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COURT OF APPEALS

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STATE OF WASHINGTON

NO. 40283-1-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON *c*

DIVISION II

BARBARA THOMPSON,
Respondent/Cross-Appellant,

v.

TERRY L. WILSON,
Appellant/Cross-Respondent.

On Appeal from Lewis County Superior Court
Cause No. 06-2-01044-1

APPELLANT/CROSS-RESPONDENT'S
BRIEF IN RESPONSE TO CROSS-APPEAL

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July 26, 2010

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I. IDENTITY OF APPELLANT/CROSS-RESPONDENT

Terry L. Wilson, the Lewis County Coroner, is the Appellant/Cross-Respondent.

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

- A. Did the trial court correctly refuse to instruct the jury on the definition of homicide and to determine whether Ronda Reynolds's death was "probably homicide" in a judicial review of a coroner's determination of the manner of death?
- B. Did the trial court correctly refuse to enter findings of fact after ruling that the jury was sitting as the fact finder?
- C. Did the trial court correctly refuse to issue a writ of mandate directing the coroner to re-issue a death certificate stating the manner of death was probably homicide?
- D. Did the trial court correctly refuse to issue a writ of mandate to the County Prosecuting Attorney to re-determine the manner of Ronda Reynolds's death and determine it was probably homicide?
- E. Did the trial court correctly strike the declaration of a juror submitted post-trial to support Ms. Thompson's post-trial motions?
- F. Did the trial court correctly refuse to award cross-appellant reasonable attorneys fees when she failed to cite a legal basis supporting such an award?

III. COUNTER-STATEMENT OF THE CASE

Coroner Terry Wilson has previously submitted an opening brief in support of his appeal which contains a statement of the factual and procedural background of this case. He will not re-state those facts in this brief. The facts relevant to the cross-appeal by Barbara Thompson, however, are set forth below.

A. Proceedings Prior to the Jury Trial.

The plaintiff's complaint originally sought: (1) judicial review under RCW 68.50.015; (2) a writ of mandamus; (3) a writ of certiorari; and (4) declaratory judgment. *Thompson v. Wilson*, 142 Wn. App. 803, 807, 175 P.3d 1149. (2008). The trial court granted summary judgment of all claims, and an appeal was taken. *Id.* at 810. This Court affirmed dismissal of the writ of certiorari and declaratory judgment. *Id.*, at 815-819. It reversed the dismissal of the writ of mandamus "to the extent she seeks to compel Wilson to meet to discuss the autopsy and post-mortem findings under RCW 68.50.105." *Id.* at 816.

This Court also reversed dismissal of the claim for "judicial review" under RCW 68.50.015. *Thomspon*, 142 Wn. App. at 814. It agreed that a two year statute of limitations applied to a claim for

judicial review, but applied the doctrine of equitable tolling to “commence only upon [the Coroner’s] good faith compliance with RCW 68.50.105.” *Thompson*, 142 Wn. App. at 814-15. The meeting described in RCW 68.50.105 occurred on April 17, 2008 without a writ of mandate from the trial court. *Respondent/Cross-Appellant’s Brief*, at 3.

IV. ARGUMENT

A. **The Trial Court Did Not Err in Refusing to Instruct the Jury Regarding the Definition of Homicide and in Refusing to Submit a Special Verdict to the Jury to Determine Whether Ronda Reynolds’s Death Was “Probably Homicide.”**

In her cross-appeal, Ms. Thompson argues that, under RCW 68.50.015, the court should have instructed the jury on the definition of homicide and given them a special interrogatory to determine whether Ms. Reynold’s death was probably homicide. *Respondent/Cross-Appellant’s Brief*, at 41. The trial court properly rejected the instructions and verdict form.

A “trial court’s decision to give a jury instruction is reviewed de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact.” *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009). Ms. Thompson fails to provide any legal

authority for the proposition that the jury should have been permitted to determine the manner of death of Ronda Reynolds.

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.” The statute mentions nothing about having the “judicial review” determine the “manner of death.” Moreover, the cases pre-existing this statute did not permit a jury reviewing a coroner’s determination to reach a verdict on the “manner of death.”

