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CASE 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,

Appellants.

RESPONDENT BNSF RAILWAY COMPANY'S ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON ASSOCIATION OF CORONERS AND MEDICAL EXAMINERS

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I. INTRODUCTION

The Brief of Amicus Curiae, the Washington Association of Coroners and Medical Examiners ("WACME"), provides no additional support for the proposition that an inquest subpoena authorizes a coroner or medical examiner to compel production of documents. Rather, WACME for the first time raises the possibility that the inquest subpoena statute, RCW 36.24.050, actually applies much more broadly than asserted by Appellants Thomas Clark and the Pierce County Medical Examiner (collectively, the "PCME"). In its brief, WACME argues that RCW 36.24.050 should be interpreted to allow a coroner or medical examiner to subpoena anyone, at any time, regardless of whether an inquest has been convened. This assertion is flatly inconsistent with the language of the inquest subpoena statute, past practice, the PCME's own admissions in these proceedings, and basic tenets of statutory construction.

Moreover, such a strained interpretation would result in allowing coroners and medical examiners, who at times act in a law enforcement role, the unfettered right to issue subpoenas without due process and probable cause. Such a policy would necessarily infringe on the public's fundamental rights. If coroners and medical examiners want additional tools to do their jobs, including the right to compel the production of documents and witnesses, they must do so through the legislative process,

through which legislators, and all relevant interest holders, will have the opportunity to carefully weigh the important competing interests at stake, including the public's right to privacy, right to due process, and right to be free from unreasonable search and seizure.

II. ARGUMENT

A. AMICUS' ARGUMENT, WRITTEN BY APPELLANT, IS INCONSISTENT WITH APPELLANTS' OWN ADMISSIONS AND IMPROPERLY SEEKS TO ENLARGE THE ISSUES BEFORE THE COURT

Throughout this litigation, the PCME has taken the position that there was **no** general right for a coroner or medical examiner to issue a subpoena outside of the unique procedure for a "coroner's inquest." CP 118 (PCME's Motion for Summary Judgment at 9:10-13) ("[Inquests] are justified, where, as here, a medical examiner cannot otherwise obtain the evidence necessary to conduct a complete a death investigation. Under that circumstance, an inquest becomes necessary and justified as ***the only legal mechanism by which the medical examiner or coroner can obtain the evidence necessary for a death determination***.") (emphasis added); CP 161 (Supp. Decl. of Thomas Clark at ¶ 3) ("I believed that by sending the letter that notified the Superior Court Administrator of my intent to conduct an inquest, my subpoena authority thereby became effective."); CP 103, 104 (Alexis Krell, *Train death on video: Pierce Medical Examiner Battles with Railroad*, TACOMA NEWS TR. (April 22, 2017), https://www.thenewstribune.com/news/local/crime/article146185084.htm

("But [Thomas Clark] said he needed to open one to subpoena the railway video. 'That is the only place that the medical examiner is allowed to issue a subpoena,' Clark said. 'Normally we don't have to.'")

In spite of these admissions, WACME, in a brief written by the PCME's attorney, now requests that the Court ignore the PCME's admissions and hold that the inquest subpoena statute acts as a general subpoena statute, authorizing coroners and medical examiners to issue subpoenas whenever desired.[1] The Court should not consider this position, as it is flatly inconsistent with the position of the PCME and his prior admissions, and regardless, is not properly before the Court. *See, e.g.*, *People v. Archer*, 68 A.D.2d 441, 449, 417 N.Y.S.2d 507, 513 (1979), aff'd, 49 N.Y.2d 978, 406 N.E.2d 804 (1980) ("We would add that it is improper for the *amicus curiae* herein to raise issues and cite alleged errors which were never raised or cited by appellant either in the trial court or on appeal."); *State ex rel. Donaldson v. Hines*, 163 Kan. 300, 323, 182 P.2d 865, 880 (1947) ("The acts were referred to in a supplemental brief filed by a counsel amicus curiae but it would be highly improper for the

[1] As disclosed by WACME itself, counsel for PCME assisted in the drafting of WACME's Brief. WACME's Motion for Leave to File Amicus Curiae Brief, p.3. While this is not "improper" *per se* (*Duronslet v. Cty. of Los Angeles*, No. 216CV08933, 2017 WL 5643144, at *2 (C.D. Cal. Jan. 23, 2017)), the position taken in this brief should be viewed with skepticism, particularly where it is inconsistent with the PCME's own positions.

court to pass upon questions which were not within the issues and consequently not briefed by counsel for all parties.”).

Moreover, as fully discussed below, even were the issue properly before the Court, WACME’s position is inconsistent with the inquest subpoena statute itself, basic tenets of statutory construction, and sound public policy. Adopting the WACME’s interpretation would result in a substantial infringement of the public’s rights.

