

FILED
COURT OF APPEALS

10/27/10 12:41
STAFF CLERK
BY *lh*

**WASHINGTON STATE COURT OF APPEALS
DIVISION TWO**

BARBARA THOMPSON,)
)
 Respondent/Cross) **Court of Appeals**
 Appellant,) **No. 40283 – 1 – II**
)
 -vs-)
) **Lewis County Superior**
 TERRY WILSON, Lewis) **Court No. 06-2-01044-1**
 County Coroner,)
)
 Appellant/Cross)
 Respondent.)
)

**BRIEF OF CROSS-APPELLANT THOMPSON IN REPLY
TO RESPONSE BRIEF
(RAP 10.1(c))**

**Royce Ferguson 5879
Attorney for Thompson
2931 Rockefeller Avenue
Everett, WA 98201-4019
Telephone (425) 258-9311**

7-29-10

TABLE OF CONTENTS

Facts Relevant to Thompson’s Reply	P. 1
Writ of Mandamus to Coroner to Indicate Homicide as Manner of Death Is Proper Under RCW 68.50.015 and RCW 7.16.160 Together	P. 3
Conclusion	P. 13

TABLE OF AUTHORITIES

Table of Cases (Washington)

<i>Sdorra v. Dickinson</i>, 80 Wn.App. 695, 910 P.2d 1328 (1996)	P. 8
---	-------------

Table of Statutes

RCW 7.16.160	P. 1, 9
RCW 68.50.015	P. 1, 2, 3, 4, 5, 7, 9, 12, 13

Facts Relevant to Thompson's Reply

Coroner Wilson is the party who requested instructions asking the jury to determine the issues of “arbitrariness” and “capriciousness.” (RP, November 9, 2009, beginning at page 14). The trial court did so at Wilson’s invitation.

The trial court instructed the jury regarding both the (a) RCW 68.50.015 *factual* accuracy of the end *result* of the coroner’s determination, i.e., the death certification; and the (b) RCW 7.16.160 *process* and *method* used by the coroner to arrive at the final result, i.e., reasonableness.

In giving instructions as to both (a) the factual “accuracy” of the end result of the coroner’s process, and (b) the reasonableness of the process by which the coroner arrived at his final determination (as of the April 17, 2008, meeting between the parties), the trial court reasoned as follows (RP, November 9, 2009, beginning at bottom of page 21)—

Thank you. Well, as everybody who has been following this case will understand, this is the first case ever under this

new statute RCW 68.50.015, so it's no surprise to me that the instructions submitted by the attorneys, both who have been very competent and thorough, are in a way like two ships passing in the night. They have two completely different theories, regarding what principles of law apply here.

It's even more interesting because this case has already been up to the Court of Appeals once and has come back down, with some but not complete direction as to how we should proceed.

At first I looked at this and I thought well we're simply to look at RCW 68.50.015, whether or not the coroner's determination is accurate, and I think we are to look at that, and the burden of proof on that is the standard preponderance of the evidence looking at the facts more likely than not was it accurate or not? However, the statute doesn't exclude what used to be the standard as pointed out by Mr. Justice. Before a coroner's determinations could only be tested as to whether or not it was arbitrary and capricious, a completely different standard. It occurred to me that this case may go back up to the Court of Appeals, it may not, but it may, and that it would be more prudent to point out that the petitioner could challenge the statute simply as the coroner's determination being not accurate by a standard of more likely than not or—maybe I should say and in addition they could also challenge that the coroner's actions were arbitrary and capricious *and that it's inaccurate for that reason. (Emphasis added).*

For instance, he didn't make a determination independent of law enforcement or he didn't follow through with red flags that should have been followed through by a reasonable person, so that I'm not saying that this is what happened, I'm saying those arguments are there to be made by the petitioner, so it seems to me there are really two different standards here and

that's why I have included both arbitrary and capricious, the classic, the original standard, and the standard that I think applies under the new statute, which is more likely than not.

The jury unanimously found that Wilson was indeed “arbitrary” and “capricious.” Moreover, the jury found that his factual determination and certification was “inaccurate.” (Special Verdict Forms 1 and 2, CP 309-310 and CP 311-312).

Significantly, this is the first reported Washington case where the coroner has actually been found arbitrary and capricious in the process of arriving at the cause and manner of death.

Writ of Mandamus to Coroner to Indicate Homicide as Manner of Death Is Proper Under RCW 68.50.015 and RCW 7.16.160 Together

Recall that prior to enactment of RCW 68.50.015, the only way to challenge an inaccurate determination (i.e., to challenge the inaccurate *result*— the certification) was to seek mandamus (alleging the coroner's *process* was “arbitrary and capricious”). A close reading of the trial court's reasoning above shows that under both

“standards” the goal of the proceeding was to determine the accuracy of the *result*— the certification.

