

FILED
Jun 07, 2013
Court of Appeals
Division III
State of Washington

No. 315193

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

D. ANGUS LEE, Grant County Prosecuting Attorney, by and through the
Office of the Grant County Prosecuting Attorney,

Respondent

vs.

JERRY JASMAN, a single person,

Appellant

and

CRAIG MORRISON,

Appellant

BRIEF OF APPELLANTS

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I. INTRODUCTION

At the surface, this case is about whether Jerry Jasman can sign death certificates as a deputy coroner or investigator in the Grant County Coroner's Office. On a deeper level, it is about the ability of an elected county officer, in this case a county coroner, to select deputies and employees and to decide what responsibilities to delegate to them.

Mr. Jasman previously served as the elected Grant County Coroner. However, he stepped down from his position following an *Alford* plea¹ to a misdemeanor for disorderly conduct, based on RCW 9.92.110, which prohibits holding public office upon conviction of a crime. The coroner elected to replace Mr. Jasman, Craig Morrison, subsequently hired him to serve as deputy coroner and investigator because these positions do not constitute public office and Mr. Jasman is the most qualified person in the area to do the job.

Approximately 19 months later, the Grant County Prosecutor, Angus Lee, filed a quo warranto action against Mr. Jasman, seeking to prevent him from serving as deputy coroner or signing death certificates. Prosecutor Lee did not raise the claim that Mr. Jasman violated the terms of his plea in the context of the underlying criminal proceeding. From the

¹ Under a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), the accused maintains his or her innocence. See *Clark v. Baines*, 150 Wn.2d 905, 907 n.1 & 916, 84 P.3d 245 (2004) (describing nature and effect of *Alford* plea).

perspective of Coroner Morrison, the action is politically motivated and part of a pattern of harassment.

Once the quo warranto action was filed, Mr. Jasman resigned from his position as deputy coroner until the issue of his authority to sign death certificates could be resolved, although he retained his position as investigator. Coroner Morrison also directed Mr. Jasman not to sign any death certificates until further notice.

Coroner Morrison filed a motion to intervene on grounds that the quo warranto action affected his ability to hire deputies and employees and delegate tasks to them. The superior court granted the motion and aligned Coroner Morrison with Mr. Jasman.

In the meantime, Coroner Morrison submitted a request to the County Commissioners of Grant County for funds to defend the quo warranto action because Mr. Jasman was merely following his instructions and acting in good faith within the scope of employment. The commissioners initially approved the request, but they subsequently reversed their decision based on legal advice from the Prosecutor's office. Prosecutor Lee's simultaneous prosecution of the quo warranto action and his advice to the county commissioners regarding the defense of the action resulted in a conflict of interest that led the superior court to disqualify

him and the other members of his office as counsel, although he remained as the nominal plaintiff.

Independently of the tender of defense to the county commissioners, Coroner Morrison and Mr. Jasman sought the appointment of a special prosecutor to defend the prerogatives of the coroner's office. However, the superior court deferred ruling on the motion pending a decision on the merits of the quo warranto action.

On cross motions for summary judgment, the superior court ultimately enjoined Mr. Jasman from signing death certificates, and denied Coroner Morrison's and Mr. Jasman's request to appoint a special prosecutor. From these decisions, Coroner Morrison and Mr. Jasman now appeal.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in granting Prosecutor Lee's cross motion for summary judgment against Mr. Jasman and Coroner Morrison. CP 294 (¶ 1).
2. The superior court erred by denying Mr. Jasman's and Coroner Morrison's cross motion for summary judgment against Prosecutor Lee. CP 294 (¶ 2).
3. The superior court erred by enjoining Mr. Jasman from signing death certificates. CP 294 (¶ 5).
4. The superior court erred by denying appointment of a special prosecutor to defend the quo warranto action. CP 294 (¶ 4).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. How should the undefined words “officer” and “office” in the constitutional and statutory provisions regarding removal of public officers be interpreted? In particular, is a deputy coroner or investigator with authority to sign death certificates an officer, even though he or she is not required to take an oath of office or post an official bond, does not have a term of office, but serves at the will of the elected county coroner, and does not have statutorily defined duties, but performs tasks delegated by the county coroner? (Assignments of Error Nos. 1-4.)
2. Is the appointment of a special prosecutor warranted to defend this quo warranto action filed by a county prosecutor, which affects the county coroner’s ability to select deputies and employees and delegate tasks to them? (Assignment of Error No. 5.)

IV. STATEMENT OF THE CASE

A. **The Elected Grant County Coroner, Craig Morrison, Hires Jerry Jasman As A Deputy Coroner And Investigator.**

Jerry Jasman is the former elected Grant County Coroner. CP 141 (¶ 2). While in office, he entered an *Alford* plea to a misdemeanor for disorderly conduct pursuant to RCW 9A.84.030(1)(a). CP 141 (¶ 2).² As part of the plea, Mr. Jasman acknowledged the forfeiture of his right to hold public office, as provided in RCW 9.92.120. CP 141 (¶ 4). When he entered the plea, Mr. Jasman understood public office to mean elected

² A person is guilty of disorderly conduct under RCW 9A.84.030(1)(a) if he or she “[u]ses abusive language and thereby intentionally creates a risk of assault.” (Brackets added.)

office. CP 141 (¶ 5). Accordingly, he stepped down from his position as the elected Grant County Coroner. CP 141 (¶ 6).

