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NO. 95015-6

**SUPREME COURT OF THE
STATE OF WASHINGTON**

BNSF RAILWAY COMPANY, Respondent

v.

THOMAS B. CLARK, MD, Pierce County Medical Examiner, and
PIERCE COUNTY MEDICAL EXAMINER, Petitioners.

PETITIONERS' REPLY BRIEF

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I. ARGUMENT

Petitioner Pierce County Medical Examiner, Dr. Thomas Clark, makes this reply to the Brief of Respondent BNSF.

A. **THE ONLY WAY THE ISSUANCE OF THE WRIT OF PROHIBITION WAS NOT ERROR WAS IF DR. CLARK WAS CLEARLY AND INARGUABLY ACTING IN EXCESS OF HIS JURISDICTION**

A writ of prohibition is an extraordinary remedy. *Barnes v. Thomas*, 96 Wn.2d 316, 318 (1981). It is only available where the entity to which it is directed is clearly and inarguably acting in excess of its jurisdiction. *Barnes*, 96 Wn.2d at 318; *In re Jurisdiction of Exam'r.*, 135 Wn. App. 312, 318 (2006).

Unless Dr. Clark was clearly and inarguably acting outside his authority and jurisdiction, the court's issuance of the Writ of Prohibition was an abuse of discretion and error. Because Dr. Clark's issuance of the Subpoena to BNSF was not clearly in excess of his jurisdiction, the court's issuance of the writ was an erroneous abuse of discretion.

B. **THE SUPERIOR COURT'S RULING IMPLICATES THREE ISSUES AS SOURCES OF ERROR**

The Superior Court's grant of the writ of prohibition implicates three questions of law. First, what are the actions a coroner or medical examiner must take in order to validly convene a coroner's inquest? Second, does the grant of inquest subpoena authority by RCW 36.24.050

empower the medical examiner to subpoena documents and things?

Third, does the inquest subpoena authority only permit the coroner or medical examiner to present subpoenaed evidence directly to the inquest jury?

Here, the court entered no conclusions of law in support of its orders. It is therefore unclear which of these questions the Superior Court decided against Dr. Clark, so that it is left to this Court to address each of these issues.

In the Superior Court's Final Judgment, it entered judgment in favor of BNSF Railway Company and against Thomas B. Clark and the Pierce County Medical Examiner. CP 171. The Judgment made permanent, *nunc pro tunc*, the Alternative Writ of Prohibition entered on April 12, 2017. CP 171-172; 68-74. The Judgment was based upon the Court's August 21, 2017, Order Granting Petitioner BNSF Railway Company's Motion for Summary Judgment, as well as the April 12, 2017, Order Issuing the Alternative Writ of Prohibition, etc. CP 171; 165; 68-74.

The April 12, 2017, Order issuing Alternative Writ of Prohibition, etc., via the attached Alternative Writ of Prohibition, commanded the Pierce County Medical Examiner, Dr. Thomas Clark, to withdraw or not enforce the subpoena to BNSF. CP 74.

Petitioner Pierce County Medical Examiner, Dr. Thomas Clark, argues that the Superior Court erred in two ways when it entered its judgment, its order granting BNSF Railway Company's motion for summary judgment; and the order issuing the alternative writ of prohibition, etc.

1. **The Medical Examiner Properly Convened the Inquest So That the Court's Issuance of the Writ of Prohibition Was Error**

Under the plain language of the statute, the only requirement for a coroner or medical examiner to commence an inquest proceeding is that the coroner or medical examiner *notify* the superior court to provide persons to serve as jurors. RCW 36.24.020. That the notice to the court is the triggering action to commence an inquest is reinforced by the fact that jurors still have to be selected and summoned, and by the fact that the coroner or medical examiner may adjourn the inquest from time to time as he or she may deem necessary. RCW 36.24.020. This is further reinforced by the fact that, "[t]he inquest must take place within eighteen months of the coroner's request to the court." Indeed, this is particularly so in light of the broad discretionary authority the statutory scheme invests in the coroner or medical examiner. See *State ex rel. Lopez-Pacheco v. Jones*, 66 Wn.2d 199, 201 (1965) ("where statute grants an administrative officer discretionary authority, the burden of establishing arbitrary and

capricious conduct rests upon the party making the assertion; and where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration).