The Court in *State ex rel. Murray v. Shanks*, 27 Wash.App. 363, 366, 618 P.2d 102 (1980), stated that “the statute directing the coroner to certify the cause of death does not provide direction as to how those official duties are to be exercised.” The Court noted that where a statute is silent in this regard, an official has an implied right and duty to employ the means and methods necessary to accomplish the statutes’ requirements. *Id.*, citing, *Smith v. Greene*, 86 Wn..2d 363, 372, 545 P.2d 550 (1976). The court must “presume that the performance of those duties meets those requirements.” *Booker v. South Central School Dist.*, 23 Wash.App. 274, 276, 597

P.2d 395 (1979).

In *Vanderpool v. Rabideau*, 16 Wash.App. 496, 497-98, 557

P.2d 21 (1977), the Court held that:

It is clear that a court may issue a writ of mandamus to compel a public officer to perform a duty imposed upon that office by law. RCW 7.16.160. This applies to duties involving discretion; however, Courts will not by mandamus attempt to control the discretion of subordinate bodies acting within the limits of discretion vested in them by law. Where courts do interfere, it is upon the theory that the action is so capricious and arbitrary as to evidence a total failure to exercise discretion and is, therefore, not a valid act. (Citation omitted.)

The Court explained that “the burden of establishing arbitrary and capricious conduct rests upon the party asserting it. . . .” *Id.* at 498. Arbitrary and capricious conduct is defined as “willful and unreasoning action, without consideration and in disregard of facts or circumstances.” *Id.* “Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.” *Id.* Thus, “the scope of a trial court's review [of a coroner’s determination] is limited to a determination of whether the discretion was exercised arbitrarily or capriciously.” *Id.*

In passing RCW 68.50.015, “the Legislature is presumed to know the existing state of the case law in those areas in which it is legislating and a statute will not be construed in derogation of the common law unless the Legislature has clearly expressed its intention to vary it.” *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 557 P.2d 21 (1994). Moreover, RCW 68.50.015 should be read *in pari materia* with RCW 70.58.170 because they “relate to the same thing or class,” thus they “must be harmonized if possible.” *Monroe v. Soliz*, 132 Wn.2d 414, 425, 939 P.2d 205 (1997). Thus, the words “accuracy of the determinations” in RCW 68.50.015 must be harmonized with the coroner’s duty to “certify the cause of death according to his or her **best knowledge and belief**,” found in RCW 70.58.170.

The legislature is presumed to know that before it enacted RCW 68.50.015, the scope of judicial review of the coroner’s determination was limited to whether it was “arbitrary and capricious.” The legislature did not express any intention to alter that standard. Instead, it appears that the legislature wanted to remove any doubt that its immunization of coroners “from civil liability for determining the cause and manner of death,” did not

mean that judicial review was also abolished. If the legislature intended a broader scope of review, then it would have had to express that in the statute - otherwise the common law standard of review remains. *Skamania County v. Woodall*, 104 Wn.App. 525, 535, 16 P.3d 701 (2001) (“all Washington statutes are interpreted by Washington courts under Washington common law unless the Legislature expresses otherwise.”) See RCW 4.04.010; *Price, supra*, 125 Wn.2d at 462. Thus, the existing case law does not permit a “judicial review” to determine the “manner of death.”

In *Thompson v. Wilson, supra*, this Court already indicated that “a judicial declaration of the manner of death” is not contemplated under chapter 36.24 RCW (the inquest statute). *Thompson*, 142 Wn. App. at 818. That is the law of the case. The “law of the case” doctrine generally “refers to ‘the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand’ ” or to “the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case.” *State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003), quoting, *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91,

113, 829 P.2d 746 (1992). It also refers to the principle that appellate courts generally do not re-determine the rules of law announced or implicitly used to reach an earlier decision. *Harrison*, 148 Wn.2d at 562. Courts apply this “doctrine in order ‘to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts.’ “ *Harrison*, 148 Wn.2d at 562 (quoting 5 Am.Jur.2d Appellate Review § 605 (1995)).