Craig Morrison was elected as Grant County Coroner on November 2, 2010, to fill the vacancy created by Mr. Jasman's resignation. CP 142 (¶ 7) & 155 (¶ 2). On November 22, 2010, Coroner Morrison hired Mr. Jasman to serve as deputy coroner and investigator, based on the authority of RCW 36.16.070. CP 142 (¶¶ 8-9) & 155 (¶ 3).

Coroner Morrison hired Mr. Jasman because Mr. Jasman's experience, training and abilities made him the most qualified person in the area to fill them. CP 155 (¶ 3). Neither Coroner Morrison nor Mr. Jasman believed the position of deputy coroner or investigator constituted public office. CP 142 (¶ 9) & 156 (¶ 9). Mr. Jasman obtained an opinion from counsel who represented him in the criminal proceeding, which he shared with Coroner Morrison and the county commissioners, confirming that his misdemeanor conviction did not preclude him from serving as deputy coroner or investigator. CP 142 (¶ 10), 156 (¶ 10) & 165 (Ex. D-6).

When he was hired, Mr. Jasman took an oath of office, although he now understands that it was not necessary to do so. CP 142 (¶ 11) & 156 (¶ 4).³ Mr. Jasman did not post an official bond when he was hired as deputy coroner and investigator. CP 142 (¶ 12). He serves at the will of,

³ Regarding the necessity of an oath of office for deputies and employees, *see infra* pt. VI(B).

and performs the tasks delegated by, Coroner Morrison. CP 142 (§§ 13-14) & 156 (§ 5). The duties are described in job descriptions for deputy coroner and investigator, maintained by the Grant County Human Resources Department. CP 79-80 (deputy job description) & 82-84 (investigator job description). The job description for deputy coroner provides that “[t]he position reports directly to the County Coroner.” CP 79 (brackets added). Similarly, the job description for investigator provides “[p]erform ... duties as assigned by the Coroner.” CP 82 (brackets & ellipses added). Neither of the job descriptions contains any indication that the positions are public offices. *See* CP 79-80 & 82-84.

B. Coroner Morrison Delegates The Task Of Signing Death Certificates To Mr. Jasman.

One of the tasks performed by a coroner’s office is the completion and certification (i.e., signing) of death certificates. *See* RCW 70.58.170 & .180. Death certificates are normally signed by a physician, physician’s assistant or nurse practitioner. *See id.* However, when a death occurs without a health care provider in attendance, or when the death results from unlawful or unnatural causes, then the certificate must be signed by a local health officer, the coroner or medical examiner, or the prosecuting attorney. *See id.*; CP 143 (§ 15) & 156 (§ 5).

Death certificates must be signed within 72 hours after death occurs. CP 143 (¶ 16) & 156 (¶ 6). Mr. Jasman and Coroner Morrison are the only two people working in the Grant County Coroner's office. *Id.* If Coroner Morrison is away from the office on official or personal business, it creates a hardship if Mr. Jasman cannot sign the death certificates. *Id.*; *see also* CP 79 (deputy job description, stating "[t]he position is one of only two in the Coroner's office, serving on a rotating 24-hour on call basis with the County Coroner"); CP 82 (investigator job description, stating "[t]he position is one of only two in the Coroner's office, working Weekends and Nights when required").

In addition, given the number of deaths that occur in Grant County, it is not possible for Coroner Morrison to fully investigate each death personally. CP 156 (¶ 7). He relies on Mr. Jasman to investigate deaths, and believes that it is important for the person who performed the investigation, and has personal knowledge of the facts, to sign the death certificate. *Id.* The Washington State Department of Health has always accepted the death certificates filed by Mr. Jasman. CP 143 (¶ 17) & 156 (¶ 8).⁴

⁴ As noted above, Mr. Jasman obtained an opinion from counsel that he could serve as deputy coroner, which he shared with Coroner Morrison and the Grant County Commissioners. CP 142 (¶ 10), 156 (¶ 10) & 165 (Ex. D-6). In addition, Coroner Morrison inquired of the Washington State Department of Health (DOH), regarding whether Mr. Jasman could sign death certificates. DOH did not raise any objection, and

C. The Grant County Prosecutor, Angus Lee, Files A Quo Warranto Action Against Mr. Jasman, Alleging That He Is Not Eligible To Serve As Deputy Coroner Or Sign Death Certificates.

Approximately 19 months after Coroner Morrison hired Mr. Jasman, Prosecutor Lee filed this quo warranto action against Mr. Jasman. CP 4-9 (quo warranto information) & 157 (¶ 14). Prosecutor Lee did not raise the claim that Mr. Jasman violated the terms of his *Alford* plea in the context of the underlying criminal proceeding. From the perspective of Coroner Morrison, the quo warranto action “is politically motivated and shows evidence of the longstanding harassment” his office has received from Prosecutor Lee’s office since his election. CP 163.