When Dr. Clark notified the court of his need for an inquest, he properly exercised his authority to commence the process and properly exercised his broad authority to issue subpoenas. His action was taken honestly and upon due consideration. It was not arbitrary and capricious, and was not done in excess of his jurisdiction. The court's grant of the extraordinary remedy of a writ of prohibition was therefore an abuse of discretion and error. The court's judgment and its order issuing the writ of prohibition should be reversed.

2. **The Medical Examiner's Inquest Subpoena Authority Includes the Authority to Subpoena Documents and Things**

Respondent argues that the statutory grant of inquest subpoena authority does not expressly include subpoena duces tecum authority to direct persons to produce documents and things, so that such authority is by implication excluded. Br. Resp. at 10-11, 14-19.

This argument fails because it ignores the fact that RCW 36.24.050 expressly provides that, "[a] witness served with a subpoena may be compelled to attend and testify [...] in like manner as upon a subpoena issued by a district court judge." Respondent fails to address this

provision, instead relying upon generalized authority from other jurisdictions that have construed subpoena authority narrowly in other circumstances.

Under CrRLJ 4.8(b), district court judges are granted authority to issue subpoenas *duces tecum*. The inclusion of the district court subpoena provision parallels RCW 36.24.160 which permits a district judge to act as a coroner if the office is vacant, or the coroner is absent or unable to attend. Given this, it would be absurd if Chapter 36.24 RCW deprived district judges acting as coroners of their ordinary authority to issue subpoenas. On the other hand, it would also lead to absurd results if a district judge had greater authority than a coroner when fulfilling the coroner's duties.

By granting the coroner the subpoena authority of a district judge, RCW 36.24.050 provides an express grant of authority to the coroner to issue subpoenas *duces tecum*. For that reason, Respondent's argument to the contrary is without merit.

Because the coroner or medical examiner has express authority to issue subpoenas *duces tecum*, Dr. Clark's issuance of the subpoena to BNSF was not done in excess of his jurisdiction, nor was it arbitrary and capricious. For that reason, the issuance of the writ of prohibition was an

abuse of discretion and error. The court's judgment and issuance of the writ of prohibition should therefore be reversed.

3. The Medical Examiner Was Not Required to Produce Subpoenaed Evidence Only to the Inquest Jury

Respondent argues that the inquest subpoena authority limits the medical examiner to only producing witnesses before the inquest jury. Br. Resp. at 13-14.

This argument is directly contrary to the plain language of RCW 36.24.050, which provides that, "[t]he coroner may issue subpoenas for witnesses returnable forthwith or at such time and place as the coroner may appoint."

Respondent's argument is also contrary to the generally broad grant of authority Chapter 36.24 gives to coroners and medical examiners with regard to the conduct of inquests. That broad grant is specifically referenced in the provisions argued in this reply. It is also evident by the general lack of the imposition of detailed or specific requirements by Chapter 36.24 RCW.

Dr. Clark's issuance of the subpoena to BNSF was done honestly and upon due consideration. It was not arbitrary and capricious, nor was it done in excess of his jurisdiction. For this reason, the extreme remedy of the issuance of a writ of prohibition was an abuse of the superior court's

discretion and error. For that reason, the court's judgment and order should be reversed.

C. THE MEDICAL EXAMINER'S RECORDKEEPING OBLIGATION IS RELEVANT TO THE ISSUES IN THIS CASE IN LIGHT OF RESPONDENT'S ARGUMENTS

Respondent argues that the Medical Examiner's recordkeeping obligations are irrelevant to this issue in this appeal. Br. Resp. 19-20. That argument is misplaced.

