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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.

BRIEF OF RESPONDENT BNSF RAILWAY COMPANY

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ISSUES PRESENTED FOR REVIEW3

III. STATEMENT OF THE CASE4

A. FACTS OF THE CASE4

1. THE TRESPASSER FATALITY AND INVESTIGATION4

2. THE PIERCE COUNTY MEDICAL EXAMINER’S
INVESTIGATION5

3. THE PIERCE COUNTY MEDICAL EXAMINER’S
“INQUEST” SUBPOENA6

4. THE PIERCE COUNTY MEDICAL EXAMINER’S
FAILURE TO OPEN AN “INQUEST” 7

B. PROCEDURAL POSTURE8

IV. STANDARD OF REVIEW9

V. ARGUMENT 10

A. THE COURT DID NOT ABUSE ITS DISCRETION IN
GRANTING BNSF’S WRIT OF PROHIBITION WHERE
APPELLANT LACKED AUTHORITY TO ISSUE A
SUBPOENA WITHOUT “CONVENING” AN INQUEST10

B. THE COURT DID NOT ABUSE ITS DISCRETION IN
GRANTING BNSF’S WRIT OF PROHIBITION WHERE
APPELLANT SOUGHT TO HAVE WITNESS APPEAR
OUTSIDE THE PRESENCE OF THE JURY.13

C. THE COURT DID NOT ABUSE ITS DISCRETION IN
GRANTING BNSF’S WRIT OF PROHIBITION WHERE
APPELLANT LACKED STATUTORY AUTHORITY TO
COMPEL PRODUCTION OF DOCUMENTS AND THINGS.....14

D. WHETHER THE PCME IS REQUIRED TO KEEP A PHYSICAL COPY OF VIDEO REVIEWED UNDER THE PUBLIC RECORDS ACT IS NOT AT ISSUE BEFORE THE COURT AND BEARS NO RELEVANCE TO THE ISSUES IN THIS APPEAL	19
VI. CONCLUSION	20

TABLE OF AUTHORITIES

STATUTES

RCW 9.95.123 16
RCW 10.27.140 15
RCW 20.01.170 16
RCW 36.24.010 3, 18
RCW 36.24.020 11, 12, 14
RCW 36.24.020-36.24.100 2, 3, 6, 10, 13
RCW 36.24.050 2, 7, 10, 11, 14, 15
RCW 41.50.137 16
RCW 42.17.360 16
RCW 74.04.290 16
RCW 82.41.080 16

RULES

CR 45 15
CrR 4.8 16

CASES

Chambers v. Oehler
107 Iowa 155, 77 N.W. 853 (1899) 12
City of Auburn v. Gauntt
174 Wn. 2d 321, 331–32, 274 P.3d 1033, 1038 (2012) 19
City of Erie v. Cappabianca
879 A.2d 823, 828 (Pa. Commw. Ct. 2005) 17
Cudahy Packing Co. of Louisiana v. Holland
315 U.S. 357, 62 S. Ct. 651, 86 L. Ed. 895 (1942) 17
Ex parte Peart
5 Cal. App. 2d 469, 43 P.2d 334 (1935) 12

<i>In re Blake's Estate</i>	
51 Misc. 2d 42, 272 N.Y.S.2d 597 (Sur. 1966).....	12
<i>In re Det. of Hawkins</i>	
169 Wn. 2d 796, 238 P.3d 11758 (2010)	19
<i>In Re: Jurisdiction of Exam'r</i>	
135 Wn. App. 312, 144 P.3d 345 (2006)	9
<i>In re Strauss</i>	
30 A.D. 610, 52 N.Y.S. 392 (App. Div. 1898).....	17, 18
<i>State v. Engle</i>	
50 Wn. 207, 96 P. 1045 (1908)	20
<i>State v. Larson</i>	
184 Wn. 2d 843, 365 P.3d 740 (2015)	18
<i>State v. McGill</i>	
230 W. Va. 569, 741 S.E.2d 127 (2013)	12
<i>United States v. Thomas</i>	
320 F. Supp. 527 (D.D.C. 1970)	18

OTHER SOURCES

Black's Law Dictionary (10 th ed. 2014)	15
John D. Howard, MD, <i>Why Modern Medical Examiners Don't Hold</i> <i>Inquests</i> (February 2013), available at https://www.spokanecounty.org/834/Why-Modern-Medical- Examiners-Dont-Hold-I	6, 10

I. INTRODUCTION

Appellants seek review of the Pierce County Superior Court's Order granting BNSF Railway Company's ("BNSF") Petition for Writ of Prohibition prohibiting the Pierce County Medical Examiner ("PCME") from enforcing a legally deficient subpoena purporting to compel production of BNSF locomotive video of a trespasser fatality.

