proceed with destruction after ten years elapsed since the filing of the proceeding in a closed matter after preparing a photostatic or similar reproduction. Laws of 1957, ch. 201, sec. 1. Copies of the reproductions, upon certification by the county clerk, were to have the full force and effect of the originals. Laws of 1957, ch. 201, sec. 2. With respect to exhibits which become the property of the courts upon admission, the clerk could only destroy or otherwise dispose of the item, upon issuance of a superior court order. Laws of 1957, ch. 201, sec. 3; Laws of 1947, ch. 277, sec. 1.

In subsequent years, the length of time the clerk was required to maintain records of cases steadily decreased. *See* Laws of 1971, ch. 29, sec. 1(1) (seven years); Laws of 1973, ch. 14, sec. (1)(1) (six years). In 1981, the legislature eliminated the waiting period in its entirety, provided the clerk

produced a photographic, photostatic, or similar reproduction. *See* Laws of 1981, ch. 277, sec. 10. The clerk’s authority to replace paper copies with other mediums existed “[n]otwithstanding any other law relating to the destruction of court records,” Laws of 1981, ch. 277, sec. 10, including court rules or statutes relating to the filing of papers and the preferences of judges. *See* Laws of 1981, ch. 277, sec. 1(4) (adding “as directed by court rule or statute” to RCW 2.32.050(4) and retaining “conform to the direction of the court” in RCW 2.32.050(9)). Regardless of the clerk’s choice of format, he was required to provide public notice of the procedures by which the public could inspect the court records. Laws of 1981, ch. 277, sec. 1(10).

In 1989 the legislature added “electronic” to the authorized reproductions the county clerk could maintain in lieu of paper records. Laws of 1989, ch. 226, sec. 1. The law authorized the clerk to destroy the original documents immediately upon confirming that the electronic reproduction was successfully made. Laws of 1989, ch. 226, sec. 1 (codified at RCW 36.23.065), The practice of discarding paper records immediately after making an authorized reproduction is endorsed by the state archivist. Office of the Secretary of State, Washington State Archives, County Clerks and Superior Court Records Retention Schedule Version 7.0 at 1, 17 (June 26, 2014).⁷

In 2014, 25 years after the legislature authorized the county clerks to replace all paper records with electronic copies, the Administrative Office of the Courts (AOC) developed a web-based electronic court records

⁷The retention schedule is available at https://www.sos.wa.gov/_assets/archives/recordsmanagement/county%20clerks%20and%20superior%20court%20records%20rs%20ver%207.0.pdf (last visited Apr. 10, 2019).

management system for the superior courts named “Odyssey.” CP 26 ¶4; 118 ¶ 12. The goal of Odyssey was to establish and maintain a fully “paperless” system for the storage and retrieval of filed court documents in the superior courts of Washington. CP 26 ¶4, 118 ¶ 12. Each county was given the option of utilizing the Odyssey system or developing its own case management system that could transfer data in real time to AOC. CP 118-19 ¶ 12. Currently, 37 counties use the Odyssey system. CP 119 ¶ 15.

Odyssey consists of two parts. The Superior Court Case Management System (CMS) component “is best described as the ‘front end’/Clerk’s Office case management system which is accessible to the public; via the Odyssey Portal.” CP 119 ¶ 16. The Document Management System (DMS) enables the clerk to create work flows⁸ and work queues. CP 119 ¶ 20. DMS provides the legal community, the public, and judges with online access to public documents. CP 119-120 ¶ 19. A clerk may use both DMS and CMS or only CMS. CP 119-20 ¶¶ 19-20.

Odyssey was implemented in 37 counties over a multi-year period. *See* CP 26 ¶ 4. When Odyssey was installed in some counties, the county clerks had already established paperless offices. *See* CP 76. A clerk possesses considerable discretion with respect to whether, when and which components of Odyssey he may use. *See In re Recall of Riddle*, 189 Wn.2d 565, 576, 403 P.3d 849 (2017) (“becoming an early adopter of Odyssey was an appropriate exercise of discretion” by the county clerk).

⁸In some documents “work flow” appears as a two word phrase and in others as a compound word. *Compare* Judge Spanner’s Declaration in Support of Complaint for Writ of Mandamus, CP 27 ¶6 (“management of workflow processes”), *with* Judicial Resolution No. 18-0001, CP 29 ¶4 (“implementation of work flow and work queue”). Except when quoting from a document that uses the compound word, this brief will use the phrase “work flow.”

B. Franklin County

Michael Killian first assumed the office of Franklin County Clerk in January of 2001, following a vote of the citizenry. CP 117 ¶2. Clerk Killian, who has been repeatedly reelected, is responsible for filing all papers delivered to him for that purpose in any action or proceeding in the superior court. CP 117 ¶4. Upon receipt, Clerk Killian becomes the custodian of the records, maintaining them as directed by law throughout his term of office, before delivering them to his successor. *Id.* See also RCW 36.23.040 (“The clerk shall be responsible for the safe custody and delivery to his or her successor of all books and papers belonging to his or her office.”).