The information alleges that Prosecutor Lee has authority to bring a quo warranto action “pursuant to RCW 7.56.010 and .020.” CP 4. The information further alleges that Mr. Jasman “has unlawfully exercised the public office of coroner or deputy coroner[.]” CP 4 (brackets added); *accord* CP 6-7 (¶¶ 3.14 & 3.16, stating Mr. Jasman “is precluded from serving as the Grant County Coroner or as a Grant County deputy

the agency has accepted all death certificates signed by Mr. Jasman. CP 157 (¶ 11) & 166-67 (Ex. D-7). Coroner Morrison also asked the Washington Association of Coroners and Medical Examiners (WACME) for a formal opinion whether Mr. Jasman could sign death certificates. WACME did not raise any objection either, although it declined to issue an opinion. CP 157 (¶ 12) & 168 (Ex. D-8). Meanwhile, Prosecutor Lee asked the Washington State Attorney General’s Office (AGO) for a formal opinion whether Mr. Jasman could serve as deputy coroner or investigator and sign death certificate. As with WACME, the AGO did not raise any objection, but declined to issue an opinion. CP 157 (¶ 13), 169 (Ex. D-9) & 170 (Ex. D-10).

coroner”). Specifically, the information identifies the signing of death certificates as the allegedly unlawful exercise of public office. CP 7 (¶¶ 3.17-3.20). The information seeks declaratory judgment that Mr. Jasman “unlawfully exercised the public office of Grant County Coroner or deputy coroner[,]” and injunctive relief prohibiting him “from performing the duties of the Grant County Coroner or of a deputy coroner, including the completion and/or signing of death certificates[.]” CP 8 (¶¶ 5.1-5.3, brackets added).

D. Mr. Jasman Resigns From His Position As Deputy Coroner (But Not Investigator) And Coroner Morrison Instructs Him Not To Sign Death Certificates Pending The Outcome Of The Quo Warranto Action.

After being served with the quo warranto information, Mr. Jasman resigned from his position as deputy coroner, although he remains in the position of investigator. CP 143 (¶ 18), 157 (¶ 15) & 160 (Ex. D-1). Coroner Morrison accepted the resignation and instructed Mr. Jasman not to sign death certificates pending resolution of Mr. Jasman’s authority to serve as deputy coroner and/or sign death certificates in the quo warranto action. CP 143 (¶ 19), 157 (¶ 16) & 162 (Ex. D-3). They subsequently notified Prosecutor Lee of these actions, and Mr. Jasman has not signed any death certificates, despite the resulting hardship for the coroner’s office. CP 143 (¶¶ 18-19), 157-58 (¶¶ 16-17) & 162 (Ex. D-3).

E. The Superior Court Allows Coroner Morrison To Intervene And Aligns Him With Mr. Jasman.

Coroner Morrison moved to intervene in the quo warranto action, on grounds that the action interfered with his authority to hire deputies and employees as well as his authority to delegate tasks to them. CP 196-97 (motion), 199-02 (memorandum), 204-06 (Morrison declaration) & 211-12 (Jasman declaration).⁵ The superior court granted the motion to intervene and aligned Coroner Morrison with Mr. Jasman as a defendant. CP 290-91.

F. Prosecutor Lee Interferes With The Defense Of The Quo Warranto Action, And The Superior Court Disqualifies Him And The Other Members Of The Prosecutor's Office.

In the meantime, Coroner Morrison submitted a request to the Grant County Commissioners for funds to defend and indemnify Mr. Jasman in the quo warranto action, because he was merely following instructions and acting in good faith within the scope of his employment. CP 144 (¶ 20), 158 (¶ 18) & 163 (Ex. D-4). The commissioners initially approved the request. CP 144 (¶ 21), 158 (¶ 20) & 164 (Ex. D-5). However, they subsequently reversed their decision “[b]ased on legal

⁵ See, e.g., CP 5 (quo warranto information, ¶ 3.6, alleging “Coroner Morrison hired JASMAN as the Coroner Chief Investigator”); CP 7 (¶ 3.18, alleging “it is the intent and desire of Coroner Morrison to allow JASMAN to continue completion of death certificates”); CP 48 (motion for preliminary injunction, lines 34-38, stating “Coroner Morrison approved of JASMAN’s intrusion upon public office, and/or JASMAN acting as a public officer”).

advice from the Prosecuting Attorney's office[.]” CP 164 (Ex. D-5, brackets added).

Prosecutor Lee's simultaneous prosecution of the quo warranto action and his advice to the county commissioners regarding the defense of the action created a conflict of interest, resulting in disqualification of himself and the members of his office as counsel.⁶ Following disqualification, Prosecutor Lee remains as the nominal plaintiff in the quo warranto action, although he is represented by a special deputy prosecuting attorney appointed pursuant to RCW 36.27.040.

G. Coroner Morrison And Mr. Jasman Seek Appointment Of A Special Prosecutor To Represent The Interests Of The Coroner's Office.

Independently from the tender of defense to the Grant County Commissioners, Coroner Morrison and Mr. Jasman sought the appointment of a special prosecutor pursuant to RCW 36.27.030, on grounds that the quo warranto action impinges upon the right and responsibility of Coroner Morrison, as an elected county officer, to manage his office. CP 196 (motion) & 201-02 (memorandum). However, the superior court deferred ruling on the motion pending a decision on the merits of the quo warranto action. CP 294.

⁶ A declaration of Prof. John A. Strait describes the conflict of interest. The declaration and the superior court's orders disqualifying counsel and denying reconsideration of the disqualification order are being transmitted to the Court pursuant to a supplemental designation of clerk's papers.

H. The Superior Court Ultimately Grants The Injunctive Relief Requested In The Quo Warranto Action, And Denies Coroner Morrison's and Mr. Jasman's Request For Appointment Of A Special Prosecutor.