Both before and after the issuance of the PCME's legally deficient subpoena, BNSF repeatedly offered to show the PCME the video at issue, wherever convenient for the PCME or his staff, whenever convenient for the PCME or his staff, and as many times as the PCME or his staff needed or wanted. However, BNSF declined to provide the PCME with physical copies of its video to keep. Because of unfortunate past experiences, BNSF generally does not provide physical copies of locomotive videos of trespasser fatalities due to concerns regarding distribution of the videos on internet sites such as YouTube, and privacy concerns for decedents, their families, and the involved train crews.

Dissatisfied with merely viewing the footage as often as needed, as the involved local law enforcement chose – and was content – to do, the PCME opted to force BNSF's hand by purporting to issue an "inquest subpoena." Under state law, a coroner may forfeit his right to make a cause of death determination, and instead cede that power to the jury by

use of arcane statutory procedure called an “inquest.” RCW 36.24.020-36.24.100. Once that procedure is convened, the coroner has the statutory authority to issue subpoenas “to compel witnesses to appear and testify” before the inquest jury. RCW 36.24.050. There is no statutory authority for a coroner to compel the production of documents and things.

Here, the PCME issued the “inquest subpoena” without having actually convened inquest proceedings. Rather, the PCME included an unregistered “inquest” cause number and wrote to the Superior Court Clerk explicitly telling him *not* to secure a courtroom or jury. Regardless of his motivation or intent, the failure to follow the proper statutory requirement to convene an inquest, and cede his power to an inquest jury, is fatal to the PCME’s ability to use any of the articulated statutory “inquest” powers, including the authority to issues subpoenas for witnesses to appear and testify.

More fundamentally, even had the PCME followed the appropriate procedure to convene inquest proceedings, the subpoena would still be deficient, as it seeks to compel the production of documents and things. A medical examiner’s authority in inquest proceedings is limited to issuing subpoenas to compel the appearance and testimony of witnesses. Unlike myriad other statutes in Washington, which expressly afford a government

official the power to subpoena documents and things, the inquest statutes do not afford coroners or medical examiners such rights.

In purporting to issue a subpoena for production of a private party's personal property without any statutory authority to do so, the PCME grossly overreached his narrowly-prescribed power. This play was particularly egregious in the context of a Medical Examiner, who also possesses the statutory power to act as a sheriff in certain circumstances. RCW 36.24.010. Such a grave overreach of power is ripe for abuse and cannot be tolerated.

Accordingly, BNSF respectfully requests that the Court affirm the Pierce County Superior Court's Order granting BNSF's writ of prohibition and quashing the PCME's deficient subpoena.

II. ISSUES PRESENTED FOR REVIEW

The issues presented for review are:

1. Did the Court abuse its discretion in granting the Writ of Prohibition barring enforcement of a purported "coroner's inquest" subpoena where the PCME failed to follow the statutory prerequisites to commence an "inquest" under RCW 36.24.020 *et seq.*?

2. Did the Court abuse its discretion in granting the Writ of Prohibition, barring enforcement of a purported “coroner’s inquest” subpoena where the PCME sought BNSF’s appearance outside the presence of the inquest jury?
3. Did the Court abuse its discretion in granting a Writ of Prohibition barring the enforcement of a purported “coroner’s inquest” subpoena where the agency sought to compel production documents and things from a private party without explicit statutory authorization to do so?