In addition to maintaining court records, Clerk Killian has numerous other duties. See generally CP 244 ¶ 18. A recurring duty is the preparation of an annual budget. CP 117 ¶ 5. The budget request includes supplies and personnel costs. See CP 117 ¶¶ 5-8, 177-190. Ultimately, the Franklin County Board of County Commissioners (BOCC) appropriates funds for the operation of the clerk’s office. See generally CP 247 ¶ 21; RCW 36.40.080. While Clerk Killian may request a supplemental appropriation, there is no assurance that the BOCC will provide the funds. CP 247 ¶ 22. If Clerk Killian exceeds his budget, he must pay the overages from his own pocket. See RCW 36.40.130.

Franklin County was an “early adopter” of the Odyssey system. With the agreement of the BOCC, the members of the Benton and Franklin County Superior Court (collectively “Judges”), and Clerk Killian, Franklin County installed both the DMS and CMS components of Odyssey in November of 2015. CP 26 ¶4, CP 119 ¶ 17, CP 122 ¶ 36, CP 140-42, 144. From the start,

Clerk Killian indicated that his office would transition to a “paperless” file system by January 1, 2018. CP 121 ¶ 27.⁹ By “paperless,” Clerk Killian meant that his office would only maintain electronic copies of court records.

When Franklin County went “live” with Odyssey each of the judicial officers received laptops, tablets, or other electronics to enable them to access the court files from anywhere in the world, 24 hours a day. CP 117-18 ¶ 7, 120 ¶¶ 23-24. Prior to the adoption of Odyssey, the Judges’ access to the paper files was limited by the clerk’s office hours. CP 120 ¶ 23. This electronic access has proven to be so efficient and comprehensive that within weeks of going “live,” paper files were no longer pulled for court dockets. CP 120 ¶ 21.

The general public can obtain case information from a kiosk located near the clerk’s office. Employees of the clerk’s office are available, upon request, to assist users of the kiosk. These employees provide copies from the electronic records for the public in the same manner as from the paper files. CP 121 ¶ 26.

Over 500 Enhanced Odyssey Portal users enjoy direct access to Franklin County’s case information which, in some cases, allows them to view document images from any location in the world at any time of day. CP 120-21 ¶ 25. The prosecuting attorney’s office, law enforcement agencies, the local attorney general’s office, the Judges, other county judicial officers, and court administration enjoy this enhanced access at no charge. *Id.*

⁹Judge Spanner disagrees with this assertion, claiming that Clerk Killian did not notify the Judges until December 18, 2017, of his intention to go paperless. *See, e.g.* CP 27 ¶ 6. Because this is an appeal from an order granting the Judges’ motion for summary judgment, this Court must consider all facts and make all reasonable factual inferences in the light most favorable to Clerk Killian. *See, e.g., Harper v. Department of Corrections*, 192 Wn.2d 328, 338 n. 4, 429 P.3d 1071 (2018).

In 2017 the Franklin and Benton County Superior Court Judges (collectively “Judges”) assigned Judge Spanner “to work with” Clerk Killian to develop unspecified “workflow processes.” CP 27 ¶6. The Judges’ initiated “project” was delayed for unspecified reasons and in late October the Judges proposed that the work flows and Clerk Killian’s “paperless concept” be addressed in January of 2018. *Id.* Clerk Killian indicated a willingness to address whatever concerns the Judges might have with paperless files, but he declined to maintain paper files beyond December 31, 2017. *Id.*

Clerk Killian’s refusal to maintain paper files in addition to electronic records beyond December 31, 2017, was based upon a number of considerations. First, allowing Clerk Killian’s staff to focus on uploading pleadings and records onto the electronic system has cut the time in half between receipt of documents and the public’s access to the documents. CP 118 ¶ 10, CP 244 ¶ 17. Second, the Judges and court staff rarely request paper files or printed copies of any documents. *See* CP 121 ¶ 29, 243 ¶ 9 (between January 1, 2018 and November 21, 2018 only eight requests were received for paper documents or files). Third, since Odyssey was first implemented in November of 2015, no judicial officer notified Clerk Killian of any access problems or any concerns related to Odyssey. CP 121 ¶¶ 29 and 31, 247 ¶ 24.

Probably the most important consideration is a lack of funding to maintain both electronic and paper records. Since Odyssey was installed, Clerk Killian’s budget steadily decreased from a high in 2017. Clerk Killian’s personal services salaries, wages, and overtime decreased in 2018 by \$26,517 from 2017. *Compare* CP 181-82 with CP 183-84. This decrease

is the equivalent of a half-time filing clerk position. *See* CP 244 ¶ 16. While the 2018 budget for folders remained the same as in 2017, the amount is inadequate for the creation and maintenance of new paper files as Clerk Killian's office exhausted its supply of recyclable folders. CP 117-18 ¶¶ 5-8, 242 ¶ 2.

Maintaining paper records in addition to electronic records would require an increase to his budget line for salaries and wages of \$5,600.00 per month and an increase of staff to enable his employees to spend the approximately 70 hours per week creating and maintaining paper files. CP 118 ¶¶ 8-9, 243-44 ¶¶ 7-8 and 16. Clerk Killian cannot merely reassign current staff to perform these additional duties as the number of proceedings his staff must cover has continuously increased and other time sensitive tasks must be performed expeditiously. CP 243-247 ¶¶ 3-5, 18.

