

NO. 36277-5-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION II

BARBARA THOMPSON,

Appellant,

v.

TERRY L. WILSON,

Respondent.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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On Appeal from Lewis County Superior Court
Cause No. 06-2-01044-1

RESPONDENT'S BRIEF

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July 13, 2007

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I. IDENTITY OF RESPONDENT

Terry L. Wilson, the Lewis County Coroner, is the Respondent.

II. COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

A. Did the trial court properly grant Coroner Wilson's motion for summary judgment on the appellant's challenge to the Coroner's determination of the manner of death because RCW 4.16.080 requires that an action against coroner "upon a liability incurred by the doing of an act in his official capacity and by virtue of his office" be commenced within three years?

B. Did the trial court properly grant Coroner Wilson's motion for summary judgment because the appellant commenced her cause of action more than three years after the last amendment to the death certificate of the appellant's daughter?

III. COUNTER-STATEMENT OF THE CASE

On December 16, 1998 Ronda Roberts died from a single gunshot wound to the head. CP 47. She was at her home at the time. *Id.* The Lewis County Sheriff's Office investigated her death to determine whether it was a suicide or a homicide. *Id.* On December 16, 1998 the Lewis County Coroner issued a Coroner's

Determination and Certificate of Death, ruling that the cause of death was “contact handgun wound of the head.” CP 47, 49 & 50. The manner of death was listed “undetermined.” *Id.* On August 9, 1999 the Death Certificate was amended to list the manner of death as “suicide.” CP 47 & 51. On October 23, 2001, the Death Certificate was again amended to change the manner of death to “undetermined” due to a reopening of the investigation by law enforcement. CP 48 & 52. Following additional investigation by law enforcement, the manner of death was re-confirmed as a “suicide” and the Death Certificate was finally amended to reflect that ruling on May 30, 2002. CP 48 & 53.

This lawsuit was commenced by the filing of the complaint on August 18, 2006. *Brief of Appellant*, pg. 16; CP 61-65. This was more than three years from the issuance of the final amendment of the Death Certificate.

Coroner Wilson moved for summary judgment on the grounds that the statute of limitations on appellant’s cause of action was three years or less and that the lawsuit was therefore barred. The trial court granted the motion for summary judgment. CP 3-4.

IV. ARGUMENT

A. Standard of Review.

Civil Rule 56(c) provides that summary judgment shall be granted where “there is no genuine issue as to any material facts and the moving party is entitled to judgment as a matter of law.” The purpose of summary judgment is to examine the sufficiency of the evidence supporting the plaintiff’s formal allegations so that unnecessary trials may be avoided. *Island Air, Inc. v. LeBar*, 18 Wn. App. 129, 566 P.2d 972 (1977).

Summary judgment does not alter the applicable burden of proof; a moving party need not disprove an essential element of the nonmoving party’s case, and may merely point out for the court the absence of any essential element. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225-27, 770 P.2d 182 (1989). The nonmoving party must submit a competent affidavit setting forth specific facts, as opposed to general conclusions, demonstrating a genuine issue of material fact. CR 56(e). In reviewing the grant of summary judgment “the appellate court engages in the same inquiry as the trial court.” *Maynard v. Sisters of Providence*, 72 Wn. App. 878, 866 P.2d 1272 (1994).

B. The Applicable Statute of Limitations Bars This Challenge to the Coroner's Certification of the Manner of Death.

This case involves a challenge to the Coroner's certification of the manner of death. RCW 68.50.015 provides:

A county coroner or county medical examiner or persons acting in that capacity shall be immune from civil liability for determining the cause and manner of death. The accuracy of the determinations is subject to judicial review.

RCW 68.50.015 does not contain a specific statute of limitations and no appellate court has specifically ruled on the issue. However, there appear to be only two possible limitations periods.

The first, most logical statute of limitations, RCW 4.16.080 provides in pertinent part:

The following actions shall be commenced within three years:

...

(5) An action against a sheriff, **coroner**, or constable **upon a liability incurred by the doing of an act in his official capacity and by virtue of his office . . .**

(emphasis added).