As much as, or more so than Thompson, Wilson has kept the question of the remedy of mandamus alive and well in this case. Despite the enactment of RCW 68.50.015, Wilson keeps insisting that only his *actions* should be judged whether “arbitrary and capricious,” not that his *final determination* be judged as “accurate” or not. Wilson himself requested that the jury be instructed on the questions of “arbitrary and capricious,” presumably hoping that a jury would find he had been reasonable, i.e., not arbitrary and capricious.

If Wilson had been found to have been reasonable, this case may have ended and the inaccurate “suicide” death certificate would still remain as final, *but for* the jury also being instructed to determine whether or not the death certificate was accurate. And, even as Wilson was found unreasonable, nothing may have changed regarding his certification of manner of death, *but for* the jury also being instructed to determine whether or not the death certificate was accurate. At the very, very least, it has been proven that the death was

not suicide. Nevertheless, Wilson argues that he may not be told to correct even that inaccuracy in his certification. Yet, is the purpose of RCW 68.50.015 merely to establish what is *not* accurate? What is *not* the accurate cause and manner of death? Or does “accuracy” require a finding of what is probably the true and correct manner of death? Is it merely a statute to facilitate eliminations?

Without conceding to the argument, it is Wilson who maintains that nothing in RCW 68.50.015 alone can result in a writ directed to him to change his certification of suicide.¹ If so, what is the practical purpose of RCW 68.50.015?

Thus, it is the finding of arbitrariness and capriciousness that truly causes Coroner Wilson the problems from which he appeals. The death certificate having been proven inaccurate, it is largely upon that finding of inaccuracy that a writ of mandamus has been issued by

¹ Wilson insists that this case be about *him*, rather than knowing the true and correct cause and manner of Ronda Reynolds’ *death*. In this RCW 68.50.015 judicial proceeding to review the accuracy of his final determination and certification, it was Wilson who injected the issues of arbitrariness and capriciousness into the review, and it was Wilson who proposed instructions consistent with his theories— Respondent’s Proposed Instructions Nos. 5, 7, 8, and proposed Special Verdict Form (CP 215, 217, 218 and 221).

the trial court in this action. The writ has been issued to correct an inaccuracy. Was it issued only to create another inaccuracy by the coroner refusing to indicate “homicide” as the true manner of Ronda Reynolds’ death?

It is the finding of inaccuracy that gives the finding of unreasonableness context and importance, and it is the arbitrariness and capriciousness which has resulted in the issuance of the writ of mandamus to Coroner Wilson to be accurate in his certification of Ronda’s death.

To use Wilson’s argument that the trial court may not direct him to indicate homicide as the true fact: a writ issued by the trial court may only direct the coroner to be “less inaccurate” by eliminating suicide, or may only direct the coroner to “try again” by eliminating suicide; or, the writ may not specify “not suicide” or “homicide;” but eventually, enough successful judicial review petitions will eliminate all inaccurate determinations without directing anything specific.

To avoid the issuance of a writ of mandamus, Wilson hopes for a new trial wherein the accuracy of his determination is not an issue and does not matter, and thus it could then be said that volitional ignorance of evidence of homicide does not matter either— because it would not be important or relevant whether or not his determinations were accurate.² In other words, Wilson maintains that the accuracy of his certification is not important and that RCW 68.50.015 does not pertain to him, should not affect him, and should not concern him.

Wilson’s argument on appeal is somewhat similar to the doctrine of “invited error,” where Wilson has injected issues and requested instructions setting the foundation and framework for the issuance of a writ of mandamus. His arguments that a writ of mandamus should not have been issued by the trial court would be more persuasive had he not requested instructions and verdict asking whether or not he had acted arbitrarily and capriciously. Wilson

² A new trial will not likely result in a jury verdict that Wilson is reasonable, particularly now that we all know—including Wilson— that a jury, presented with all the evidence, will most likely find the manner of death to be homicide. (Declaration of Jury Foreperson, CP 405-406). Yet, that is what Wilson argues for—a new trial where the jury will only decide only if he acted reasonably, not decide whether his certification is accurate or not.

should not be allowed to invite the construction of a legal box at trial, and then on appeal complain about being boxed in. *Sdorra v. Dickinson*, 80 Wn.App. 695, 910 P.2d 1328 (1996) (“invited error” discussed; party cannot set up an error at trial and then complain about it on appeal).

The trial court instructed that “[t]he Petitioner has the burden to prove that the Lewis County Coroner’s determination is not accurate, or, that the determination was arbitrary and capricious.” (Instruction No. 9, CP 301). The trial court also instructed and defined petitioner’s burden as the jury “... must be persuaded, considering all the evidence in the case, that the proposition on which [petitioner] has the burden of proof is more probably true than not true.” (Instruction No. 10, CP 302). Moreover, Wilson even enjoyed a presumption that his official acts were properly performed. (Instruction No. 13, CP 305).

Wilson was free to argue that Thompson had not met her burden. Stated another way, Wilson was free to argue that his determination of suicide was “probably” or “more likely than not”

suicide, or even that it was “probably” not homicide. He chose not to do so. He chose to do nothing. Now, on appeal, he argues he should be left alone to exercise his discretion as he sees fit.