On cross motions for summary judgment, the superior court enjoined Mr. Jasman from signing death certificates, and denied Coroner Morrison's and Mr. Jasman's request to appoint a special prosecutor. CP 292-94. From these decisions, Coroner Morrison and Mr. Jasman now appeal.⁷

V. SUMMARY OF ARGUMENT

Forfeiture of the right to hold public office upon conviction of a misdemeanor does not preclude employment as a deputy or employee. The undefined words "officer" and "office," as used in the constitutional and statutory provisions regarding removal of a public officer, Wash. Const. Art. 5, § 3, RCW 7.56.010(1) and 9.92.120, should be interpreted in accordance with the common, ordinary and accepted meaning, as recognized in *Nelson v. Troy*, 11 Wash. 435, 39 Pac. 974 (1895), and reaffirmed in *State ex rel. McIntosh v. Hutchinson*, 187 Wash. 61, 59 P.2d 1117 (1936). Under the common meaning, "[a]n employee or a deputy is not an officer." *McIntosh*, 187 Wash. at 63 (citing *Nelson*; brackets added). Alternate definitions proposed by Prosecutor Lee from the

⁷ The notice of appeal is being transmitted to the Court pursuant to a supplemental designation of clerk's papers

Criminal Code, RCW 9A.04.110(13), and the Code of Ethics for Municipal Officers, RCW 42.23.020(1), are inapplicable.

Properly understood, Jerry Jasman does not hold public office nor can he be considered a public officer. As deputy coroner and investigator, he is not elected, nor is he required to take an oath of office or post an official bond, nor are the term and responsibilities of his employment determined by statute. Instead, he is hired, and the term and responsibilities of his employment are determined in the discretion of the elected county coroner. As a result, Mr. Jasman's misdemeanor conviction is not an impediment to serving in these positions, and there is no basis for this quo warranto action.

Mr. Jasman and Coroner Morrison are entitled to appointment of counsel as a special prosecutor and reimbursement of attorney fees and costs incurred herein because this quo warranto action is an attack on the prerogatives of the elected county coroner's office, including the coroner's ability to hire deputies and employees and delegate tasks to them. Prosecutor Lee's prosecution of this quo warranto action precludes him from providing the defense that he would otherwise be obligated to provide.

On de novo review, this Court should reverse summary judgment granted in Prosecutor Lee's favor, grant summary judgment in Mr.

Jasman's and Coroner Morrison's favor, appoint their counsel as a special prosecutor, and award attorney fees and costs incurred in the superior court and on appeal.

VI. ARGUMENT

A. **The Standard Of Review Is De Novo, And No Deference Is Due To The Superior Court's Summary Judgment Order.**

The rulings of the superior court to which Coroner Morrison and Mr. Jasman assign error were all made in connection with summary judgment proceedings, and are embodied in the court's summary judgment order. CP 294. Rulings on summary judgment are subject to review de novo, and no deference is due to the decision of the superior court. *See Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). In reviewing the grant of summary judgment, the appellate court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inference from the evidence in that party's favor. *See id.* Summary judgment should only be granted if there is no genuine issue of disputed material fact and the moving party is entitled to judgment as a matter of law. *See id.*

In this case, there do not appear to be any genuine issues of disputed material fact. Instead, the parties dispute the legal significance of the facts regarding Mr. Jasman's employment as a deputy coroner or

investigator with authority to sign death certificates, and whether such employment constitutes “public office” within the meaning of RCW 9.92.120. Before addressing this issue, it is helpful to review the constitutional and statutory provisions relating to county officers, including county coroners, and the distinctions between such public officers and their deputies and employees.

B. Overview Of County Officers, And The Distinctions Between Such Officers And Their Deputies And Employees.

County offices are established by the legislature pursuant to authority granted by the state constitution:

The legislature, by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys and other county, township or precinct and district officers, as public convenience may require, and shall prescribe their duties, and fix their terms of office: *Provided*, That the legislature may, by general laws, classify the counties by population and provide for the election in certain classes of counties certain officers who shall exercise the powers and perform the duties of two or more officers. It shall regulate the compensation of all such officers, in proportion to their duties, and for that purpose may classify the counties by population: *Provided*, That it may delegate to the legislative authority of the counties the right to prescribe the salaries of its own members and the salaries of other county officers. And it shall provide for the strict accountability of such officers for all fees which may be collected by them and for all public moneys which may be paid to them, or officially come into their possession.

Wash. Const. Art. XI, § 5 (brackets added). This constitutional provision is mandatory, as evidenced by the word “shall” and the rule of construction embodied in Wash. Const. Art. I, § 29. *See State ex rel. Egbert v. Blumberg*, 46 Wash. 270, 274, 89 Pac. 708 (1907).⁸

The provision creates several public offices, *i.e.*, “county commissioners, sheriffs, county clerks, treasurers, [and] prosecuting attorneys,” and the legislature does not have the authority to abolish or even change the name of these offices. *See State ex rel. Hamilton v. Troy*, 190 Wash. 483, 486-87, 68 P.2d 413 (1937) (holding statute changing title of office of “prosecuting attorney” to “district attorney” violates Art. XI, § 5). In addition to those enumerated in the text, the legislature has the authority to create “other county ... offices, as public convenience may require,” and it has created the offices of assessor, auditor and coroner or medical examiner. *See RCW 36.16.030*. This authority is confined to the legislature, and county officers do not have authority to create additional offices. *See County Commissioners—Authority to Create a New County Office—Veterans Relief Fund*, Wash. Att’y Gen. Op. 1957-58, No. 83 (June 13, 1957), *available at* 1957 WL 53974.

