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STATE OF WASHINGTON
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S. Ct. No. 90827-3

Ct. App., Div. III, No. 315193

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SUPREME COURT OF THE STATE OF WASHINGTON

GRANT COUNTY PROSECUTING ATTORNEY,

Respondent,

vs.

JERRY JASMAN, and CRAIG MORRISON,

Petitioners.

PETITIONERS' SUPPLEMENTAL BRIEF

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Petitioners Jerry Jasman and Craig Morrison submit the following supplemental brief:

I. SUPPLEMENTAL STATEMENT OF THE CASE

The material facts regarding Morrison's employment of Jasman within the Grant County Coroner's Office do not appear to be disputed. Petitioners incorporate by reference the statement of the case in their opening brief in the Court of Appeals and their Petition for Review in this Court. *See* App. Br., at 4-14; Pet. for Rev., at 1-7.

II. SUPPLEMENTAL STATEMENT OF ISSUES ON REVIEW

Petitioners incorporate by reference the statement of issues in their Petition for Review. *See* Pet. for Rev., at 1.

III. SUPPLEMENTAL ARGUMENT

- A. The Court of Appeals and Respondents improperly rely on a repealed statute to define "public office" and "public officer" in RCW 9.92.120, when they should rely on the common law definition, which excludes deputies of county officers.**

The merits of this quo warranto action hinge upon the definition of the phrases "public officer" and "public office" as they appear in RCW 9.92.120; specifically, does the definition include deputies of county officers? The Court of Appeals below and

Respondents rely on the definition of “officer” and “public officer” in the Washington Criminal Code, RCW 9A.04.110(13), even though that definition is inapplicable by its terms to Title 9 RCW. *See Lee ex rel. Office of Grant County Prosecuting Attorney v. Jasman*, 183 Wn. App. 27, 47, 332 P.3d 1106 (2014) (stating RCW 9A.04.110(13) “undermines” the argument that a deputy coroner is not a public officer), *rev. granted*, — Wn. 2d —, 42 P.3d 327 (2015); *accord id.*, 183 Wn. App. at 63; Ans. to Pet. for Rev., at 10-13. The court properly recognizes that this definition is inapplicable by its terms. *See id.* at 47 (noting that the definition in RCW 9A.04.110(13) is limited to “this title,” i.e., Title 9A RCW).

Nonetheless, the court reasoned that the definition should apply in this case because a similar, but not identical, definition was adopted as part of the same enactment as RCW 9.92.120, notwithstanding the fact that the definition has subsequently been repealed. *See Lee*, 183 Wn. App. at 47; *see also* Laws of 1909, Ch. 249, § 51(24) (adopting definition of “public officer” that includes deputies); Laws of 1975, 1st Ex. Sess., Ch. 260, § 9A.92.010(1) (repealing “Section 51, chapter 249, Laws of 1909”).

While acknowledging the fact of repeal, the court does not address the effect of repeal. *See Lee*, at 55. The court’s reasoning is

flawed because the effect of repeal is to reinstate the common law as it existed prior to the enactment of the statute. *See Roberts v. Johnson*, 91 Wn. 2d 182, 182-83 & 188, 588 P.2d 201 (1978). It does not matter whether the repeal was intentional or inadvertent, because separation of powers prevents the courts from attempting to cure perceived errors in legislation. *See State ex rel. Hagen v. Chinook Hotel, Inc.*, 65 Wn. 2d 573, 576, 399 P.2d 8 (1965). It appears to be conceded by respondents that the common law definition of public office and officer does not include deputies of county officers. *See, e.g.*, Ans. to Pet. for Rev., at 10-12 (discussing *Nelson v. Troy*, 11 Wash. 435, 39 P. 974 (1895), and arguing that RCW 9A.04.110(13) “prevails over the common law definition contained in *Nelson*”); *see also State ex rel. McIntosh v. Hutchinson*, 187 Wash. 61, 63, 59 P.2d 1117 (1937) (approving *Nelson*).¹

In applying the repealed statutory definition of public officer and office, the Court of Appeals relied on a misreading of the decision in *State v. Korba*, 66 Wn. App. 66, 832 P.2d 1346 (1992). In *Korba*, the court applied the Washington Criminal Code

¹ *See also Lee*, 183 Wn. App. at 79 (Siddoway, J., dissenting; “The court should not have ignored ... the fact that the changes made by the 1975 legislature [in repealing the definition of “public officer”] limited the application of the broad statutory definition of ‘officer’ and ‘public officer’ to statutes that define criminal offenses”; ellipses & brackets added).

definition of “public officer” to the crime of misappropriation of a public record under RCW 40.16.020. That result was entirely appropriate because the Criminal Code specifically provides that its definitions and other provisions “are applicable to offenses defined by this title or another statute[.]” RCW 9A.04.090 (brackets added). However, the court below read *Korba* as illustrating that the definition of “public officer” in RCW 9A.04.110(13) extends beyond Title 9A, without recognition of any limits. *Lee*, 183 Wn. App. at 55 (brackets added). This reads too much into *Korba* and ignores the statutory limitations on definitions of terms in the Criminal Code. While the Criminal Code definition of “public officer” may extend beyond Title 9A RCW, it only extends to “offenses.” RCW 9A.04.090. It does not apply to RCW 9.92.120 because forfeiture of public office is not an “offense,” and quo warranto proceedings to enforce the statute are civil in nature. *See State ex rel. Zempel v. Twitchell*, 59 Wn. 2d 419, 430-31, 367 P.2d 985 (1962).