On January 5, 2018, Judge Spanner, the superior court administrator, Pat Austin, Clerk Killian, and Chief Deputy Clerk Ruby Ochoa met to discuss the work flow process. CP 122 ¶ 32. Rather than identify what work flows or work queues Judge Spanner believed were necessary for the Judges to be able to properly and adequately fulfill their duties, Judge Spanner merely asked Clerk Killian if he would comply with the Judges' directive to maintain a paper file. *Id.* When Clerk Killian indicated that the electronic documents in Odyssey were the official court record, Judge Spanner slammed his laptop shut and stormed out of the room with the court administrator in his wake. *Id.* At no time since this aborted meeting have any of the Judges advised Clerk Killian of any impediments to the performance of their duties that paper files would resolve. CP 122 ¶ 33. At no time since this aborted

meeting have any of the Judges identified exactly what work flows or work queues are needed to allow them to perform their duties.

Eleven days after the failed meeting, the Judges adopted Judicial Resolution No. 18-001. This resolution contains a number of findings. *See* CP 29-30. The resolution finds that “the Court requires implementation of work flow and work queue functionality of the case management system” before paper files may be abandoned. CP 29 ¶ 4. The resolution, however, does not identify any impediments to the performance of judicial duties arising from the absence of paper files. *See* CP 29-30. The Judges adopted LGR 3 solely because they “believed that dual files were necessary, at least until [they] could assure that work flows and work queues were developed to meet the needs of stakeholders.” CP 165-66 ¶ 5.

The resolution was accompanied by an order adopting an emergency and permanent rule, CP 32. The new rule, LGR 3, stated that:

(a) The clerks of Benton and Franklin Counties shall keep and maintain paper files for all cases and file types, by forthwith filing all pleadings and papers in paper files, except as may be otherwise authorized in writing by the Court.

(b) The clerks of Benton and Franklin Counties shall make up-to-date paper files for all cases and case types available to the Court, as directed by its judicial officers.

(c) While paperless courts are preferable, they should only be implemented after careful consideration of the impacts upon the Court, the legal community and the public, and only after case management systems have been configured so all of their capabilities are realized. Accordingly, neither clerk shall attempt or purport to operate with “paperless” processes unless and until the same has been approved in writing by the court. Permission will not be granted unless the Court is satisfied that appropriate workflows and work queues have been implemented, that equipment and processes have been acquired and developed to facilitate electronic signatures, and that the paperless processes do not adversely affect the Court's ability to conduct

court proceedings and other court functions. As directed by the Court, the Clerks shall work diligently, collaboratively and harmoniously with the Court to satisfy all of the conditions precedent to “paperless” court, as set forth above. In so doing, the clerks shall conform to the direction of the Court.

(d) Pursuant to GR7(e) this rule shall become effective immediately upon filing the same with the Washington Administrative Office of the Courts.

CP 33.

Although LGR 3 rule indicates it is applicable to both the Benton County Clerk¹⁰ and the Franklin County Clerk,

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.

CP 169.

Clerk Killian requested an opportunity to respond to LGR 3, which was adopted without prior notice to him or an opportunity to be heard. On February 8, 2018, Clerk Killian again declined to maintain paper records in addition to the electronic records. CP 27-28 ¶ 6. He declined, in part, because compliance with LGR 3 would require funding beyond his current budget and an increase in staff. CP 118 ¶ 8, 244 ¶¶ 14 and 16.

The Judges filed a complaint for writ of mandamus to compel Clerk Killian to comply with LGR 3 on March 21, 2018. CP 3.¹¹ The action was

¹⁰The Benton County Clerk lacks the ability to implement work flows and work queues as the Benton County Clerk did not adopt Odyssey DMS. CP 120 ¶ 20, 247 ¶ 24. The Judges have not taken enforcement action to compel the Benton County Clerk to develop work flows and work queues. See CP 119-20 ¶¶ 18-20, 247 ¶ 24.

¹¹A First Amendment Complaint for Writ of Mandamus was later filed on March 26, 2018. CP 34. The amended complaint is identical to the original complaint except that paragraph 3.7 of the original complaint included a request “that the Court enter judgment against the defendant and award plaintiffs their costs and disbursements herein,” CP 5 ¶3.7, while the amended complaint omits this request. See CP 36 ¶3.7. Accord CP 39.

supported by a declaration from Judge Spanner, which explained that

Paper copies of case files, pleadings and other materials are needed by the Court because computerized systems for retrieval and reading of such materials have not yet evolved to the point where they are readily accessible at all places where they are needed for review by the judges and court commissioners conducting proceedings with litigants, attorneys and other members of the court. For example, settlement conferences in domestic relations cases are conducted in jury rooms. They are not scheduled to be conducted in a judge's chambers because these areas contain confidential material of others. There are no computers in the jury rooms, so it is necessary for the Judge to have a paper file there in order to review briefs, declarations and exhibits which are relevant to the issues in the settlement conference. This dispute must be resolved before procedures to address this and other challenges created by a paperless environment can be implemented.

CP 28 ¶7. Neither the complaint nor Judge Spanner's declaration identified specific instances in which the court was unable to perform its duties due to the absence of paper records. Neither the complaint nor Judge Spanner's declaration defined the phrases "work flow" or "work queue" or explained how these items impact the court's ability to perform its duties.

Shortly after the mandamus complaint was filed a member of the SC-CMS Steering Committee, Barbara Christensen, contacted Judge Spanner and asked him to share the concerns the Judges are having with the Odyssey program. CP 76. The request was made so that issues might be addressed before Odyssey was expanded into 12 counties, some of which are paperless. *Id.* Judge Spanner responded that he was "very satisfied with Odyssey and its ability to perform in a paperless environment" and that he had "heard no complaints from my bench mates." CP 78.

