

NO. 40283-1-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON

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
REPLY BRIEF

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I. FACTS RELEVANT TO REPLY

The Report on EHB 590 by the The Senate Committee on Judiciary summarizes the bill as follows:

A county coroner or medical examiner is immune from civil liability for determining the cause and manner of death. The findings of the cause and manner of death are subject to judicial review, but coroners and medical examiners are not liable for damages.

CP 17-18. Three people testified to the Committee: Jim Goche, Barbara Hodley, and Mike Redman. CP 18.

None of the witnesses Thompson called at the jury trial directly examined the physical evidence in Ronda Reynold's case.

II. ARGUMENT

A. Thompson does not dispute that the trial court erred when it instructed the jury on two different standards by which to make their decision.

1. The Correct Standard of Review is Whether the Coroner's Determination was Arbitrary and Capricious.

In one sentence, Thompson asks this Court to make a giant leap from the long considered common law standard of review of whether coroners' determinations are 'arbitrary and capricious' to a new standard of 100% accuracy. Thompson first acknowledges multiple cases considered prior to the enactment of RCW

68.50.015 where the courts inquired whether a coroner acted arbitrarily and capriciously. Thompson then suggests that RCW 68.50.015 changed the common law review principal of “arbitrary and capricious” to a review of whether the coroner was accurate. In support, she quotes a phrase from Mike Redman she indicates was made before the Senate Judiciary Committee. This statement is unpersuasive. It represents only one of three opinions heard by the Committee.

Close review of the report by the Committee on Judiciary of March 31, 1987, demonstrates that the rationale behind this statute was to exempt coroners from civil liability. CP 16-17. There is no documentation that the legislators contemplated that a coroner must be 100% accurate in his determination. Such a standard is impossible for most scenarios, let alone judicial review. Even a prosecutor trying a death penalty case is not required to put on a case proving 100% accuracy of the state’s theory of the case.

In fact, RCW 68.50.015 allows a coroner to make a determination of suicide where evidence, the initial responder law enforcement, and specialty homicide investigators agree that the death was a suicide even if not all of the evidence ‘adds up.’ The

statute allows a coroner to make a tough decision and not fear a long, expensive litigation battle initiated by family members who can't accept his determination.

It is unfathomable that the legislators would derogate so far from the common law without some mention of the contemplated change in the report. As discussed in the Coroner's opening brief, a statute is presumed not to derogate from the common law, except where the legislature has done so expressly. *State ex rel. Munroe v. City of Poulsbo*, 109 Wn. App. 672, 37 P.3d 319 (2002) *Price v. Kitsap Transit*, 125 Wn.2d 456, 886 P.2d 556 (1994). The trial court erred by instructing the jury to decide whether or not the Coroner's determination was "accurate."

2. The Trial Court Erred by Instructing the Jury on both "Arbitrary and Capricious" and "Accuracy" Standards.

The "giving of conflicting and inconsistent instructions on a material issue is prejudicial error requiring reversal." *Coyle v. Municipality of Metropolitan Seattle*, 32 Wn. App. 741, 747, 649 P.2d 652 (1982)(Holding that the (1) trial court erred when it gave an instruction defining negligence as the failure to exercise ordinary care, which was an erroneous statement of law with regard to the

alleged negligence of a common carrier, (2) that the instruction conflicted with the instruction given defining the negligence of a common carrier as the failure to exercise the highest degree of care, and (3) the two should not be given together without explaining the application of each.) Thompson did not dispute that the conflicting instructions on the standard of review in this case were given and thus reversal and remand for a new trial is proper based on the giving of instruction numbers 9 and 11 (accuracy) and 12 (arbitrary and capricious).

B. The Trial Court Erred when it admitted evidence that was not before the Coroner when he made his determination.

Petitioner argues that “The purpose of RCW 68.50.015 is to determine the “accurate” and “true” manner” of death. This misstates the plain language of the statute, which is quoted here, in relevant part:

A county Coroner...shall be immune from civil liability for determining the cause and manner of death. The accuracy of the determinations is subject to judicial review.