The trial court, in fact, quoted *Thompson v. Wilson*, 142 Wn. App. at 818 in rejecting Ms. Thompson’s request to instruct the jury on homicide and for a verdict form asking the jury to determine whether the death was “probably homicide.” RP, Nov. 9, 2009, pg. 23, line 19 - pg. 24, line 12.

Ms. Thompson fails to cite any authority for the proposition that the “judicial review” jury should have been instructed to make a “judicial determination” of the manner of death of Ronda Reynolds. The trial court correctly ruled that was not the function of the review under RCW 68.50.015. That trial court’s refusal to instruct the jury on the definition of homicide and charge the jury to

determine the manner of death by verdict should be affirmed.

B. The Trial Court Correctly Refused to Enter Findings of Fact and a Supplemental Judgment Based on the Proposed Findings.

The trial court that the jury empaneled for the judicial review was the fact finder. RP January 8, 2010, pages 3-4.

Therefore, no findings of fact were required. CR 52(a)(1).

Ms. Thompson cites CR 39 in support of her argument that findings are required. However, the Court did not issue a “finding that a right of trial by jury” did “not exist” with respect to the factual issues addressed by the Court. Rather, the trial court, as noted above, concluded that judicial review did not encompass a determination of the manner of death.

She also cites RCW 4.40.070. However, that statute applies to a court exercising its equitable jurisdiction. *See, State ex rel. Dept. of Ecology v. Anderson*, 94 Wn.2d 727, 620 P.2d 76 (1980). The trial court was not sitting in equity in this case and Ms. Thompson did not argue that this statute applied below.

In sum, the trial court did not err in refusing to enter findings of fact and a supplement judgment based on the proposed findings when it ruled that the empaneled jury was the fact finder.

C. The Trial Court Did Not Err in Refusing to Order the Death Certificate to Be Altered by the Coroner to Indicate Homicide as the Manner of Death.

Ms. Thompson assigns error to the trial court's refusal to issue a writ of mandate to the Coroner directing him to alter the death certificate to indicate "homicide" as the manner of death. *Assignment of Error No. 3*. No argument section of the brief is devoted to this assignment contrary to RAP 10.3(a)(6) and thus it need not be considered. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 416, 120 P.3d 56 (2005) (appellate court will not review issues or arguments that a party inadequately briefs).

Mandamus is an extraordinary writ. *Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994). A writ of mandate may be issued by the Superior Court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office. RCW 7.16.160. A writ of mandate cannot "control the exercise of discretion." *Bullock v. Superior Court*, 84 Wn.2d 101, 103, 524 P.2d 385 (1974). It can only "require that discretion be exercised." *Id.*

There is no authority supporting a writ of mandamus

directing a coroner to exercise their discretion in a particular manner.

Finally, this Court has already indicated that “a judicial declaration of the manner of death” is not contemplated under chapter 36.24 RCW. *Thomson v. Wilson, supra*, 142 Wn. App. at 818.

The trial court’s refusal to order the Coroner to amend the death certificate to indicate “homicide” as the manner of death should therefore be affirmed.

D. There Is No Authority to Order the Death Certificate to Be Altered by the Prosecutor to Indicate Homicide as the Manner of Death.

RCW 68.50.015 provides no authority for the Court to order the Prosecutor to alter the death certificate to indicate a specific manner of death. Furthermore, no case cited by Ms. Thompson supports this relief.

Ms. Thompson cites *Murray, supra*, in support of her argument that the trial court should have ordered the Prosecutor to change the death certificate or, alternatively, to Order the Prosecutor to appear and show cause why he should not be ordered to alter the death certificate. *Murray* provides no support for either

motion.

Murray reversed a summary judgment granted to the coroner because it found there were questions of fact about whether the coroner acted arbitrarily and capriciously in determining suicide was the manner of death. The Coroner had earlier stated that “never again as long as I live will I ever put down carbon monoxide death as anything but suicide.” *Id.* at 368. The Court, in dicta, stated that if the coroner “is found **to have a predetermined bias as to the cause of death in carbon monoxide cases**, the court in its discretion may **appoint the prosecuting attorney as an alternative official to redetermine the cause of Mr. Murray’s death.**” *Id.* at 368, citing RCW 70.58.170 (emphasis added). *Murray* in no way supports the relief Ms. Thompson sought from the trial court. Neither the trial court, nor the jury, found that Coroner Wilson had a predetermined bias that all cases involving a person found with a gun shot wound to the head and a handgun in their hands committed suicide. There was no basis for the requested relief.