Judge Spanner further explained that the "the bench does not have an Odyssey problem. But, there is a clerk problem." *Id.* Specifically, Judge

Spanner was “frustrated,” “dismayed,” and “annoyed” that Clerk Killian “refuses to fully exploit all of the labor-saving functionality of Odyssey.” CP 78-79. As evidence, Judge Spanner indicated that Clerk Killian’s seven work flows compare unfavorably to the number created by Thurston County. CP 78. Judge Spanner, without quantifying the length of the alleged delay, claimed that the absence of a “work flow transmitting the felony and judgment sentences” to the jail resulted in “prisoners spending extra time incarcerated.” CP 78-79.

Ms. Christensen, who in addition to serving on the SC-CMS Steering Committee was also the President of the Washington State Association of County Clerks and the Clallam County Clerk, investigated Judge Spanner’s allegations. As to work flows, it appeared that Judge Spanner was either using the phrase in a different manner than the Odyssey program or he was not understanding the data. CP 82. Contrary to Judge Spanner’s representations, the Thurston County Clerk has 20 work flow queues, not 253 work flow queues. CP 82. With respect to the judgment and sentences, Clerk Killian’s office scans and e-mails the documents to the sheriff’s office the same day as entry, and the sheriff’s office has not identified any issues associated with the current procedure. CP 82-83.

On June 6, 2018, two days before Clerk Killian filed his answer to the first amended complaint for writ of mandamus, the Judges filed a motion for summary judgment. CP 37. The only evidence tendered in support of the motion was Judge Spanner’s prior declaration. CP 38, 46-46-54, 71. The tendered evidence and argument established that the Judges might be inconvenienced by the absence of paper files, but not that their ability to

perform their duties are imperiled by the lack of paper files. *See* CP 37-70, 145-222.

Clerk Killian opposed the Judges' motion for summary judgment. CP 116-144, 289-305. Clerk Killian was supported in his opposition to the Judge's summary judgment motion by two amici curiae, the Washington State Association of Counties ("WSAC") and the Washington State Association of County Clerks ("Clerk's Association"). *See* CP 84, 101, 103, 223.

Oral argument was heard on the Judges' summary judgment motion on Friday, December 7, 2018. RP 1; CP 232, 254. The motion was granted on December 10, 2018, with the writ of mandamus issued the same day. CP 236, 239. The writ of mandamus makes no allowance for the lack of BOCC appropriated funds to pay for compliance with LGR 3. *See* CP 239-41.

The trial court explained its decision in a letter which claimed "that the entire court system (and any records kept therein) operates under one direct chain of command, from the Supreme Court to the trial court" with the clerks "operating under the direction and supervision of the Supreme Court." CP 234. The trial court's letter further stated that neither Clerk Killian nor the amici provided "any authority for the assertion that the *manner* in which the Clerk holds the records is a discretionary act." CP 233 (emphasis in original). Accordingly, the timing of when a paperless system is adopted rests with the Judges and not with Clerk Killian. CP 235.

Clerk Killian filed a timely motion for reconsideration. CP 250. The memorandum in support of the motion identified the statutory authority which vested the decision of the medium in which to maintain the records in

the clerk. *See* CP258-59, citing RCW 36.23.065. Clerk Killian's submission also explained the cost of complying with the writ of mandamus and the lack of financial resources to pay those costs. *See generally* CP 242, 261-64.

Specifically, Clerk Killian's office received 85,275 documents consisting of 287,778 pages between January 1, 2018 and December 14, 2018 that would now need to be "sorted, hole punched, placed into paper files, shelved and maintained in the Clerk's Office vault." CP 243 ¶¶ 6, 11. Staff costs for performing these tasks would require an appropriation of approximately \$12,000. CP 244 ¶ 13. Performing these tasks with respect to documents filed subsequent to December 14, 2018, would require an additional staff person at an annual cost of \$52,609.00. CP 244 ¶ 16, 247 ¶ 20. Clerk Killian's 2019 budget, which was approved by the BOCC on December 18, 2018, did not include an appropriation to cover the one-time or the on-going expenses. CP 244 ¶ 21. This budget renders it impossible for Clerk Killian to comply with LGR 3 or the writ of mandamus. CP 247-48 ¶¶ 25-26.

The trial court requested that the Judges respond to Clerk Killian's motion for reconsideration. CP 267. After reviewing the response, the trial court denied Clerk Killian's motion for reconsideration. CP 287. Clerk Killian filed a timely appeal from the order denying his timely motion for reconsideration, the order granting the Judges' motion for summary judgment and the writ of mandamus. CP 306.

V. ARGUMENT

A. The Separately Elected County Clerk is Solely Responsible for the Maintenance of Court Records Once They are Filed.

1. Lgr 3 Conflicts with Both Statutes and Court Rules.

In RCW 36.23.065 the legislature placed the decision as to the media in which superior court records were to be maintained solely in the hands of the county clerk. *See also* RCW 36.23.040 (clerk responsible for the custody of the superior court records). A clerk may exercise his discretion to maintain only electronic reproductions of superior court records without judicial leave, as RCW 36.23.065 contains no requirement that the clerk obtain a judicial order prior to destroying original court documents while such a provision appears in RCW 36.23.070. *See generally Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998) (where the legislature includes particular language in one section of a statute but omits it in another, the exclusion is presumed intentional).