The Court should apply the common law definition of the undefined phrases “public office” and “public officer” in interpreting RCW 9.92.120, and hold that these phrases do not include deputies of county officers such as Jerry Jasman.

- B. When a county prosecutor files a lawsuit, and another county officer is the real party in interest, and the effect of the lawsuit is to impose limitations on the other county officer's ability to manage his or her coordinate branch of county government, the county officer should be entitled to appointment of a special prosecutor to defend his or her office.**

The superior court determined that Morrison, as the elected Grant County Coroner, is the real party in interest to this quo warranto proceeding because it interfered with his ability to hire deputies and employees and his authority to delegate tasks to them. *See* CP 290-91, 349-50 & 354. This ruling regarding Morrison's interest in the lawsuit formed part of the basis for the superior court's decision to disqualify the former prosecutor from the case. *See* CP 349-50 & 354. The prosecutor initially appealed the disqualification order, but that appeal was abandoned. *See* Reply Br., at 1-4. Morrison's status as the real party in interest in this lawsuit is therefore the law of the case. If he is not entitled to appointment of a special prosecutor to defend his office, then there is no effective way to address a prosecutor's interference in his coordinate branch of county government. Morrison is ultimately accountable to the voters for how he runs his office, but he should not be deprived of the ability to defend himself from such interference in the meantime.

While the circumstances presented in this case are unique, this Court has previously held that appointment of a special prosecutor is warranted when a county officer is the real party in interest. *See In re Lewis*, 51 Wn. 2d 193, 201, 316 P.2d 907 (1957); *see also Osborn v. Grant County*, 130 Wn. 2d 615, 625, 926 P.2d 911 (1996) (citing *Lewis* with approval); Reply Br., at 6-7 (quoting *Lewis*). Neither the Court of Appeals majority below, nor Respondents address this key holding in *Lewis*. *See Lee*, 183 Wn. App. at 53 (citing *Lewis* for the proposition that probation officers are county officers under RCW 36.27.020(2)). *But see id.* at 81-83 (Siddoway, J., dissenting; citing and discussing *Lewis* as authority for appointing special counsel in this case).

The Court should apply the rule of *Lewis* here and appoint a special prosecutor to defend Morrison. Since the appointment of a special prosecutor can no longer provide complete relief at this stage of proceedings, Morrison's reasonable attorney fees and costs should be recoverable as the equivalent. *See Nichols v. Snohomish County*, 109 Wn. 2d 613, 620, 746 P.2d 1208 (1987).

C. Morrison and Jasman should be entitled to attorney fees and costs incurred in obtaining dissolution of the permanent injunction.

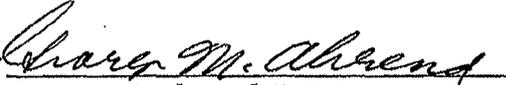
This Court has previously authorized recovery of attorney fees and costs as damages for wrongfully issued temporary injunctive relief. *See City of Seattle v. McCready*, 131 Wn. 2d 266, 273-74, 931 P.2d 156 (1997). The rationale is that a party enjoined has no choice but to litigate. *See id.*, 69 Wn. 2d at 277-78. The Court of Appeals has held that this rule and its rationale apply with equal force to an action resisting a final injunction. *See All Star Gas, Inc. v. Bechard*, 100 Wn. App. 732, 739, 998 P.2d 367 (2000). The Court should approve of *All Star Gas* and award reasonable attorney fees and costs to Morrison and Jasman to dissolve the injunction issued by the superior court.

IV. CONCLUSION

The Court should reverse summary judgment entered against Morrison and Jasman, dissolve the injunction issued against them, grant summary judgment in their favor, appoint their counsel as a special prosecutor, and award attorney fees and costs incurred in the superior court and on appeal.

Respectfully submitted this 6th day of March, 2015.

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By: 
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CERTIFICATE OF SERVICE

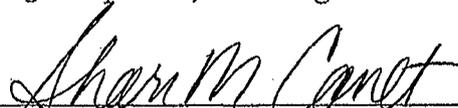
The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On March 6, 2015, I served the document to which this is annexed via email and First Class Mail, postage prepaid, as follows:

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Attached for filing please find Petitioners' Supplemental Brief. Thank you.

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