B. THERE IS NO GENERAL RIGHT FOR CORONERS TO ISSUE SUBPOENAS, LET ALONE TO SUBPOENA DOCUMENTS

WACME seeks to enlarge a coroner’s very limited right to compel testimony in an inquest proceeding by arguing that the inquest subpoena statute, RCW 36.24.050, should be construed to provide *all* coroners and medical examiners a general right of subpoena to anyone at any time. In making this suggestion, WACME offers no evidence or argument that any coroner or medical examiner has *ever* used a subpoena in such a manner, let alone cites any legal authority supporting such a use.[2]

Rather, WACME claims that because RCW 36.24.050 does not specifically mention the inquest (only the jury), the statute should be read to broadly delegate a general subpoena power to all coroners and medical

[2] The only cases citing to RCW 36.24.050 all solely address inquest proceedings. *State ex rel. Sowers v. Olwell*, 64 Wn. 2d 828, 828, 394 P.2d 681, 682 (1964); *Carrick v. Locke*, 125 Wn. 2d 129, 133, 882 P.2d 173, 176 (1994); *Miranda v. Sims*, 98 Wn. App. 898, 903, 991 P.2d 681, 684 (2000).

examiners, regardless of whether such subpoena is part of an inquest proceeding. This is inconsistent with the express text of RCW 36.24.050, with the context of the overall coroner's inquest statutes, and with basic tenets of statutory construction.

In determining the meaning of a statute, the Court interprets the plain language of the statute considering "the text of the provision, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole." *Blomstrom v. Tripp*, 189 Wn. 2d 379, 390, 402 P.3d 831, 837 (2017) (internal citations omitted). *See also Assoc. of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn. 2d 342, 351, 340 P.3d 849, 854 (2015) ("When we interpret a statute, we look to its placement within the entire statutory scheme."); *State Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn. 2d 1, 11, 43 P.3d 4, 10 (2002) ("meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.").

Here, the inquest subpoena statute, RCW 36.24.050, lies directly in the middle of a series of laws all directly regulating the procedures and use of a coroner's inquest. *See* RCW 36.24.020 to RCW 36.24.100. It simply makes no sense that a broad-based subpoena power would be placed between a section regarding the duty of a coroner's jury (RCW 36.24.040)

and a section regarding the form of a coroner's jury verdict (RCW 36.24.070).

Further, the inquest subpoena statute itself expressly provides that "The coroner must ***summon and examine as witnesses, on oath administered by the coroner, every person, who, in his or her opinion or that of any of the jury, has any knowledge of the facts.***" RCW 36.24.050 (emphasis added). While WACME argues that this language contains no explicit limitations to inquests, there is no other context outside of an inquest in which a coroner would summons and examine "every person" with potential knowledge "on oath." *See, e.g.*, RCW 36.24.020 (detailing purpose of inquest procedure conducted by coroner). If WACME's interpretation were accepted and this statute were intended to be generally applicable, then the plain language of RCW 36.24.020 would mandate that <u>every</u> coroner be <u>required</u> to "summons and examine" every person with knowledge, <u>under oath</u>, in <u>every</u> single investigation. That simply does not happen, nor could it practically be accomplished outside the context of the inquest procedure. *See, e.g.*, *State v. Barbee*, 187 Wn. 2d 375, 389, 386 P.3d 729, 736 (2017), as amended (Jan. 26, 2017) ("When engaging in statutory interpretation, the court must avoid constructions that yield unlikely, absurd or strained consequences.") (internal citations and quotations omitted); *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.

2d 398, 410, 341 P.3d 953, 959 (2015) (rejecting interpretation that would result in absurd results of citizen being able to personally issue orders with the same authority as a subpoena and require the appearance of other citizens to answer questions, in lieu of attorney general).

Moreover, and as detailed more fully in Respondent's Brief, a limited and tailored reading of the inquest subpoena statute is particularly appropriate here, given that subpoena power is narrowly construed, and the ability to compel shall not be implied absent express legislative intent. *See, e.g.*, *Cudahy Packing Co. of Louisiana v. Holland*, 315 U.S. 357, 366, 62 S. Ct. 651, 656, 86 L. Ed. 895 (1942) ("subpoena power shall be delegable only when an authority to delegate is expressly granted."); *In re Strauss*, 30 A.D. 610, 613, 52 N.Y.S. 392, 394 (App. Div. 1898) ("respondents must show some 'clear affirmative power' conferred by the statute" for power to compel production).