The legislature further provided that no other law could alter the county clerk's exercise of discretion. *See* RCW 36.23.065 ("Notwithstanding any other law relating to the destruction of court records"). This language encompasses court rules. *See Guillen v. Pierce County*, 144 Wn.2d 696, 729, 31 P.3d 628 (2001) (the phrase "notwithstanding any other provisions of law" includes both statutes and court rules), *rev'd on other grounds by Pierce County v. Guillen*, 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003).

Local General Rule 3 directly conflicts with RCW 36.23.065. With LGR 3 the Judges insert a judicial consent requirement into RCW 36.23.065, prohibiting Clerk Killian from destroying the paper documents until some

unspecified future date. But a local court rule may not be promulgated for such a purpose. *Harbor Enters., Inc.*, 116 Wn.2d at 293 (local rules must not conflict with a statute).

A court, whether acting in its legislative role as a rule maker or in its adjudicative role, may not add language to a statute that the court believes the legislature may have inadvertently omitted. *See, e.g. In re Postsentence Review of Leach*, 161 Wn.2d 180, 186, 163 P.3d 782 (2007) (Washington courts have a long history of restraint in compensating for legislative omissions and will not read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission). For a court to add language to a statute is a ““usurpation of legislative power for it results in destruction of the legislative purpose.”” *State v. Taylor*, 97 Wn.2d 724, 728, 649 P.2d 633 (1982) (quoting 2A C. Dallas Sands, *Statutes and Statutory Construction* § 47.38, at 173 (4th ed. 1973)).

The Judges acted in excess of their authority by adopting LGR 3. The rule is invalid. Clerk Killian cannot be compelled to comply with an invalid court rule. The mandamus order must be vacated and the matter remanded with directions to dismiss the Judges’ action with prejudice. The necessity for vacation of the writ of mandamus is further established by LGR 3’s conflict with rules promulgated by this Court.

In GR 29(f) this Court expressly forbade judges from “exercising general administrative supervision” over the “duties assigned to clerks of the superior court pursuant to law.” The commentary to the rule explains that the limitation arises because

In the superior courts, the clerk’s office may be under the direction of a separately elected official or someone appointed

by the local judges or local legislative or executive authority. In those cases where the superior court is not responsible for the management of the clerk's office the presiding judge should communicate to the court clerk any concerns regarding the performance of statutory court duties by county clerk personnel.

Commentary to GR 29(f).

In the instant case, the Judges have eschewed the communication so necessary for problem solving. The Judges have never identified with specificity their concerns related to Odyssey, what work flows and work queues they believe are necessary to allow them to perform their duties, or what additional accommodations are needed to provide them with the access they desire to the electronic court records. Instead, the Judges in LGR 3 ordered Clerk Killian to "conform to the direction of the Court," LGR 3(c), while performing his RCW 36.23.040 and 36.23.065 statutory duties.

The path selected by the Judges in LGR 3 threatens the independence of Clerk Killian and invades the prerogatives of his office. This Court should invalidate LGR 3 and direct the Judges to engage Clerk Killian in dialogue so that he may address their concerns in the collaborative manner envisioned by the Commentary to GR 29(f) and this Court's precedent. *See Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975) ("Harmonious cooperation among the three branches is fundamental to our system of government.").

2. LGR 3 Is a Usurpation by the Judicial Branch of Duties Vested in the Executive Branch Office of the County Clerk.

The starting point of any constitutional inquiry into the duties and powers of each office or officer must begin with article I, section 1, of the constitution. This provision announces to one and all that the people reserve unto themselves the right to select who may exercise political power in

Washington:

All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

Const. art. I, sec. 1.

The final constitution constituted an express surrender of much of the people's sovereignty to the state government. *See Amalgamated Transit v. State*, 142 Wn.2d 183, 238, 11 P.3d 762 (2000). The people, however, reserved to themselves the right to determine who could serve in the government. By specifying in the constitution the terms of offices, providing for the election of officers, setting the qualifications for service as an officer, and naming the officers and offices, the delegates ensured that power could not become concentrated in any one person or any one branch of government. *See* Const. art. II, secs. 4, 5, 6 and 7; Const. art. III, secs. 1, 2, 3 and 25; Const. art. IV, secs. 3, 5, and 17; Const. art. XI, secs. 4 and 5.

At the state government level, the Washington Constitution created three branches of government: the judicial, the legislative, and the executive. *See, e.g., Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 696, 310 P.3d 1252 (2013). The powers of the executive branch were further subdivided through the direct election of the attorney general, the state treasurer, the state auditor, the secretary of state, the attorney general, the superintendent of public instruction, and the commissioner of public lands, rather than allowing the governor to appoint these individuals.¹² *See* Const. art. II, sec. 7; Const.

¹²The United States Constitution grants the president the power to appoint all other officers of the United States, whose appointments are not otherwise provided for in the constitution. *See* U.S. Const. Art. II, sec. 2.

art. III, sec. 25; Const. art. IV, sec. 17.

