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Harvey John Justice
(Terry L. Wilson) Dated: 7-26-07

NO. 36277-5-II

**COURT OF APPEALS
DIVISION TWO
THE STATE OF WASHINGTON**

Barbara Thompson, Appellant,

-vs-

Terry L. Wilson, Lewis County Coroner, Respondent

Reply Brief of Appellant – RAP 10.1(b) (3)

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Appendix

King County Superior Court No. 86-2-23703-8, Respondents'
[Coroner's] Trial Brief, first two pages, which includes
"Statement of the Case," original pleadings in *State ex rel Taylor v.
Reay*, 61 Wn.App. 141, 810 P.2d 512 (1991)

Reply to Appellant's Arguments

In replying to respondent's argument raised in his brief, appellant will refer to pertinent arguments using respondent's respective letters contained in his brief:

B. "Liability" Statute of Limitations.

This is not an action upon a "liability," but is a special action for "judicial review." RCW 68.50.015 specifically abolished a coroner's "liability" for determinations of cause of death, while at the same time specifically providing for "judicial review" of such determinations. Nevertheless, respondent argues that a statute of limitations controlling liability actions should apply to a statute where such liability actions have been abolished, while ignoring that equitable principles have historically governed whether or not the special actions retained by the statute are "time-barred."

It is not difficult to imagine situations where a coroner may be "liable" in a civil action, to which a two, three or six-year statute of

limitations may pertain. For example, a coroner may be sued for breach of verbal contract (2 years), assault (2 years), law against discrimination (3 years), negligent injury of personalty or person (3 years), trespass (3 years), breach of written contract (6 years), and past rent (6 years). However, those civil actions do not involve determinations of manner and cause of death. Accordingly, appellant argues that the three-year statute of limitations, RCW 4.16.080 (5), is *not* superfluous “unless applied to ‘judicial review’ of the coroner’s determination,” as respondent contends.

The cases cited by respondent are primarily *liability* claims for monetary damages— *Thorgaard Plumbing v. County of King*, 71 Wn.2d 126, 426 P.2d 828 (1967) (an action to confirm arbitration award of \$18,540.44); *State Ex Rel. Bond v. State*, 59 Wn.2d 493, 368 P.2d 676 (1962) (discharged employee recovered judgment allowing recovery of damages in the sum of \$16,044.58, together with accrued vacation time, sick leave, and other incidental benefits); *Smoke v. City of Seattle*, 132 Wn.2d 214, 937 P.2d (1997) (award of

\$9,066.69); *U.S. Oil & Ref. Co. v. Dept. of Ecology*, 96 Wn.2d 85, 633 P.2d 1329 (1981) (in an action to collect \$90,000 in civil penalties, issue was whether statutes of limitations for recovery of penalties or for remedial actions applied).

C. The Meeting with the Coroner.

The respondent's statutory obligation to meet with the appellant is relevant, for example, in determining whether or appellant was "reasonable" in expending time trying to meet with the coroner, as compared to precipitously commencing her action for judicial review before even requesting a meeting with the coroner. To use respondent's logic, appellant could have initiated an action for judicial review on each of no less than *four* instances— immediately after each of the four determinations of death— without ever having even requested to meet or discuss the death with the respondent. To have done so, however, would no doubt have been deemed unreasonable (and certainly an abuse of the courts).

How was appellant to know *which* of the continually changing determinations of death was the respondent's *last* determination, so that she could seek judicial review, unless she asked him and his response was clear and explicit, which it finally was on April 20, 2006? (CP 13, ll. 1-4).¹

D, and E. “Timeliness” of Special Actions.

Surely, the action authorized under RCW 68.50.015 for “judicial review” of a coroner’s determination of manner and cause of death is a “special” action more akin to *certiorari*, *mandamus* and a petition for declaratory judgment than it is to a civil action for “liability” and damages. It is important to note that RCW 68.50.015

1. In *State ex rel Taylor v. Reay*, 61 Wn.App. 141, 810 P.2d 512 (1991), discussed more below and in footnote 2, the parents of the deceased met with the coroner some time after the final determination of death, but the coroner did not change his mind or his original determination of death. The parents filed their mandamus action against a coroner more than four years after the final determination of death. The facts in that case are almost identical to the instant case, although here the coroner was at least susceptible to changing his mind.

was enacted in response to prior actions that had been filed as petitions for *mandamus* to review determinations of death, and also in response to a civil action alleging damages caused by a negligent determination of cause of death. RCW 68.50.015 proscribes such civil liability, but authorizes judicial review. It is a well-accepted proposition that petitions for writs of *certiorari* and *mandamus* and for declaratory judgment are “judicial review.”²