For all county offices, whether enumerated in the text or subsequently created, the legislature is required to “provide for the

⁸ Wash. Const. Art. I, § 29, provides: “The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.”

election of,” “prescribe their duties,” “fix their terms of office,” “regulate the compensation” and “provide for the strict accountability” of officers. The legislature does not have authority to create a county office that violates any of these requirements. *See Egbert*, 46 Wash. at 274 (denying mandamus to compel payment “for services as assistant county fruit inspector” because office of county fruit inspector not elective); *State ex rel. Johnston v. Melton*, 192 Wash. 379, 73 P.2d 1334 (1937) (denying mandamus to compel appointment of investigator having “the same authority as the sheriff” because it infringes on office of sheriff and is not elective).

In accordance with Wash. Const. Art. XI, § 5, the legislature has provided for the election of county officers, *see* RCW 36.16.010 & .030, prescribed their duties in various chapters of Title 36 RCW,⁹ fixed their terms of office, *see* RCW 36.16.020, regulated their compensation, *see* Ch. 36.17 RCW, and imposed accountability for handling public funds, *see* RCW 36.16.050 (regarding official bonds) & 36.18.160-170 (regarding penalties for taking illegal fees and failing to pay over fees).

The legislature has also provided for the appointment of deputies and employees by county officers:

⁹ *See* Chs. 36.21 (assessor), 36.22 (auditor), 36.23 (clerk), 36.24 (coroner), 36.27 (prosecuting attorney), 36.28 (sheriff), 36.29 (treasurer), & 36.32 (commissioners).

In all cases where the duties of any county office are greater than can be performed by the person elected to fill it, the officer may employ deputies and other necessary employees with the consent of the board of county commissioners. The board shall fix their compensation and shall require what deputies shall give bond and the amount of bond required from each. The sureties on deputies' bonds must be approved by the board and the premium therefor is a county expense.

A deputy may perform any act which his or her principal is authorized to perform. The officer appointing a deputy or other employee shall be responsible for the acts of his or her appointees upon his or her official bond and may revoke each appointment at pleasure.

RCW 36.16.070. Deputies and employees appointed pursuant to this statute contrast with county officers in a number of significant ways. First and foremost, deputies and employees are appointed, not elected.

Second, deputies and employees are not required to take an oath of office. The requirement of an oath is limited to persons "elected to county office." RCW 36.16.040. The statute authorizing the appointment of deputies and employees does not mention an oath. *See* RCW 36.16.070.

Third, deputies and employees are not generally required to post an official bond. The statute requiring a bond is limited to elected county officers. *See* RCW 36.16.040. Deputies and employees do not have to post a bond unless specifically required by the county commissioners. *See* RCW 36.16.040 & .070. The appointing officer is responsible for the acts

of deputies and employees on his or her official bond. *See* RCW 36.16.070.

Fourth, deputies and employees do not serve a term of office. The term of office of all county officers is four years. *See* RCW 36.16.020. Deputies and employees, on the other hand, serve at the will of the appointing officer, and may be terminated at any time, for any reason. *See* RCW 36.16.070 (stating “[t]he officer appointing a deputy or other employee ... may revoke each appointment at pleasure”); *Halliburton v. Huntington*, 20 Wn. App. 91, 98, 579 P.2d 379 (1978) (stating that the statutory language “is nothing more than a recital of the common law right of an employer to dismiss an employee”).

Fifth, the duties of deputies and employees are not defined by statute. *See* RCW 36.16.070. Instead, they must perform duties assigned by the appointing officer. *See id.*

In light of these distinctions, the appointment of deputies and employees is consistent with the limitations and requirements of Wash. Const. Art. XI, § 5, only because deputies and employees are not “officers” within the meaning of the constitutional provision. *See Nelson v. Troy*, 11 Wash. 435, 39 Pac. 974 (1895). In *Nelson*, a taxpayer sought to enjoin payment of the salary of a deputy clerk appointed pursuant to the

predecessor statute to RCW 36.16.070. *See* 11 Wash. at 436.¹⁰ The taxpayer argued that the statute under which the deputy clerk was appointed violated Wash. Const. Art. XI, § 5. *See id.* at 437. The Court rejected this argument on grounds that “[a] deputy county clerk is not a county officer[.]” relying on the “common, ordinary, and accepted meaning” of the term “officer.” *See id.* at 441-42. The Court explained:

“The ‘officer’ is distinguished from the employé in the greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office; and usually, though not necessarily, in the tenure of his position.”

Id. at 442 (quoting *Throop v. Langdon*, 40 Mich. 673, 682 (1879)). Because deputies are not county officers, the limitations and requirements of Wash. Const. Art. XI, § 5, are inapplicable. *See id.* at 441-43; *accord State ex rel. Scofield v. Easterday*, 182 Wash. 209, 46 P.2d 1052 (1935) (rejecting argument that county engineer’s power to appoint assistant gives him the power to create an office in violation of Wash. Const. Art.

¹⁰ As quoted by the Court in *Nelson*, the predecessor to RCW 36.16.070 provided:
And in all cases where the duties of any office are greater than can be performed by the person elected to fill the same, said officer may employ, with the consent of the county commissioners, the necessary help, who shall receive a just and reasonable pay for services. The officer appointing such deputies or clerks shall be responsible for the acts of such appointees upon his official bond.

11 Wash. at 438.

XI, § 5, and stating “[c]learly the naming of an assistant is not the creation of an office”).

With a proper understanding of the distinctions between county officers, on one hand, and deputies and employees, on the other, it is now possible to address the constitutional and statutory provisions regarding removal of public officers.