The duties of the judicial branch were also subdivided at the superior court level between the judges and a separately elected superior court clerk. *See* Const. art. IV, secs. 5 and 26. This division of duties was adopted from California, whose courts had determined that the framework prohibited judges from interfering with the clerk's duties and the clerk from performing judicial functions. *See Crane v. Hirshfelder, supra; Houston v. Williams, supra.* These pre-Washington Constitutional Convention cases were consistent with the leading treatise of the day. *See generally Constitutional Limitations* (5th ed.), at 135-36 (powers conferred by the constitution upon any officer cannot be performed by another officer).

The framers' expectation that their chosen language would be given the same effect in Washington as in California, was realized shortly after statehood. *See generally Denny v. Holloway, supra* (clerk prohibited from performing duties assigned by statute to the judge of the superior court); *Lewis v. Seattle*, 5 Wash. 741, 750-51, 32 P. 794 (1893) (judicial interpretation given to California constitutional provisions prior to Washington adopting the provisions should be given force and recognized in Washington); *State ex rel. Gordon*, 3 Wash. at 704 ("neither the court nor the judge can interfere with the ministerial duty of the clerk").

While assigning the ministerial duties of the superior court to the county clerk, the county clerk was not made a judicial branch officer. The position of the county clerk was placed in Article XI of the Constitution. *See* Const. art. XI, sec. 5 ("The legislature, by general and uniform laws, shall provide for the election in the several counties of . . . county clerks,"). By

naming the county clerk in article XI, section 5, the people intended that the person elected to that office should exercise the powers and perform the duties then recognized as appertaining to the position of county clerk. *State ex rel. Johnston v. Melton*, 192 Wash. 379, 388, 73 P.2d 1334 (1937). The pre-statehood Washington statutes and the California statutes applicable to county clerks and superior court clerks define the “core functions” of the office of county clerk.

Once the constitution was ratified, the legislature, although directed to “prescribe [the] duties,” Const. art. XI, sec. 5, of the county clerk, lost the power to strip the office of its core functions or to authorize anyone else to perform those functions. *Cf. Drummond*, 187 Wn.2d at 179-182 (a statute that authorizes a board of county commissioners to hire outside counsel over the objection of an able and willing prosecuting attorney would unconstitutionally deny the electorate’s right to choose who provides the services of an elected office); *State v. Rice*, 174 Wn.2d 884, 905, 279 P.3d 849 (2012) (“the legislature is free to establish statutory duties that do not interfere with core prosecutorial functions”); *State ex rel. Johnston v. Melton*, *supra* (legislature could not authorize the prosecuting attorney to appoint an investigator to perform the duties of the county sheriff); *Constitutional Limitations* (5th ed.), at 136 (“That such powers as are specially conferred by the constitution upon the governor, or upon any other specified officer, the legislature cannot require or authorize to be performed by any other officer or authority; and from those duties which the constitution requires of him he cannot be excused by law.”).

The core functions of the county clerk include safely maintaining the records of his office. *See* RCW 36.23.040. In performing this core function, the county clerk must exercise judgment regarding where to store the records, how and when access to the records will occur, and the media in which the records will be kept. The legislature cannot assign responsibility for making these judgment calls to any other person.

The constitution gives judges no role in defining the duties of the separately elected county clerk. Nonetheless, the Judges in LGR 3 placed themselves in charge of core functions of the county clerk. The Judges' diminishment of Clerk Killian's office is unconstitutional. Clerk Killian cannot be compelled to comply with an unconstitutional court rule. The writ of mandamus must be vacated.

B. Judges Cannot Compel Public Funds Through A Court Rule When the Rule is Not Constitutionally Mandated and the Judges Can Perform Their Duties Without the Rule

As a general rule, public funds may not be expended except as authorized by law. *Moore v. Snohomish County*, 112 Wn.2d 915, 919-920, 774 P.2d 1218 (1989) (citing Wash. Const. art. VIII, sec. 4¹³). At the county level, this means that the legislative authority allocates funds to county officers for the performance of their duties. *See generally* Chapter 36.40

¹³Const. art. VIII, sec. 4 provides:

No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law. . . .

The expenditure of public funds without the necessary appropriation is a felony. *See* Const. art. XI, sec. 14 ("using [public funds] for any purpose not authorized by law, by any officer having the possession or control thereof, shall be a felony, and shall be prosecuted and punished as prescribed by law.").

RCW. A county officer who exceeds this allocation is personally responsible for any claims in excess of the budget appropriation. RCW 36.40.130.

A court, however, may exceed a county legislative authority's allocation of funds on very rare occasions. A court has the inherent power to dictate its own survival when insufficient funds are provided by the legislative branch. *In re Salary of Juvenile Director*, 87 Wn.2d 232, 245, 552 P.2d 163 (1976). The exercise of this inherent power by a superior court requires the court to make its case to a disinterested judicial officer. *See Committee for Marion County Bar Ass'n v. County of Marion*, 123 N.E.2d 521, 524 (Ohio 1954) (because of the interest which a court would necessarily have with respect to an action to compel funds for court services, the remedy should be sought in another court). *Accord Juvenile Director*, 87 Wn.2d at 249 (extreme care must be taken with respect to actions to compel funding to maintain the judiciary's image of impartiality).