Because RCW 68.50.015 has no appellate court history, it was prudent of appellant to seek “relief in the alternative or of several different types” as allowed by CR 8 (a) (claims for relief). Further, the precedential value of appellate cases regarding *certiorari*, *mandamus* and declaratory judgment actions is helpful in determining the legislative intent of the statute, the procedures to be applied and

2. *Washington Public Employees Ass’n v. Washington Personnel Resources Bd.*, 91 Wn. App. 640, 959 P.2d 143 (1998) (“statutory certiorari provides a means for courts to review judicial actions of public officers”); *Rios v. Washington Dept. of Labor and Industries*, 103 Wn.App. 126, 5 P.3d 19 (2000) (“agency rule could be judicially reviewed by petition for declaratory action”).

the issues to be determined.

Additionally, because RCW 68.50.015 does not set forth a specific time period within which to commence the action for judicial review, review of that question in *certiorari*, *mandamus*, declaratory actions and other “special proceedings” cases is helpful.

At page 10, respondent states that

Appellant cites cases which she claims apply the writ of mandamus to a challenge to a coroner’s determination of the manner of death... 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.

Yet, in footnote 3 on page 35 of her brief, appellant has cited the case of *State ex rel Taylor v. Reay*, 61 Wn.App. 141, 810 P.2d 512 (1991), which was a 1986 mandamus action filed *before* the 1987 adoption of RCW 68.50.015, and which 1991 appellate opinion is dated *after* the 1987 adoption of RCW 68.50.015.

In *Taylor v. Reay*, the death occurred on June 20, 1981. In

reading footnote 1 in the *Taylor v. Reay* opinion, we can conclude that the final determination of cause of death occurred sometime *before* December 9, 1981. The parents of the deceased filed their action for *mandamus* in 1986, (i.e., King County Superior Court No. 86-2-23703-8), which was between four and five years after the coroner's final determination of cause of death. Interestingly, a *jury* trial was held in September of 1989, which was more than eight years after the death.³

3. The written opinion in *Taylor v. Reay*, 61 Wn.App. 141, 810 P.2d 512 (1991) does not recite the date of an autopsy, nor the *exact* date of the final version of death certificate (but from which we can conclude was before December 9, 1981).

Appellant's counsel in the instant case found these same questions intriguing— when was the death in *Taylor v. Reay*? what was the *exact* date of the coroner's determination of that death? when was that action filed? what kind of action was it? how did a *jury* come to decide the *mandamus* petition? A search of the original pleadings in that case was made in an effort to answer these questions. Those dates are recited in the "Statement of the Case" contained in Respondents' [Coroner's] Trial Brief in that case, the first two pages of which pleading are attached hereto as an exhibit for the Appellate Court's convenience or musing— an autopsy was conducted on June 22, 1981, and the final determination of cause of death was made on July 2, 1981.

Appellant respectfully submits that *Taylor v. Reay*, 61 Wn.App. 141, 810 P.2d 512 (1991) is surprisingly similar to the instant case, and is relevant and very helpful.

Respondent cites *Cathcart-Maltby-Clearview Comm'ty Coun. V. Snohomish Cy.*, 96 Wn.2d 201, 634 P.2d 853 (1981), for the proposition that 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. However, a close reading of that opinion shows the Court of Appeals found that "the trial court ruled, for reasons which are unclear, that a 30-day limitation period applied . . ." to appeal a re-zone petition. Further, the Court stated, citing *Pierce v. King County*, 62 Wn.2d 324, 382 P.2d 628 (1963), that

where there is no express law to the contrary, the "rule of timeliness" applicable to appeals does "not apply ..." Instead, absent a controlling statute or ordinance, the writ must only be filed within a reasonable period . . . Since the writ was filed within 30 days . . . it was timely.

Respondent contends that appellant may not include in her action petitions for “judicial review” through writs of *certiorari* and *mandamus*, because she has not explained why the “judicial review” provided in RCW 68.50.015 is not a “plain, speedy and adequate remedy at law.”⁴ The issue in this case is whether or not *any* “judicial review” is time-barred— not the subtle distinctions (if any there are) between the names given to the judicial review sought in this case.