C. The Constitutional And Statutory Provisions Regarding Removal Of Public Officers Should Be Interpreted In Accordance With The Common, Ordinary And Accepted Meaning Of The Words “Officer” And “Office,” As Recognized In *Nelson v. Troy* And *State ex rel. McIntosh v. Hutchinson*.

The authority to remove officers is derived from the state constitution. The governor, heads of state executive departments and judicial officers—described as “superior officers”—may only be removed by means of impeachment. *See* Wash. Const. Art. 5, § 2; *State v. Smith*, 6 Wash. 496, 497-98, 33 Pac. 974 (1893). “All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law.” Wash. Const. Art. 5, § 3. The legislature has implemented this constitutional provision by enacting RCW 9.92.120,¹¹ which provides:

¹¹ *See State ex rel. Knabb v. Frater*, 198 Wash. 675, 678, 89 P.2d 1046 (1939) (citing former Rem. Rev. Stat. § 2289 as implementing Wash. Const. Art. 5, § 3); *accord State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 422 & 430-31, 367 P.2d 985 (1962) (citing RCW 9.92.120).

The conviction of a public officer of any felony or malfeasance in office shall entail, in addition to such other penalty as may be imposed, the forfeiture of his or her office, and shall disqualify him or her from ever afterward holding any public office in this state.

The statute may be enforced by means of a quo warranto action. *See* RCW 7.56.010(1) (stating “[a]n information may be filed . . . [w]hen any person shall usurp, intrude upon, or unlawfully hold or exercise any public office”).

The words “officer” and “office,” as used in Wash. Const. Art. 5, § 3, RCW 9.92.120 and the quo warranto statute are not defined.¹² Undefined words in a constitutional provision or statute should be given their “common, ordinary, and accepted meaning.” *See Nelson*, 11 Wash. at 441; *see also Gerberding v. Munro*, 134 Wn.2d 188, 199, 949 P.2d 1366 (1998) (constitution); *Cregan v. Fourth Memorial Church*, 175 Wn.2d 279, 285, 285 P.3d 860 (2012) (statute).

¹² The original enactment that included the statute now codified as RCW 9.92.120 defined “officer” and “public officer” as including “all assistants, deputies, clerks and employes [sic] of any public officer and all persons exercising or assuming to exercise any of the powers or functions of a public officer.” Laws of 1909, ch. 249, § 51(24) (brackets added). It is questionable whether this definition could enlarge upon the meaning of the constitutional provision authorizing the legislature to enact laws for the removal of officers. *See* Wash. Const. Art. 5, § 3. In any event, the definition has since been repealed. *See* Laws of 1975, 1st Ex. Sess., ch. 260, § 9A.92.010(1). The effect of repeal on cases arising afterward is the same as if the definition never existed. *See Palermo at Lakeland, LLC v. City of Bonney Lake*, 147 Wn. App. 64, 85, 93 P.2d 168 (2008), *rev. denied*, 166 Wn.2d 1003 (2009); *see also* RCW 10.01.040 (savings statute limited to penalty or forfeiture incurred prior to repeal); *State ex rel. Hagan v. Chinook Hotel, Inc.*, 65 Wn.2d 573, 576-78, 399 P.2d 8 (1965) (stating “it matters not whether it [repeal of part of a statutory definition] was done intentionally or by inadvertence”).

As discussed above, the common meaning of the word “officer” involves making a distinction from a mere deputy or employee. *See Nelson*, 11 Wash. at 442 (referring to the distinction as “of controlling importance”). The common meaning of the word “office” involves making the same distinction. *See State ex rel. McIntosh v. Hutchinson*, 187 Wash. 61, 63, 59 P.2d 1117 (1936). In *McIntosh*, a prospective candidate for office sought to compel the secretary of state to accept and file his declaration of candidacy on grounds that the incumbent was disqualified by the constitutional prohibition against holding more than one “office,” Wash. Const. Art. 2, §§ 13-14. *See* 187 Wash. at 62-63. The Court cited *Nelson* with approval for the proposition that “[a]n employee or a deputy is not an officer,” and noted “the distinction between an officer and employee.” *Id.* at 63. The Court emphasized that *Nelson* “is in harmony with what we shall here say,” and adopted a 5-part test to add precision to the distinction between public office and employment:

After an exhaustive examination of the authorities, we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be

performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional. In addition, in this state an officer must take and file an official oath, hold a commission or other written authority, and give an official bond, if the latter be required by proper authority.

Id. at 63-64 (quotation omitted). The reference to each element as being “indispensable” means that all of them must be present in order to satisfy the definition of “public office.” *Accord id.* at 65 (stating “the great weight of authority well supports the necessity of meeting all of the conditions”); *Oceanographic Comm’n v. O’Brien*, 74 Wn.2d 904, 910, 447 P.2d 707 (1968); *State ex rel. Hamblen v. Yelle*, 29 Wn.2d 68, 76, 185 P.2d 723 (1947).

In the superior court, Prosecutor Lee argued that the definition of “officer” in the Criminal Code, RCW 9A.04.110(13), and/or the Code of Ethics for Municipal Officers, RCW 42.23.020(1), should be used. By their express terms, both of these statutory definitions are inapplicable to the constitutional and statutory provisions regarding removal of a public officer. The fact that the legislature deemed it necessary to specially define these terms in the Criminal Code and the Code of Ethics merely confirms

that the definitions depart from the common meaning, and the court should reject the alternate definitions proposed by Prosecutor Lee.