In addition, the Lewis County Prosecuting Attorney is not a “party” in this case. There was no jurisdiction over him or his office

and no authority to order him to take specific action or to “appear and show cause” why he might refuse to take specific action. For this reason alone the Court properly refused to enter such an order. *See, e.g., T.R. v. Cora Priest's Day Care Center*, 69 Wash.App. 106, 109, 847 P.2d 33 (1993) (“The entry of an order commanding individuals who are not parties to a suit is not a matter of judicial discretion, but rather an invalid exercise of the court's jurisdiction.”)

The trial court's decision not to enter a mandate directing to the Prosecuting Attorney to act in the place of the Coroner and issue a death certificate listing “homicide” as the manner of death should be affirmed.

E. The Trial Court Correctly Struck the Declaration of the Jury Foreperson from Consideration in Ms. Thompson's Post-Trial Motions.

Only a strong affirmative showing of juror misconduct can overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). The mental processes by which individual jurors reach their respective conclusions, their motives in arriving at their verdicts, the effect the

evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict." *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 179-180, 422 P.2d 515, (1967); citing *Purdy v. Sherman*, 74 Wash. 309, 133 Pac. 440 (1913); *Taylor v. Kitsap County Transp. Co.*, 158 Wash. 404, 290 Pac. 996 (1930); *Kelly v. Carroll*, 36 Wn.2d 482, 219 P.2d 79, 19 A.L.R.2d 1174 (1950); *Russell v. City of Grandview*, 39 Wn.2d 551, 236 P.2d 1061 (1951); *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651, 379 P.2d 918 (1962); *Coleman v. George*, 62 Wn.2d 840, 384 P.2d 871 (1963). A trial court may not consider a juror's post-verdict statements that explain the reasoning behind the jury's verdict as such statements inhere in the verdict. *Breckenridge v. Valley General Hospital*, 150 Wn.2d 197, 206, 75 P.3d 944 (2003).

In this case, the Declaration of the Jury Foreperson contains statements unrelated to any claim of juror misconduct and was not in support of any motion for a new trial. It was therefore not

relevant to any trial court determinations in this case. It was correctly stricken from the record.

The jurors' opinion on whether the death of Ronda Reynolds was a homicide was also properly stricken because it was uninformed. The jury had no instructions on the definitions relevant to such a determination, the burden of proof with which to consider this question, or any other guidance to make an informed decision within the bounds of the law.

The jury has a limited role to play in any trial, and that is to follow specific instructions and produce a verdict within the guidelines of the instructions. A jury's job is not to decide what evidence is admitted into trial, or what questions the court should ask of them in a special verdict.

Finally, the juror's declaration is hearsay. Hearsay is not admissible unless the statement falls under a specific exception of the Evidence Rules. ER 802. In this case, the Declaration of Jury Foreperson offers statements of the other jurors on the panel and does not fall under any exception to the rule excluding hearsay. ER 801. The declaration was properly stricken from consideration by the trial court and the Court of Appeals should affirm that decision

and also should not consider the declaration.

F. Ms. Thompson is Not Entitled to Reasonable Attorneys Fees.

In Washington, attorney fees may be awarded only when there is a contractual, statutory, or recognized equitable basis. *Miotke v. City of Spokane*, 101 Wn.2d 307, 338, 678 P.2d 803 (1984). Ms. Thompson first argues she is entitled to reasonable attorneys fees under RCW 4.84.010. That statute only permits an award of statutory attorneys fees. That is limited to \$200. RCW 4.84.080.