The word liability is “virtually synonymous” with “responsibility,” which has been defined by a least one Court as to “be answerable for the discharge of a duty or obligation.” *Thorgaard Plumbing v. County of King*, 71 Wn.2d 126, 135-36, 426 P.2d 828 (1967). A “liability” therefore need not require exposure to money damages. In this case, Coroner Wilson is being named as a defendant to answer “for the discharge of a duty” he is required to perform by statute, an “act in his official capacity and by virtue of his office.” A plain reading of RCW 4.16.080(5) would make it applicable to this case. *See, Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001) (“If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself.”)

In addition, because a Coroner cannot be sued for monetary damages for determining the “cause and manner of death,” RCW 4.16.080(5) would be superfluous unless it applied to “judicial review” of the coroner’s determination. *See, State v. Keller*, 143 Wash.2d 267, 277, 19 P.3d 1030 (2001). (Construction that would render a portion of a statute “meaningless or superfluous” should be avoided, as should a construction that

would yield “unlikely” or “absurd” results.”)

The only other alternative statute of limitations is RCW 4.16.130, the so-called “catch all” statute of limitations. It provides that “[a]n action for relief not hereinafter provided for, shall be commenced within two years after the cause of action shall have accrued.” This statute of limitations has been held to properly apply to causes of action created by statute where the particular statute does not contain a specific limitations period. *State Ex Rel. Bond v. State*, 59 Wn.2d 493, 498, 368 P.2d 676 (1962).

Coroner Wilson issued the last amendment to the Death Certificate on May 30, 2002. An action for judicial review of that certification had to be commenced by May 30, 2004 if RCW 4.16.130 applies, or at the latest, May 30, 2005 if RCW 4.16.080(5) applies. It was not commenced until August 18, 2006. Because the statute of limitations expired prior to the commencement of this lawsuit, summary judgment was properly granted by the trial court.

C. The Statute of Limitations Was Not Extended by Appellant’s Meeting with the Coroner.

The appellant argues that the statute of limitations did not begin to run until after she met with Coroner Wilson on or about March 24, 2006. Her argument is essentially that she was required

to “exhaust administrative remedies” prior to seeking judicial review. RCW 68.50.105 provides that the coroner shall, “upon request, meet with the family of the decedent to discuss the **findings of the autopsy or post mortem.**” (emphasis added) This statute does not state that such a meeting is a **prerequisite** to seeking judicial review under RCW 68.50.015. Nor does it provide that this meeting is an administrative remedy. *See, e.g. Smoke v. City of Seattle*, 132 Wash.2d 214, 223-24, 937 P.2d 186 (1997) (“Where an agency has an appeal procedure in place, an aggrieved person is required to seek redress under that procedure before seeking judicial review.”)

There is no indication in the statute that the meeting between the coroner and a family member is an “appeal” of the determination of the manner and cause of death. In fact, the statute states clearly that its purpose is to provide an explanation of the “findings of the autopsy or post mortem.” It does not state that it is an opportunity to have the coroner review additional information or discuss the manner of death. Moreover, the appellant is not seeking to compel the meeting provided for by RCW 68.50.105. The appellant in fact cites no authority for the proposition that RCW

68.50.105 constitutes an “administrative remedy” that must be exhausted prior to seeking judicial review of the coroner’s death certification.

Appellant cites *Vance v. Seattle*, 18 Wn. App. 418, 569 P.2d 1194 (1977). In that case, the Court held that the plaintiff was seeking judicial review of an administrative decision upholding his termination from the City. *Id.* at 422-423. Consequently, he was required to seek judicial review within the time period for appealing “to the superior court from final decisions of courts of limited jurisdiction” which was twenty days. *Id.* at 424. His appeal was ruled untimely and the dismissal of his case affirmed by the Court of Appeals. *Id.*

Even if *Vance* were applied this cause of action would be untimely. A cause of action accrues when a party has a right to apply to a court for relief. *U.S. Oil & Ref. Co. v. Dep't of Ecology*, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981). In this case, as previously noted, RCW 68.50.015 does not contain an administrative exhaustion requirement, nor does any other statute cited by plaintiff. Thus, the appellant had a right to apply to the court for relief when the coroner issued his last determination of the manner

of death on **May 30, 2002**. *Wilson Declaration*, ex. 5. By analogy, RCW 34.05.542 requires a petition for judicial review within **thirty days** of a final agency action. *See, also*, RCW 64.40.030 (Any assertion of a claim under this statute must be brought no later than 30 days after the exhaustion of all administrative remedies.)