The Criminal Code definition of “officer” is limited to criminal offenses. The definition states:

In this title unless a different meaning plainly is required

...

- (13) “Officer” and “public officer” means a person holding office under a city, county, or state government, or the federal government who performs a public function and in so doing is vested with the exercise of some sovereign power of government, and includes all assistants, deputies, clerks, and employees of any public officer and all persons lawfully exercising or assuming to exercise any of the powers or functions of a public officer[.]

RCW 9A.04.110(13) (ellipses & brackets added.) Although the last clause of the definition would appear to encompass Mr. Jasman’s employment as deputy coroner and investigator, the language referring to “this title” limits the application of this definition to the Criminal Code.

The general provisions of the Criminal Code are further limited to “*offenses* defined by this title or another statute.” RCW 9A.04.090 (emphasis added). The constitutional and statutory provisions regarding removal of a public officer do not define an offense, or even a punishment for an offense. *See Zempel*, 59 Wn.2d at 430 (indicating RCW 9.92.120 is not a criminal punishment, even though it arises from a conviction); *State*

ex rel. Hamilton v. Standard Oil Co., 190 Wash. 496, 501, 68 P.2d 1031 (1937) (indicating quo warranto is a civil, not criminal, remedy).¹³

The purposes of the Criminal Code include giving fair warning of the nature of conduct declared to constitute an offense. *See* RCW 9A.04.020(1)(c). This purpose would be undermined by applying a definition limited by its terms to the Criminal Code to a statute outside of the code that does not constitute an offense. There is no basis for applying the Criminal Code definition of officer to the constitutional and statutory provisions regarding removal of a public officer.

The definition of “officer” in the Code Of Ethics For Municipal Officers is limited to conflict-of-interest transactions. The definition states:

For the purpose of chapter 268, Laws of 1961 . . .

- (2) “Municipal Officer” and “officer” shall each include all elected and appointed officers of a municipality, together with all deputies and assistants of such an officer, and all persons exercising or undertaking to exercise any of the powers or functions of a municipal officer[.]

¹³ In the superior court, Prosecutor Lee relied on *State v. Korba*, 66 Wn. App. 666, 832 P.2d 1346 (1992), which applied the definition from the Criminal Code, RCW 9A.04.110(13), to the crime of injury to and misappropriation of a public record, RCW 40.16.020, which was part of the same original enactment as RCW 9.92.120. *See* Laws of 1909, ch. 249, §§ 37 & 96. *Korba* is distinguishable because injury to and misappropriation of a public record is an offense to which the Criminal Code definition remains applicable. *See* RCW 9A.04.090. Apart from the Criminal Code definition, *Korba* confirms that “neither a deputy nor an employee is a public officer.” 66 Wn. App. at 669.

RCW 42.23.020(2) (ellipses & brackets added). The definition of “municipality” includes counties, *see* RCW 42.23.020(1), and thus the definition of “municipal officer” would appear to encompass Mr. Jasman’s employment as deputy coroner and investigator. However, the reference to the session law enacting the Code of Ethics indicates that this definition is limited by its terms to this particular enactment. The purpose of the code is to provide uniform guidance regarding conflict-of-interest transactions by municipal officers. *See* RCW 42.23.010, something that is wholly unrelated to the removal of a public officer. There is no basis for applying the Code of Ethics definition of officer beyond the Code itself.

With a proper understanding of the words “officer” and “office” as used in to the constitutional and statutory provisions regarding removal of a public officer, it is now possible to address whether Mr. Jasman is a public officer and whether his employment as a deputy or investigator constitutes public office.

D. Under The Common Meaning Of The Words “Officer” And “Office” Recognized In *Nelson* And *McIntosh*, Jerry Jasman Cannot Be Considered A Public Officer And His Position As Deputy Coroner and Investigator Cannot Be Considered Public Office.

The express recognition by the Washington Supreme Court that a deputy or employee of a county officer is not an officer him- or herself should be dispositive. *See Nelson*, 11 Wash. at 441-42 (holding “[a]

deputy county clerk is not an officer”); *McIntosh*, 187 Wash. at 63 (citing *Nelson* for the proposition that “[a]n employee or a deputy is not an officer”); *accord Korba*, 66 Wn. App. at 669 (citing *Nelson* for the proposition that “neither a deputy nor an employee is a public officer”). Nonetheless, an analysis of the 5-part test for distinguishing between an officer and a deputy or employee adopted in *McIntosh* confirms that Jerry Jasman is not a public officer, and that his position as deputy coroner and investigator does not qualify as a public office. As noted above, all five elements of the test must be satisfied.

The first element of the test requires a position to be created by the Constitution or the Legislature, or by another body through authority conferred by the legislature. *See McIntosh*, 187 Wash. at 63. Arguably, the position of deputy coroner or employee satisfies this element because the county commissioners must consent to the employment of a deputy or employee by another county officer. *See RCW 36.16.170*.

The second, third and fourth elements all relate to different aspects of the delegation of sovereign power involved in public office. *See McIntosh*, at 62-63. In particular, the second element of the test requires a delegation of the sovereign power of the government, the third element requires the powers and duties of the position to be defined by the legislature or through legislative authority, and the fourth element requires

the powers and duties to be exercised independently. *See id.* The delegation of sovereign power contemplated by these elements is lacking when a person is engaged in mere “employment,” meaning that he or she is “directly responsible to,” or “under the immediate supervision of any superior authority.” *See Oceanographic Comm’n*, 74 Wn.2d at 911-12.