Black’s Law Dictionary defines judicial review as follows:

1. A court’s power to review the actions of other branches or levels of government; esp., the courts’ power to invalidate legislative and executive actions as being unconstitutional.

2. The constitutional doctrine providing for this power.

3. A court's review of a lower court's or an administrative body's factual or legal findings.

Black's Law Dictionary (8th ed. 2004). (Emphasis added)

Similar to an appeal from a trial court to a court of appeals, the judicial review in RCW 68.50.015 reviews a coroner's findings. Similar to any other appeal from an administrative body or a lower court's factual or legal findings, unless there is some exception¹, the record reviewed in the proceeding reviewing a coroner's determination should be limited to the information he actually considered.

Petitioner dreams up "worse case scenarios" where a person in the position of Coroner could intentionally disregard relevant evidence. In this case, there is no evidence that Coroner Wilson disregarded relevant evidence, prejudged the case or formed an opinion about the manner of death prior to reviewing the relevant evidence.

Even so, the nature of a coroner's duties is to use his

1. Coroner Wilson is not advocating for the exclusion of evidence and the procedures for its inclusion in the record as contemplated in RAP 9.11, for example.

discretion in reviewing materials and making a determination of death. RCW 70.58.170. Whether the information was considered by a coroner or not, if it was not in his possession at the time he made his determination, it's not relevant to the review of his decision.

There are worst case scenarios from a Coroner's perspective, as well. Someone could spend a lifetime and a fortune generating opinion reports and other secondary evidence long after law enforcement has reviewed and re-reviewed the case, and special homicide investigation teams have all concluded that a death was a suicide. While he has the discretion to reopen a case if the evidence submitted after his determination is compelling and change his determination of manner of death, he also has the discretion to disregard the evidence if it was not substantially reliable or did not critically call into question *facts* already considered. Admission of this evidence on judicial review should be a carefully guarded exception to rule that review of a determination must be based on the information before the deciding party.

Judicial review of a coroner's determination is not a second bite at the apple. The position of coroner is not an adversary one. It

is more analogous to a hearings examiner in an administrative setting, who has no personal interest in the outcome of the case, but rather is tasked with making findings consistent with the evidence and the law. Judicial review should thus be limited to the information possessed by the coroner at the time he made his determination to flush out potential bias.

Under this limited scope of review, the only evidence presented is what the Coroner had to consider **at the time he issued his determination.** *City of Tacoma v. Mary Kay, Inc.*, 117 Wn. App. 111, 116, n. 6 (2003.)

C. The Trial Court Abused its Discretion by first limiting the opinions an expert was qualified to give during testimony and then admitting those unqualified opinions in written form.

Marty Hayes was allowed to provide live testimony regarding only the subject of firearms. The trial court abused its discretion by, after excluding his testimony on other subjects, thereby eliminating the Coroner's opportunity to respond, and then *admitting* the 42 page report for consideration by the jury.

Thompson does not dispute that Hayes' written report contained statements that were not qualified expert opinion. The trial court's admission of these statements, outlined in Appellant's

opening brief not only violated the Rules of Evidence but was extremely prejudicial to the Coroner. Unqualified opinions cloaked in an expert's garb cause unwarranted weight to be given the statements by the trier of fact.

By limiting the Hayes' testimony to firearms, the court basically held that what he had to say about the excluded subjects was neither reliable nor relevant. Then the trial court essentially reversed its earlier ruling by admitting the entire report. The trial court's admission of the report was an abuse of discretion. And, the trial court's inconsistent application of the rules of evidence was an abuse of discretion. Reversal and remand for a new trial without this offending evidence is proper.

D. Substantial Evidence in the Record Did Not Support the Jury's Verdict that the Coroner's Determination was Arbitrary and Capricious.