F. Laches and Estoppel.

Appellant has not raised laches and estoppel for the first time on appeal, as respondent contends. Rather, when respondent asserted in the trial court below that the three-year statute of limitations

4. Appellant replies that the determination of whether there exists a plain, speedy and adequate remedy in the ordinary course of law, and so that such writs are not warranted, is based upon the facts of the case and rests within the court’s discretion. *River Park Square, L. L. C. v. Miggins*, 143 Wn.2d 68, 17 P.3d 1178 (2001); *City of Kirkland v. Ellis*, 82 Wn.App. 819, 920 P.2d 206 (1996).

governed whether or not appellant's actions were time-barred, appellant replied that the proper inquiry was the application of equitable principles, such as laches and estoppel. This argument was presented to the trial court below for consideration. (CP 35, 36, citing *Arant v. Lane*, 249 U.S. 367, 39 S.Ct. 293 (1919), noting that "while mandamus is classed as a legal remedy, it is a remedial process and it is generally regarded as not embraced within statutes of limitation applicable to ordinary actions, but as subject to the equitable doctrine of laches"). (Emphasis added).

It is the appellant's position that the respondent incorrectly argued the application of the statute of limitations and, further, that the correct application is equitable principles, such as laches. If the trial court was being urged to consider whether or not appellant's action was time-barred, it was only appropriate that the trial court apply the appropriate principle— and, when applying the appropriate principle it would be seen that appellant had raised a genuine issue of material fact relevant to the reasonableness of her acts and the

timeliness of the commencement of her action.⁵ Appellant is not raising this for the first time on appeal.

It would have been misleading to the trial court for appellant to have remained mute and not offered to it for consideration what she believed to have been the proper inquiry. Similarly, the equitable principles of estoppel, together with that of “equitable tolling,” are not asserted on appeal for the purpose of raising new issues not raised below, but to illustrate and support by analogy and argument why equitable principles are the proper inquiry when determining whether or not “special actions” are “time-barred.”

5. In *State ex Rel. Bond v. State*, 62 Wn.2d 487, 383 P.2d 288 (1963), a discharged employee sought reinstatement by writ of mandamus and reimbursement for salary. His action was filed within three years of his discharge, but the employer alleged that the petition was still time-barred by *laches*. At summary judgment, the employee had to establish that there is no *laches* or reasonable inference thereof to be drawn from the undisputed facts; if the employee failed to establish that there was no *laches*, “a genuine issue as to a material fact is presented and a trial on the merits is required.”

Dated July 26, 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Royce Ferguson 5879". The signature is written in a cursive style with a large initial "R" and "F".

Royce Ferguson 5879
Attorney for Appellant

Rec'd
by [signature]

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SUPERIOR COURT OF WASHINGTON FOR COUNTY OF KING

STATE EX REL LOU TAYLOR)
and NINA TAYLOR,)

Petitioners,)

vs.)

DR. DONALD T. REAY and DR.)
JOHN W. EISELE, MEDICAL)
EXAMINERS FOR KING COUNTY,)
and KING COUNTY,)

Respondents.)

NO. 86-2-23703-8

RESPONDENTS' TRIAL BRIEF

I. STATEMENT OF THE CASE

This case arises from the June 20, 1981, death of Karen Taylor Erickson from a single contact bullet wound to the chest. There were no witnesses to the death. Upon returning home, John Erickson, the deceased's husband, found the deceased's body in a bedroom in their home. A Smith and Wesson revolver owned by the couple was found near the deceased. There was no evidence of the presence of anyone else at the scene at the time of death.

Personnel from the King County Police Department and the King County Medical Examiners Office investigated the death. Former King County Medical Examiner, Dr. John W. Eisele, conducted an autopsy of the deceased's body on June 22, 1981. Dr. Eisele concluded preliminarily that the cause of the death was a self-inflicted gunshot

1 wound. Final certification of the manner of death was withheld
2 until after the King County Police had closed their investigation.

3 On July 2, 1981, Dr. Eisele certified that Karen Taylor
4 Erickson's manner of death was suicide. Although John Erickson
5 complimented county personnel on their professionalism, Lou and Nina
6 Taylor, parents of the deceased, were unable to accept the coroner's
7 certification.

8 The Taylors proceeded to conduct their own investigation of the
9 death. Over a matter of years, various county personnel listened to
10 the Taylors and responded to their concerns. Dr. Eisele and Dr.
11 Donald T. Reay, Chief Medical Examiner, met with Taylors and repre-
12 sentatives of the police on a variety of occasions. The Taylors
13 would not accept their judgment, however, and brought this action
14 for writ of mandamus against respondents. The Taylors allege that
15 the certification of the death of their daughter was made in an
16 arbitrary and capricious manner. They seek a court decree command-
17 ing respondents to change the finding of the cause of death from
18 suicide to "findings supported by the facts."

19 II. DISCUSSION

20 A. Burden of Proof.

21 This case presents a single issue: Did Dr. Eisele, in perform-
22 ing his duties as Medical Examiner of King County, act arbitrarily
23 and capriciously when he certified the manner of death of Karen
24 Taylor Erickson as suicide?
25