As noted in her opening brief (at page 19), Coroner Wilson did not attend the entire trial, did not call any witnesses, and did not testify. (RP November 9, 2009, page 50; all references to the record may be found in Thompson’s opening brief on page 5). There is substantial evidence in the testimony to support the jury’s verdict that Wilson was arbitrary and capricious by not considering evidence of homicide, which when taken in context, supports the issuance of the RCW7.16.160 writ of mandamus to indicate homicide as the “accurate” and true fact as found under RCW 68.50.015. It is the arbitrariness of Wilson that supports the conclusion that Wilson must be instructed what to do to fulfill his statutory duties (again).

For example, Petitioner Thompson testified at trial in relevant part as follows (at RP, November 1, 2009, at page 31, line 7)—

Q At some point, you were able to meet with Mr. Wilson to discuss the autopsy results?

A Yes.

Q When was the date of that?

A April 17, 2008.

Q So did it take ten years before Mr. Wilson sat down and talked to you about the autopsy?

A He did talk to me very briefly at a point earlier and had indicated that he would look at it and get back to me, then, he had [Deputy Coroner] Carmen Brunton write me a letter and say he couldn't meet with me.

Q When you say look at it, are you talking about the contents of Exhibit 2?

A Yes.

Q Do you remember when that point earlier was that you gave this Exhibit 2 to Mr. Wilson to view?

A It was years before.

Q Would it be 2002 or 2004 or 2006 do you remember?

A I would have to look at a letter from Carmen telling me he wouldn't meet with me to give you an exact date.

Q Were you continually trying to get this information in front of the coroner?

A Yes.

Q Are you here filing a petition apparently because Mr. Wilson still maintains that the cause of death was a gunshot and the manner is suicide?

A That's correct, and the fact that he won't explain to me or show me the evidence that he used.

Thompson further testified (RP, November 1, 2009, page 41, line 8)—

Q Do you personally know or did you ever receive a response from Mr. Wilson of whether or not he considered those things?

A In April of 2008 he told me that he did read those and that he did not consider them.

Thompson was not cross-examined about these subjects, and no evidence or testimony was presented by Wilson to contradict her testimony.

Also, former lead homicide detective Jerry Berry testified in relevant part (RP November 2, 2009, page 116, beginning at line 8, and continuing on to page 117) as follows—

Q Did you ever see Coroner Terry Wilson at the scene?

A No.

Q Did you attend the autopsy?

A I did.

* * *

Q Was Coroner Wilson there?

A No.

Q And these red flags that you noticed, has Coroner Wilson ever talked to you about these things or talked to you about this death?

A No. . . .

* * *

Q From the date of death December 16th, 1998, until the present day, has Coroner Wilson ever talked to you about these red flags or unanswered questions?

A Not one time. Never.

And yet, Coroner Wilson argues that RCW 68.50.015 is of no concern to him and not relevant to his determination of manner of death, that there was insufficient evidence that he acted unreasonably, and that the trial court may not direct him to indicate any particular or specific proven or disproved manner of death even if he was arbitrary and capricious.

Conclusion

It is conceded that this is the first case under RCW 68.50.015. However, that does not mean that Petitioner Thompson is, or should be without a remedy based upon the facts and circumstances in this case. The record is clear that the manner of death of Ronda Reynolds was probably homicide, and that the arbitrary and capricious Coroner Wilson refuses to acknowledge that proof and refuses to certify homicide as the manner of Ronda's death. There is sufficient statutory and case law authority to mandate that Wilson certify the death as homicide.

Respectfully submitted,



Royce Ferguson 5879
Attorney for Respondent and
Cross-Appellant Thompson

Royce Ferguson
2931 Rockefeller Avenue
Everett, WA 98201-4019
425.258.9311

FILED
COURT OF APPEALS

10 APR -2 PM 9:41

STATE OF WASHINGTON

BY ca
CLERK

**WASHINGTON STATE COURT OF APPEALS
DIVISION TWO**

BARBARA THOMPSON,)
)
 Respondent/Cross) **Court of Appeals**
 Appellant,) **No. 40283 – 1 – II**
)
 -vs-)
) **Lewis County Superior**
 TERRY WILSON, Lewis) **Court No. 06-2-01044-1**
 County Coroner,)
)
 Appellant/Cross)
 Respondent.)
)

Declaration of Mailing
BRIEF OF CROSS-APPELLANT THOMPSON IN REPLY
TO RESPONSE BRIEF
(RAP 10.1(c))

The undersigned swears under penalty of perjury under the laws of the State of Washington that on this day she mailed, U.S. postage prepaid, a true and correct copy of revised "Brief of Cross-Appellant Thompson in Reply to Response Brief (RAP 10.1(c))" addressed to

John E. Justice
Attorney at Law
Law, Lyman, Daniel, Kamerrer, et al
P. O. Box 11880
Olympia, WA 98508-1880

Dated and signed at Everett this 30 day of July, 2010.

A handwritten signature in black ink, appearing to read "John E. Justice", written over a horizontal line.