In the hearing before a disinterested judicial officer, the superior court must establish by clear, cogent, and convincing proof that it cannot fulfill its duties without the increased funding. *Id.*, at 252. This demanding standard was set in recognition that litigation based on inherent judicial power to finance court functions ignores the political allocation of available resources by the legislative branch and can harm the judiciary's image of impartiality and the public's willingness to accept the court's decisions as those of a fair and disinterested tribunal. *Id.*, at 248-49.

The costs associated with the county clerk's maintenance of the superior court records are borne by the county. *See* RCW 36.23.030. While the county legislative authority may choose to allocate sufficient funds to

maintain court records in both paper and electronic formats, there is no requirement to do so. *See* RCW 36.23.065. In this case, the BOCC's allocation of funds for Clerk Killian's office is insufficient to maintain both paper and electronic copies of records.

The Judges, nonetheless, desired paper records. Rather than request a supplemental appropriation for the duplicate files from the BOCC, the Judges declared an "emergency" and adopted LGR 3. Through the court rule process, the Judges passed upon the sufficiency of their own showing of "need" or "necessity" without any rebuttal from either Clerk Killian or the BOCC.¹⁴ The findings contained in Judicial Resolution No. 18-0001, CP 29-31, even when supplemented by the grievances identified in the Judges' superior court pleadings, do not establish that paper records are required for the court to perform its duties.

Most of the Judges' "evidence" regarding the need for duplicate paper records consists of a desire for work queues, work flows, and electronic signatures. The Judges, however, provided no information as to how the first two relate to courtroom procedures and courts have successfully operated for centuries with judges manually signing their names to documents with a pen.

The Judges bemoan the inconvenience of electronic records during settlement or discovery conferences in jury rooms which lack computers. *See, e.g.*, CP 28 ¶ 7, 166-67 ¶ 4. The Judges, however, have not established that rooms with computers are not available for these conferences or that they

¹⁴The BOCC would be a necessary party to any action in which a court or a judge seeks to exercise the judicial branch's inherent authority to appropriate money as the BOCC is responsible for adjusting the county's overall budget to ensure that the judicially appropriated funds will not cause a deficit.

cannot access the electronic records while in the jury room through their county provided laptop computers or tablets. The existence of these alternatives prevents them from meeting their burden of proof. *See Juvenile Director*, 87 Wn.2d at 234, 252 (there was a “fundamental failure of proof by respondent Superior Court” in support of funds to increase the salary of the juvenile director where qualified employees could be obtained at the lower salary).

LGR 3 is without force or effect as it is unfunded. The mandamus order compelling Clerk Killian to comply with LGR 3 must, therefore, be vacated and the mandamus action be dismissed with prejudice.

C. The Writ of Mandamus Was Improperly Granted

RCW 7.16.160 provides that a writ of mandamus may be issued “to compel the performance of an act which the law especially enjoins as a duty resulting from an office.” Mandamus requires the satisfaction of three elements: (1) the party subject to the writ is under a clear duty to act, (2) the applicant has no plain, speedy, and adequate remedy in the ordinary course of law, and (3) the applicant is beneficially interested. RCW 7.16.160, .170; *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003).

A writ of mandamus is an extraordinary remedy that is appropriate only where the plaintiff shows there is a clear duty to act and the duty is ministerial, not discretionary. *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 589, 243 P.3d 919 (2010). An act is “ministerial” when the law “prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 599, 229 P.3d 774 (2010) (internal

quotation marks omitted) (quoting *State ex rel. Clark v. City of Seattle*, 137 Wash. 455, 461, 242 P. 966 (1926)). A writ of mandamus will not issue to compel a general course of conduct, only specific acts. *Clark Cty. Sheriff v. Dep't of Soc. & Health Servs.*, 95 Wn.2d 445, 450, 626 P.2d 6 (1981).

1. The Writ of Mandamus Improperly Compels Clerk Killian to Exercise His Discretion in a Particular Manner

A writ of mandamus will issue to compel the exercise of discretion, but not to compel the exercise of a particular discretionary decision. *Vangor v. Munro*, 115 Wn.2d 536, 798 P.2d 1151 (1990). “Once officials have exercised their discretion, mandamus does not lie to force them to act in a particular manner.” *Aripa v. Department of Social & Health Servs.*, 91 Wn.2d 135, 140, 588 P.2d 185 (1978) (emphasis in the original), *overruled on other grounds by State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999).

Here, Clerk Killian had a non-discretionary duty to “file all papers delivered to him for that purpose in any action or proceeding in the court as directed by court rule or statute.” RCW 2.32.050(4). Clerk Killian has a non-discretionary duty to maintain these papers in a safe manner and to deliver them to his successor. RCW 36.23.040. Clerk Killian has discretion, however, as to the medium in which to keep the records. *See* RCW 36.23.065 (records may be maintained for the use of the public a photographic, microphotographic, electronic or similar reproduction of each document or record). Clerk Killian has discretion regarding the maintenance of original records, and he may destroy them immediately upon confirming that the reproduction was successfully made. *See* RCW 36.23.065; County Clerks and Superior Court Records Retention Schedule Version 7.0 at 1, 17.

The writ of mandamus in this case does not compel Clerk Killian to exercise his discretion. Clerk Killian has already done so, choosing not to maintain the paper originals in separate, constantly updated, physical files in addition to the electronic reproductions. The writ purports to force Clerk Killian to follow a different course. This exceeds the scope of mandamus. *See, e.g., Aripa*, 91 Wn.2d at 141. As Clerk Killian's decision to abandon duplicate paper files was not arbitrary or capricious, the writ of mandamus must be vacated.