III. STATEMENT OF THE CASE

A. FACTS OF THE CASE

1. THE TRESPASSER FATALITY AND INVESTIGATION

On February 5, 2017, at approximately 9:30 p.m., a BNSF train was traveling through Puyallup, Washington, during heavy snow. CT 3 at ¶ 3.1. A trespasser was on the railroad tracks facing the oncoming train. *Id.* Sadly, the train struck and killed the trespasser as he appeared to start stepping off of the tracks. *Id.*

According to Puyallup Police Department officers at the scene, there were three witnesses who all told the same story – that the BNSF train was blowing its whistle trying to get the person’s attention, but that

he did not respond in time to get out of the way. CT 33 at ¶ 2. The lead locomotive of the train was equipped with a video camera, which captured the incident. CT 33 at ¶ 3. The recording was secured by the BNSF evidence preservation team. *Id.* At their request, the locomotive video was shown to the Puyallup Police Department officers, who, after viewing it several times, concluded that “[i]t appeared this was not a suicide attempt due to [decedent] trying to remove himself from the tracks prior to be struck [sic].” CT 33 at ¶ 4, CT 43.

2. THE PIERCE COUNTY MEDICAL EXAMINER’S INVESTIGATION

On February 8, 2017, just one day after Puyallup police officers had satisfied themselves with repeated viewings of BNSF’s video, the PCME requested a copy of the locomotive video. CT 33 at ¶ 5. BNSF, in accordance with its policy regarding locomotive video, explained to the PCME that in the era of social media and YouTube, BNSF does not release such locomotive videos to protect the privacy of the decedent, his or her family, and the BNSF crewmembers involved in the tragedy. *Id.* BNSF further explained, however, that it retains the video for 40 years, and that it would make the locomotive video available to the PCME and his office for viewing anytime, anywhere, as many times as the PCME would like to view it. *Id.* The PCME refused the offer. CT 33-34 at ¶ 5-8.

3. THE PIERCE COUNTY MEDICAL EXAMINER'S
"INQUEST" SUBPOENA

On March 17, 2017, BNSF was served with what purported to be an "Inquest Subpoena" issued by the "Pierce County Medical Examiner." CT 63-65. A "coroner's inquest" is a specific statutory procedure to allow a jury to determine the cause of death, rather than the coroner or medical examiner. See RCW 36.24.020 *et seq.* Its use in modern death investigations, however, is exceedingly rare. See, e.g., John D. Howard, MD, *Why Modern Medical Examiners Don't Hold Inquests* (February 2013), available at <https://www.spokanecounty.org/834/Why-Modern-Medical-Examiners-Dont-Hold-I> ("Modern death investigation techniques, modern medical knowledge, and modern forensic sciences (all used currently by forensic pathologists serving as medical examiners) long ago replaced the coroner's inquest: Villagers standing around a dead body and being asked by a coroner if anyone knew who the dead person was and how the person came to his or her death."). The current PCME, Dr. Clark, has never used this procedure during his nearly 10 years in the office. CT 103.

Because of the unique historical nature of a Coroner's Inquest, once they have commenced an inquest, the Coroner or Medical Examiner conducting the inquest is provided with additional powers beyond the

limited powers typically afforded a Coroner or Medical Examiner under state law once they have commenced the inquest. These include the power to subpoena witnesses “to appear and testify.” RCW 36.24.050.

Rather than demand appearance of a witness to testify, the “Inquest Subpoena” issued by the PCME demanded that BNSF provide the PCME with a copy of “[a]ll photographs, film, or video” of the incident involving the decedent by 2:00 p.m. March 31, 2017. CT 63-65. The “Inquest Subpoena” bore the “Cause Number” 2017-0326, and purported to be issued under the authority of “RCW 36.24.050 and CR45/CRLJ 45.” *Id.*

4. THE PIERCE COUNTY MEDICAL EXAMINER’S FAILURE TO OPEN AN “INQUEST”

Given that there was no online record of the “cause number” printed on the subpoena, BNSF requested that the PCME “confirm that an inquest has been convened by the medical examiner,” and that, pursuant to RCW 36.24.020, the medical examiner has “notif[ied] the Superior Court to provide persons to serve as a jury of inquest to hear all the evidence concerning the death and to inquire into and render a true verdict on the cause of death.” CT 26.