Because RCW 68.50.015 does not contain an exhaustion of remedies requirement, there is no basis to conclude that the appellant was required to meet with the Coroner under RCW 68.50.105 prior to seeking judicial review of his conclusion of the “manner of death.” Consequently, appellant cannot use the timing of her meeting as a sword to extend the statute of limitations.

D. The Request for a Writ of Certiorari or Mandamus Does Not Make Appellant’s Action Timely.

Appellant argues that she is seeking writs of certiorari and mandamus, neither of which contain a statute of limitations. *See* RCW 7.16 and 7.24. Washington courts require that writs be applied for within a “reasonable time.” What constitutes a reasonable time is determined by analogy to the time allowed for appeal of a similar decision as prescribed by statute, rule of court, or other provision. *See, e.g., Cathcart-Maltby-Clearview Comm'ty Coun. v.*

Snohomish Cy., 96 Wash.2d 201, 205-06, 634 P.2d 853 (1981).

Even assuming the appellant is entitled to seek a writ of certiorari or mandamus, her cause of action would be untimely.¹ If the time period for appealing agency decisions applied, thirty days, then clearly this case is untimely. The only other alternative is RCW 4.16.080(5), which would again make this case untimely.

Appellant cites cases which she claims apply the writ of mandamus to a challenge to a coroner's determination of the manner of death. *Appellant's Brief*, pp. 32-34. However, none of those cases discuss when the cause of action was filed *in relation to the issuance of the final death certificate*. Likewise, none of the cases cited by plaintiff discuss RCW 4.16.080(5). Finally, these cases pre-date the adoption of RCW 68.50.015. These cases are therefore of no use in determining whether RCW 4.16.080(5) applies to judicial review under RCW 68.50.015.

¹ The writ of certiorari, or "writ of review" statute requires that there be no "plain, speedy and adequate remedy at law." RCW 7.16.040. The writ of mandamus likewise requires that there is "not a plain, speedy and adequate remedy in the ordinary course of law." RCW 7.16.170. In this case, RCW 68.50.015 already provides for "judicial review" of the coroner's determination of the manner and cause of death. Appellant fails to explain why this statutorily provided "judicial review" is not "plain, speedy and adequate."

In short, even if the appellant were entitled to seek writs of certiorari and mandamus, she was required to commence those claims within a “reasonable time” which, by analogy, should be no more than three years.

E. Appellant’s Request for a Declaratory Judgment Does Not Make Her Action Timely.

The reasonable-time-by-analogy analysis also applies to declaratory judgment actions as well as writ proceedings. 15 L. Orland & K. Tegland, Wash.Prac., *Trial Practice-Civil* § 613 (4th ed. 1986) (right to declaratory relief should be barred when right to coercive relief is barred); 22A Am.Jur.2d *Declaratory Judgments* § 184 (1988) (when a special statute of limitations applies to a special statutory proceeding, it governs a declaratory judgment action brought to achieve same result as the special proceeding). *See also Hulo v. Redmond*, 14 Wash.App. 568, 572-73, 544 P.2d 34 (1975) (declaratory judgment action challenging LID ordinance dismissed as untimely because it was not filed within the statutory period for challenging the validity of a LID), *overruled on other grounds, Fisher Bros. Corp. v. Des Moines Sewer Dist.*, 97 Wash.2d 227, 643 P.2d 436 (1982). Thus, a request for declaratory judgment does not equate to an unending limitations period. At the outside, it would

be no more than three years from the date of the last amendment to the Death Certificate.