2. The Writ of Mandamus is Unenforceable Due to Lack of Funding

A county officer may not make expenditures in excess of legislative appropriations. *See* Const. art. VIII, sec. 4¹⁵; RCW36.40.130. A county officer must perform his or her duties to the extent possible within the funding provided. A court will not compel a county officer to take actions for which there is no appropriation unless the funding thereof is constitutionally mandated. *Cf. Hillis v. Department of Ecology*, 131 Wn.2d 373, 388-89, 932 P.2d 139 (1997) (“a statutory right can be enforced only up to the funding provided by the Legislature” and a court will “not usually order an agency to do something it has not been funded to do”). Courts refrain from issuing writs of mandamus in such cases because the harm arising from not issuing the writ “will not be nearly as great as would be the consequences of the interference by the courts with the executive duties of the board of county commissioners, in whom is reposed the financial management of the county's

¹⁵Const. art. VIII, sec. 4 applies to counties as well as to the state. *Ashley v. Superior Court*, 82 Wn.2d 188, 194, 509 P.2d 751 (1973), *modified*, 83 Wn.2d 630, 521 P.2d 711 (1974).

affairs.” *State ex rel. Farmer v. Austin*, 186 Wash. 577, 588, 59 P.2d 379 (1936). *Accord Hillis*, 131 Wn.2d at 390 (it would be “even more intolerable” for the judiciary to invade the power of the legislative branch and order a specific appropriation to fund a duty or task every time a court decides that the legislature did not act wisely or responsibly in its initial allocation of funds).

The issuing of a writ of mandamus in the absence of funding is a futile act. Courts enforce compliance with a writ through its contempt powers. *See State ex rel. Hawes v. Brewer*, 39 Wash. 65, 69, 80 P. 1001(1905) (“It is the office of mandamus to direct the will, and obedience is to be enforced by process for contempt.”). Coercive contempt cannot be imposed when an officer’s violation of a writ of mandamus is not willful. *See, e.g.*, RCW 7.21.030(2) (remedial contempt sanctions may only be imposed when it is within the person’s power to perform the ordered act); AGO 2001 No. 6 at 4 (court’s power to compel a clerk to comply with a court rule is limited where the funds necessary to comply have not been provided by the county commissioners).

Noncompliance is not willful when the officer lacks the present power to perform the ordered act. Where a party claims he lacks sufficient funds to comply, and that claim is unchallenged, the court may not impose coercive contempt sanctions. *See, e.g., Smiley v. Smiley*, 99 Wash. 577, 169 P. 962 (1918) (commitment to coerce compliance improper where affidavit as to lack of ability to comply is unchallenged). Claims of inability to perform are to be adjudicated upon the facts at the time of enforcement, not upon past ability. *See, e.g., Britannia Holdings Ltd. v. Greer*, 127 Wn. App. 926, 933-

34, 113 P.3d 1041 (2005) (evidence that appellant possessed sufficient funds in 2002 and transferred the money away was insufficient to establish an ability to comply when the contempt order was entered in 2004), *review denied*, 156 Wn.2d 1032 (2006).

Clerk Killian is fulfilling his duty to maintain the records of the superior court through statutorily authorized electronic reproductions. The funds provided by the BOCC to Clerk Killian are sufficient to create and maintain these electronic reproductions. Clerk Killian's evidence that an additional \$52,000 is needed yearly in order to create and maintain duplicate paper files while performing his other statutory duties is un rebutted by competent evidence.

The Judges have not identified a constitutional right to duplicate paper files, and there is none. Their demand for duplicate paper files rests solely upon a local court rule. Judge Spanner speculates that because Clerk Killian was able to create and maintain duplicate files within the limits of his pre-2018 budgets, *see* CP 165-66, he can continue to do so under the diminished 2018 and 2019 budgets. Speculation is insufficient to support enforcement of the writ of mandamus compelling Clerk Killian to comply with LGR 3. Under these circumstances, the writ of mandamus must be vacated.

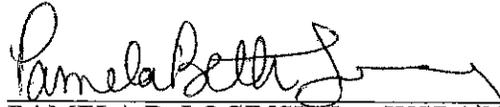
V. CONCLUSION

Clerk Killian respectfully requests that this Court reverse the trial court's order granting summary judgment to the Judges. The writ of mandamus must be vacated and this matter should be remanded to the superior court with orders to dismiss the Judges' action with prejudice.

Respectfully submitted this 16th day of April, 2019.

SHAWN P. SANT

Franklin County Prosecuting Attorney

A handwritten signature in cursive script, appearing to read "Pamela B. Loginsky".

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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 16th day of April 2019, pursuant to the agreement of the amici curiae, an electronic copy 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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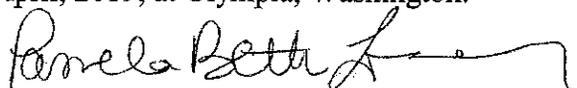
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Signed under the penalty of perjury under the laws of the state of Washington this 16th day of April, 2019, at Olympia, Washington.


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Comments:

This brief replaces the one filed yesterday. When I reread my brief this morning, I found a misspelled word. This corrected brief has replaced the misspelled word with the correctly spelled version. A number of other minor, non-substantive, formatting issues have also been corrected.

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