Respondent, both in the trial court motions and in the briefing to this Court, has repeatedly referred to the fact that Puyallup Police were satisfied with merely viewing the video. The implication of that repeated reference, which is otherwise irrelevant, is that if a mere viewing is good enough for the police, it should be good enough for the medical examiner. That implied argument, is however, without merit, which is perhaps why it is not asserted more expressly.

The role of a medical examiner differs from that of a law enforcement officer. The medical examiner performs a function of technical expertise that is completely different from the role of a law enforcement officer. This is so much the case that a forensic expert's recognition of a criminal cause of death that was unrecognized by law enforcement officers has become a trope of modern literature and media.

Consistent with his different role from that of law enforcement, the medical examiner has different duties and obligations. That includes specific record retention and preservation requirements of the information he considers. Such a broad requirement does not apply to law enforcement, whose record retention requirements are more limited.

For all the reasons argued in the Brief of Petitioner, merely viewing the video is not sufficient to permit Dr. Clark to meet his professional requirements. For this reason, this Court should decline Respondent's implicit argument that it should suffice for Dr. Clark to merely view the video and not obtain a copy of it.

Further, the Court should recognize that it would lead to absurd results if the Court were to accept Respondent's arguments. This is so because Respondent's argument would place the medical examiner in the untenable position of not being able to render a death determination due to incomplete evidence where he could not review evidence of which he could not obtain a copy without violating his record retention obligations. Dr. Clark recognizes that the law of Washington does not afford him a general subpoena authority, and that such authority only comes into being when an inquest is commenced. But for the reasons argued by Respondents, the inquest process does provide the medical examiner with

a statutorily authorized subpoena mechanism that permits him to satisfy his statutory requirements when he is otherwise unable to do so.

D. EVEN IF THIS COURT WERE TO AFFIRM THE SUPERIOR COURT, THE WRIT OF PROHIBITION DOES NOT PREVENT DR. CLARK FROM SUBSEQUENTLY ISSUING A SUBPOENA TO BNSF TO PRODUCE THE VIDEO TO THE INQUEST JURY

The writ of prohibition issued by the court directed Dr. Clark to withdraw or not enforce the subpoena issued to BNSF. CP 74. Nothing in that writ prohibits Dr. Clark from issuing a second subpoena to BNSF to appear and produce the video to the inquest jury once it is seated. If the Court were to for any reason uphold the lower court, in doing so it should also recognize that Dr. Clark retains the authority to later issue a second subpoena to appear and produce the video before the inquest jurors.

II. CONCLUSION

The inquest chapter provides broad discretionary authority regarding the conduct of inquests. That broad authority includes a grant of subpoena authority to coroners and medical examiners once an inquest is commenced. Under the plain language of the statute, an inquest was commenced when the medical examiner provided *notice* to the superior court of the need for jurors. Coroners or medical examiners have the subpoena authority of a district judge, which includes the authority to issue subpoenas *duces tecum*. The coroner or medical examiner also has

the authority to compel production at a time and place directed by the examiner so that the subpoena authority is not limited solely to production in front of the inquest jury.

For all these reasons, where Dr. Clark exercised his broad discretionary authority honestly and upon due consideration, he did not act arbitrarily and capriciously, nor did he act in excess of his jurisdiction. Therefore, when the court granted the extraordinary remedy of issuing the writ of prohibition it abused its authority and acted in error. For that reason, the court's order and judgment should be reversed.

Finally, nothing in the writ of prohibition precludes Dr. Clark from issuing a second subpoena requiring BNSF to produce the video before the inquest jury when it is seated.

DATED this 18th day of April, 2018.

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CERTIFICATE OF SERVICE

On April 18, 2018, I hereby certify that I electronically filed the foregoing PETITIONERS' REPLY BRIEF with the Clerk of the Court and I delivered a true and accurate copy pursuant to the e-service agreement of the parties to the following:

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