Appellant cites *Kightlinger v. PUD No. 1 of Clark County*, 119 Wn. App. 501, 81 P.3d 876 (2003). However, in that case the conduct challenged by the taxpayers was **ongoing** at the time of the commencement of the lawsuit. *Id.* at 512 (“The PUD chose to continue its repair program despite the concerns evident from the public, the media, the AG, and the legislature.”) In contrast to this case, the last amendment to the decedent’s Death Certificate occurred more than three years prior to commencement of this lawsuit.

The request for declaratory judgment does not make this case timely.

F. The Appellant Did Not Assert Laches or Estoppel in the Trial Court, and Neither Doctrine Would Extend the Statute of Limitations in this Case.

Appellant argues for the first time on appeal that the Court should apply principles of laches and estoppel. Generally, an issue cannot be raised for the first time on appeal unless it is a “manifest error affecting a constitutional right.” RAP 2.5(a). The exception in RAP 2.5(a) does not apply and these arguments should not be

considered. However, even if the appellant's new arguments are considered, they would not change the result.

Coroner Wilson did not raise the affirmative equitable defense of laches. Instead, as discussed above, he argued that a three year statute of limitations applied. The appellant cannot argue that summary judgment should not have been granted because there are alleged questions of fact regarding a defense that was not raised by Coroner Wilson. *See, e.g., King County v. Taxpayers*, 133 Wn.2d 584, 642-643, 949 P.2d 1260(1997) (Sander, J., dissenting) (“[L]aches is an affirmative defense which must be raised by answer. CR8(c). . . Here, however, no party pleaded laches as an affirmative defense. . . . Even where laches is appropriately invoked, it is only available as a shield, but never a sword.” *citing*, 15 Lewis H. Orland & Karl B. Tegland, Wash. Practice § 606, at 406.)

Similarly, estoppel does not apply to this case. Equitable estoppel requires a showing that the party to be estopped (1) made an admission, statement or act which was inconsistent with his later claim; (2) that the other party relied thereon; and (3) that the other party would suffer injury if the party to be estopped were allowed to

contradict or repudiate his earlier admission, statement or act.

Pub. Util. Dist. No. 1 v. Walbrook Ins. Co., 115 Wash.2d 339, 347, 797 P.2d 504 (1990). The appellant cites no evidence in the record that Coroner Wilson has ever admitted, stated or acted in a manner that would suggest RCW 4.16.080(5) does not apply to this case.

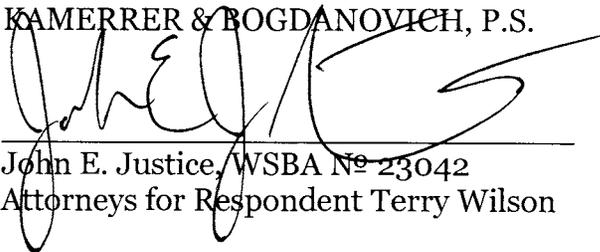
Finally, the appellant raises the doctrine of equitable tolling of the statute of limitations, also for the first time on appeal. First, this argument should not be considered because it was not raised in the trial court. RAP 2.5(a). Second, as the appellant acknowledges, equitable tolling requires evidence of “bad faith, deception, lack of notice of filing requirements, or false or misleading assurances by” the defendant. The appellant cites no evidence in the record of any justification for equitable tolling in this case and provides no argument or analysis on the subject. RAP 10.3. *See, e.g., Keever & Assocs. v. Randall*, 129 Wn.App. 733, 741, 119 P.3d 926 (2005) (when an issue is not argued, briefed, or supported by citation to the record or authority, it is generally waived).

V. CONCLUSION

For the foregoing reasons, the trial court's granting of Coroner Wilson's summary judgment should be affirmed by this Court.

RESPECTFULLY SUBMITTED this 13th day of July, 2007.

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.

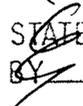


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**DECLARATION OF
SERVICE**

I declare that I served a copy of Respondent's Brief and this Declaration of Service on appellant, via ABC Legal Messengers, on July 13, 2007 to arrive no later than July 18, 2007: Royce Ferguson, Law Office, 2931 Rockefeller. Everett, WA 98201-4019.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 13th day of July, 2007 at Tumwater, WA.


Toni Allen