For example, in *State ex rel. Brown v. Blew*, 20 Wn.2d 47, 51-52, 145 P.2d 554 (1944), the Court held that the position of official court reporter does not satisfy the second, third and fourth elements of the *McIntosh* test because the reporter’s duties are not defined by statute, nor are they performed independently. Instead, the reporter’s duties are determined by the judge who supervises him or her. Similarly, Mr. Jasman’s position does not satisfy these elements of the *McIntosh* test because the duties of deputy coroner and investigator are not defined by statute or performed independently, but rather are determined by the elected county coroner and performed under his supervision. CP 142 (§ 14) & 156 (§ 5).

The fifth element of the test requires the position to have permanency and continuity to be considered public office. *See McIntosh*, at 63. Permanency and continuity refer to a definite term of office or the fulfillment of a particular mandate. *See Fitts v. Gibbs*, 40 Wn.2d 444, 447, 244 P.2d 241 (1952) (indicating the “terminal date” of the position must

legally certain based on “a definite term of office” or “it can be definitely fixed by reference to an event that is not contingent in nature”). Mr. Jasman’s position of deputy coroner does not satisfy this element of the *McIntosh* test because he does not have a definite term of office or a particular mandate. CP 142 (§ 13). As stated in the statute authorizing his appointment, the elected county coroner “may revoke [his] appointment at pleasure.” RCW 36.16.070; *see also Halliburton*, 20 Wn. App. at 98 (indicating this statutory language creates at will employment).

Apart from the formal elements of the *McIntosh* test, the Court also recognizes that an oath of office and official bond are typically associated with public office. *See McIntosh*, at 63. As noted above, a deputy coroner and investigator is not required to take an oath of office, even though Mr. Jasman did, in fact, take an oath when he was hired by Coroner Morrison. CP 142 (§ 11) & 156 (§ 4). In addition, Mr. Jasman was not required to post an official bond. CP 142 (§ 12). These facts bolster the conclusion that Mr. Jasman is not a public officer and that his position does not satisfy the test for public office.

E. Counsel Should Be Appointed As A Special Prosecutor And The Court Should Award Attorney Fees And Costs In The Superior Court And On Appeal Because Prosecutor Lee's Filing Of This Quo Warranto Action Precludes Him From Defending The Interests Of The Coroner's Office.

The elected county prosecutor has the duty to advise all county officers, appear for and represent the county in all criminal and civil proceedings, and defend all suits brought against the county. *See* RCW 36.27.020(2)-(4). This should include a duty to defend county officials in their official capacity. In *Osborn v. Grant County*, 130 Wn.2d 615, 625, 926 P.2d 911 (1996), and *Hoppe v. King County*, 95 Wn.2d 332, 339-40, 622 P.2d 845 (1980), the Court held that the prosecutor does not have a duty to bring suit against the county on behalf of a county officer. However, in *Westerman v. Cary*, 125 Wn.2d 277, 299, 892 P.2d 1067 (1994), the Court recognized that a prosecutor may have a duty to defend county officers, although the issue was not contested. While the duty to defend county officers is not explicit in the text of RCW 36.27.020, it can be implied from the duty to defend the county because county officers are arms of the county and the county is ultimately impacted by the results of litigation against them. *See Westerman*, 125 Wn.2d at 299. The duty to advise and defend county officers does not hinge upon whether the prosecutor agrees or disagrees with the county officer. *See id.* at 300.

In this case, at a minimum, Prosecutor Lee had a duty to advise Coroner Morrison regarding the quo warranto action, whether or not he can ethically fulfill that duty. He should also be deemed to have a duty to defend the action because it directly impinges upon Coroner Morrison's ability to select deputies or employees and delegate tasks to them. Coroner Morrison's interest in the action is confirmed by the order allowing him to intervene.

When a prosecutor is unable to perform his or her duties, the court has authority to appoint a special prosecutor. *See* RCW 36.27.030. Appointment of a special prosecutor is warranted when the prosecutor has a conflict of interest that prevents him or her from performing his or her duties. *See Westerman*, 125 Wn.2d at 298-99. The need for a special prosecutor is especially acute when the conflict is the result of the prosecutor initiating an action against the same county officers that he or she is supposed to represent. In conjunction with the appointment of a special prosecutor, the court has the authority to award attorney fees and costs. *See Osborn*, 130 Wn.2d at 628-30.

Here, it cannot be denied that Prosecutor Lee is directly adverse to Coroner Morrison and Mr. Jasman, as evidenced by the superior court's disqualification order, and is therefore unable to perform his duties. The

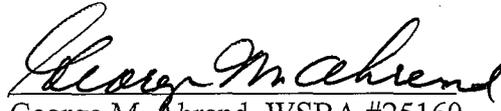
court should appoint counsel as a special prosecutor and award attorney fees and costs pursuant to RCW 36.27.030 and RAP 18.1.

VII. CONCLUSION

The court should reverse summary judgment granted in Prosecutor Lee's favor, grant summary judgment in Mr. Jasman's and Coroner Morrison's favor, appoint their counsel as a special prosecutor, and award attorney fees and costs incurred in the superior court and on appeal.

Submitted this 7th day of June, 2013.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On June 7, 2013, I served the document to which this is annexed as follows:

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Signed at Ephrata, Washington on June 7, 2013.



Shari M. Canet, Paralegal