Ms. Thompson next cites RCW 4.84.350. This is known as the Equal Access to Justice Act. However, that statute only applies to **state** agencies. *See, e.g., Entm't Indus. Coalition v. Health Department*, 153 Wn.2d 657, 667 105 P.3d (2005) (“[t]he statute awards attorney fees only to qualified parties who prevail in a judicial review of actions against ‘state’ agencies. The Tacoma-Pierce County Board of Health is not a state agency.”) Moreover, the EAJA only applies to judicial review of “agency action” as defined by chapter 34.05 RCW, the Administrative Procedure Act (APA). RCW 4.84.340(2). As noted in *Entm't Indus. Coalition, supra*, the APA “applies only to actions of state agencies clearly

involved in statewide programs.” *Id.* at 153.

The Lewis County Coroner is not a state agency under the APA and thus his actions are not “agency actions” under the EAJA. Attorneys fees are not authorized by that statute in this case.

Ms. Thompson then cites RCW 4.84.185. This statute provides:

In any civil action, the court having jurisdiction may, **upon written findings by the judge** that the action, counterclaim, cross-claim, third party claim, or defense **was frivolous and advanced without reasonable cause**, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. **This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party.** The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order. (Emphasis added)

The trial court in this case has never entered an Order finding Coroner Wilson advanced a frivolous defense or claim. Nor did Ms. Thompson ever file a motion to have the court make such a determination at any time in the case.

Coroner Wilson was a party to a case brought by Ms. Thompson seeking “judicial review” of his determination that Ronda Reynolds’s death was a suicide. As this court pointed out, “Wilson has no genuine or opposing interest to Thompson.” 142 Wn. App. at 818. Although Coroner Wilson determined that the manner of Ronda Reynolds’s death was suicide, this determination was also reached by the Lewis County Sheriff’s Office and the Washington State Attorney General’s Homicide Investigation and Tracking unit. He therefore denied that his determination was arbitrary and capricious. In short, nothing about the Coroner’s actions in participating in this judicial review have been, or can be, labeled frivolous.¹

Finally, Ms. Thompson refers to RCW 7.16, but offers no argument or explanation regarding its application or support for her request. “Argument and citation to authority are necessary to advise [the Court] of the appropriate grounds for an award of attorney fees.” *Dep’t of Labor & Indus. v. Kaiser Aluminum &*

1. Ms. Thompson suggests Coroner Wilson is refusing to comply with a writ of mandate. The writ was stayed by a Commissioner of this court. See Appendix A to Wilson’s Amended Opening Brief.

Chem. Corp., 111 Wash.App. 771, 788, 48 P.3d 324 (2002). The trial court properly declined to award Ms. Thompson reasonable attorneys fees. The trial court should be affirmed in that regard.

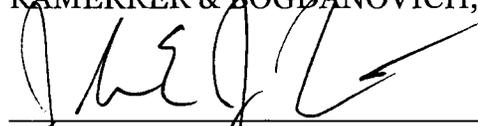
V. CONCLUSION

For the foregoing reasons, Coroner Wilson asks that this Court affirm the trial court in the following respects:

1. Refusing to instruct the jury on the definition of homicide and asking the jury to determine the manner of death;
2. Refusing to enter findings of fact;
3. Refusing to mandate the Coroner or the Prosecutor amend the death certificate to indicate "homicide" as the manner of death;
4. Striking the jury foreperson's declaration;
5. Not awarding reasonable attorneys fees.

RESPECTFULLY SUBMITTED this 26th day of July, 2010.

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



John E. Justice, WSBA N^o 23042
Attorneys for Appellant/Cross-
Respondent Terry Wilson

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STATE OF WASHINGTON

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**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

BARBARA THOMPSON,

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TERRY WILSON, Lewis County
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Respondent.

**COURT OF APPEALS
NO. 40283-1-II**

**LEWIS COUNTY
SUPERIOR COURT
NO. 06-2-01044-1**

**DECLARATION OF
SERVICE**

I declare that I served a copy of Appellant/Cross-Respondent's Brief in Response to Cross-Appeal and this Declaration of Service on Respondent/Cross-Appellant, via ABC Legal Messengers, on July 26, 2010 to arrive no later than July 28, 2010: 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 26th day of July, 2010 at Tumwater, WA.


Toni Allen