C. BNSF'S CONCERNS REGARDING RISKS OF FINDING IMPLIED RIGHT TO COMPEL DOCUMENTS IS AMPLIFIED BY WACME'S POSITION

As set forth in detail in BNSF's Respondent's Brief, the inquest subpoena rights set forth in RCW 36.24.050 are limited to the ability to compel testimony, and the separate right to compel documents may not be implied. Resp. Br. 14-18.

Although WACME merely incorporates the PCME's arguments against BNSF's position with respect to documents, WACME's claim that such an implied right should be found for *all* coroners and medical examiners, under any circumstance, highlights the dangers of both WACME's and the PCME's positions.

Notably, coroners and medical examiners may act as law enforcement professionals in certain conditions. RCW 36.24.010. "The coroner shall perform the duties of the sheriff in all cases where the sheriff is interested or otherwise incapacitated from serving; and whenever the coroner acts as sheriff he or she shall possess the powers and perform all the duties of sheriff, and shall be liable on his or her official bond in like manner as the sheriff would be, and shall be entitled to the same fees as are allowed by law to the sheriff for similar services." *Id.* WACME's position is that coroners and medical examiners would have subpoena power, even when they are acting in a law enforcement capacity, thereby working around standard warrant and probable cause requirements. *See, e.g.*, Cr.R. 2.3(c) ("A search warrant may be issued only if the court determines there is probable cause for the issuance of a warrant."); RCW 10.79.035(3) ("If the magistrate finds that probable cause for the issuance of a warrant exists, the magistrate must issue a warrant . . . .")

Even in instances where the coroner or medical examiner is not acting as a sheriff, allowing the completely unfettered ability to compel the production of documents and things certainly may infringe on the

public's constitutional rights. *See* Const. art. 1, § 7; U.S. CONST. amend. IV. Such constitutional concerns are compounded by the lack of due process, as there is no procedure available to challenge the issuance of such a subpoena.

Rather, per the express terms of the statute itself, the coroner or medical examiner herself is the individual responsible for enforcing the subpoena. *See* RCW 36.24.050 ("A witness served with a subpoena may be . . . punished ***by the coroner*** for disobedience, in like manner as upon a subpoena issued by a district judge.") (emphasis added). As demonstrated by the instant case, the sole means to address overreach, insufficiency, privacy, or other constitutional concerns regarding a subpoena issued by a coroner or medical examiner is through filing a writ of prohibition, the burden and cost of which is substantial, and beyond the means of many, if not most, members of the public.

D. WACME ALSO SEEKS A BACKDOOR TO USE INQUEST SUBPOENAS FOR IMPROPER PURPOSES

In apparent recognition of the fact that RCW 36.24.050 likely applies solely to inquest proceedings, WACME also urges that the Court "should not hold that [the PCME] is bound to conduct the inquest to conclusion." Amicus Br. at 6. In essence, WACME is urging that the PCME should be allowed to use the specialized procedures reserved for inquest proceedings to obtain information, and then be able to stop those

proceedings and use that information for whatever purpose it deems appropriate. Such gamesmanship with respect to the public's right to privacy and right to be free of unreasonable search is improper. *See* Resp. Br. 11-13.

That is not to say that there are not circumstances where stopping a coroner's inquest once it has begun may be proper and appropriate, and within a coroner's *reasonable* discretion. BNSF does not take a position on that issue. However, the use of such a bait and switch tactic, specifically to avoid express limitations on the use of subpoenas, is manifestly improper and an abuse of any reasonable discretion afforded a coroner or medical examiner.

III. CONCLUSION

WACME asks this Court to consider an issue far broader than the one before it and to hold that coroners and medical examiners have a general right to issue subpoenas. Not only is that issue flatly inconsistent with the PCME's position in this proceeding and not before this Court, but it is also inconsistent with the statute itself and with basic tenets of statutory construction. Moreover, WACME's position further demonstrates the substantial risks associated with the PCME's position that its limited subpoena right should include an implied right to compel documents. Such a right, particularly where, as here, there is no method to challenge a subpoena, would present a substantial infringement on the

public's rights. BNSF respectfully requests that the Court affirm the Superior Court's issuance of its writ of prohibition.

Dated October 22, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I am over the age of 18 and not a party to this action. I am the assistant to an attorney with Montgomery Scarp & Chait, PLLC, whose address is 1218 Third Avenue, Suite 2500, Seattle, Washington, 98101.

I hereby certify that I electronically filed the foregoing *RESPONDENT BNSF RAILWAY COMPANY'S ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON ASSOCIATION OF CORONERS AND MEDICAL EXAMINERS* with the Clerk of the Court, and I delivered a true and accurate copy pursuant to the e-service agreement of the parties to:

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DATED this 22nd day of October, 2018, at Seattle, Washington.

s/Pamela Ruggles____
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