Thompson attempts to distort the evidence by arguing that the Coroner's non-participation in the trial demonstrated that he had no interest in upholding the duties of his office, which require him to certify the cause of death according to his best knowledge and belief. RCW 70.58.170. However, this Court, viewing the evidence in the light most favorable to the Coroner, cannot let

sympathy or conjecture blind it from the facts admitted at trial. See *Hojem v. Kelly, supra*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980). A verdict which is founded on mere theory or speculation cannot stand. *Id. Campbell v. ITE Imperial Corp.* 107 Wn.2d 807, 817-18, 733 P.2d 969 (1987).

In addition to the evidence cited in the Coroner's opening brief, including the conclusions of the Lewis County Sheriff's Office and the State HITS unit² that Ronda Reynolds' death was a suicide, the trial revealed significant weaknesses in Thompsons' witness's opinion.

The jury was flat wrong when it found that Coroner Wilson's determination was arbitrary and capricious. There was no evidence that Coroner failed to consider the physical evidence and the reports from first responders who do not have a vested interest in the determination of the manner of death in any way.

There is no evidence that Coroner Wilson predetermined Ms. Reynolds manner of death. "Arbitrary and capricious means willful and unreasoning action, taken without regard to or

2. "It is our unanimous finding that the unfortunate death of Ronda Reynolds was a result of an intentional self-inflicted gunshot wound to her head and should be classified as a suicide."

consideration of the facts and circumstances surrounding the action.' " *Foster v. King County*, 83 Wash.App. 339, 347, 921 P.2d 552 (quoting *Kerr-Belmark Constr. Co. v. City Council*, 36 Wash.App. 370, 373, 674 P.2d 684, *review denied*, 101 Wn.2d 1018 (1984) ("Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous."))

No evidence in the record supports a verdict that the Coroner determination was "willful and unreasoning" or "taken without consideration and in disregard of facts or circumstances." Reversal and remand for entry of judgment in favor of Coroner Wilson is therefore appropriate.

E. The Trial Court erred in Issuing a Writ of Mandate that Limited the Coroner's Exercise of Discretion.

The trial court abused its discretion in disregard of clear case law standards that prohibit issuance of a writ of mandate that controls the coroner's exercise discretion. 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.*

The Writ of Mandate issued by the trial court goes beyond mandating the Coroner exercise his *statutory discretion*. It controls and limits the manner in which he is to exercise his discretion. CP 427.

“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). For example, “mandamus will not issue to compel the entry of a particular judgment unless it is the only judgment which can be legally entered.” *Ben-Neth v. Indeterminate Sentence Review Bd.*, 49 Wn. App. 39, 41, 740 P.2d 855 (1987), *citing*, *State ex rel. Vance v. Routt*, 571 S.W.2d 903 (Tex.Cr.App.1978). “The court cannot compel action in any particular manner. The official or agency must implement its authority with discretion and not as a result of arbitrary conduct.” *Ben-Neth*, 49 Wn. App. at 41-42, *citing*, *State ex rel. Knudsen v. Board of Educ.*, 43 Wis.2d 58, 168

N.W.2d 295 (1969).

This Court should therefore remand this case and instruct the trial court to limit its mandate to directing the Coroner to exercise his or her discretion to re-determine the manner of death.

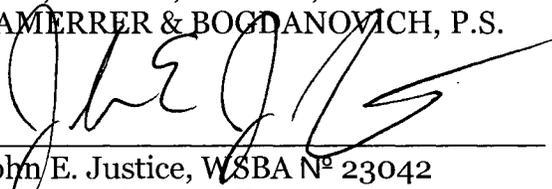
VI. CONCLUSION

Coroner Wilson asks that this Court reverse the jury's verdict and remand this case for entry of judgment in his favor.

Thompson's Response was unpersuasive and unsupported by legal precedent.

RESPECTFULLY SUBMITTED this 27th day of July, 2010.

LAW, LYMAN, DANIEL,
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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 UPS Overnight Air on July 27, 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 27th day of July, 2010 at Tumwater, WA.

Toni Allen
Toni Allen