In response, the PCME provided BNSF with a copy of a memorandum that the PCME had sent to Court Administrator Gaddis, which provided, only, that: “Pursuant to RCW 36.24.020, please be

advised that I am opening an inquest concerning the February 5, 2017 death of [decedent] in Puyallup, Washington. Until further notice, however, Superior Court is not requested to provide persons to serve as a jury of inquest, nor to schedule a courtroom or related services, because my office is still gathering evidence concerning this matter. You will be advised when the status changes.” CT 26-28 (emphasis added).

B. PROCEDURAL POSTURE

On March 31, 2017, BNSF filed its Petition for Writ of Mandamus and Writ of Prohibition in Pierce County Superior Court. On April 12, 2017, the court entered a preliminary “Order Issuing Alternative Writ of Prohibition and Setting Date for Show Cause.” CT 68-76. The Order called for the clerk to issue a writ of prohibition and required the PCME to provide notice of his intent to contest the writ. *Id.* On April 28, 2017, the PCME filed an answer to the petition and provided notice of intent to contest the writ. CT 77-84.

The parties agreed that under the circumstances of the case, the appropriate vehicle to address the ongoing dispute was for the parties to file cross-motions for summary judgment. CT 85-162. At the June 9, 2017, hearing, the parties presented argument. Following the argument, the Superior Court deferred ruling on the matter to permit the parties an

opportunity to reach a mutually-agreeable resolution of the matter, if possible, without the court's further involvement. CT 164. The parties were unable to do so.

By Order dated August 21, 2017, the Superior Court granted BNSF's motion for summary judgment in full, ordering that "a writ of prohibition requiring Dr. Clark to withdraw or not enforce the subpoena to BNSF Railway Company referenced in the Petition for Writ of Prohibition shall be issued." CT 168. The Court issued its final Order was on October 2, 2017. CT 171-72. The PCME filed this appeal. CT 166.

IV. STANDARD OF REVIEW

"Writs of prohibition are reviewed for abuse of discretion, and reviewing courts consider 'the character and function of the writ of prohibition together with all the facts and circumstances shown by the record.'" *In Re: Jurisdiction of Exam'r*, 135 Wn. App. 312, 318, 144 P.3d 345 (2006) (quoting *City of Olympia v. Bd. of Comm'rs*, 131 Wn. App. 85, 91, 125 P.3d 997 (2005)). A writ of prohibition is proper where (1) it appears the body to whom it is directed is about to act in excess of its jurisdiction; and (2) the petitioner does not have a plain, speedy, and adequate remedy in the ordinary course of law. *Id.*

V. ARGUMENT

A. **THE COURT DID NOT ABUSE ITS DISCRETION IN GRANTING BNSF'S WRIT OF PROHIBITION WHERE APPELLANT LACKED AUTHORITY TO ISSUE A SUBPOENA WITHOUT "CONVENING" AN INQUEST**

As set forth above, a "coroner's inquest" is a specific statutory procedure to allow *a jury* to determine the cause of death, *rather than the coroner or medical examiner*. See RCW 36.24.020 *et seq.* Its use in modern death investigations is exceedingly rare, because "[m]odern death investigation techniques, modern medical knowledge, and modern forensic sciences (all used currently by forensic pathologists serving as medical examiners) long ago replaced the coroner's inquest: Villagers standing around a dead body and being asked by a coroner if anyone knew who the dead person was and how the person came to his or her death." John D. Howard, MD, *Why Modern Medical Examiners Don't Hold Inquests* (February 2013), available at <https://www.spokanecounty.org/834/Why-Modern-Medical-Examiners-Dont-Hold-I>. In his nearly 10 years as Pierce County's medical examiner, Dr. Clark has *never* used this procedure, likely because he, for good reason, wants to maintain control over cause of death investigations, given that he has specific expertise in medical pathology.

Because of the unique historical nature of a Coroner's Inquest, the Coroner or Medical Examiner conducting the inquest is provided with additional powers beyond the limited powers typically afforded a Coroner or Medical Examiner in conducting their own investigation under state

law. These include the power to subpoena witnesses “to appear and testify on oath administered by the coroner.” RCW 36.24.050. As set forth in Section V(C), *infra*, even where a Coroner has the power to compel witness testimony, the statute does not afford a corresponding right to compel the production of documents and things.

A prerequisite to the granting of this witness subpoena power, however, is actually “convening” an inquest. *See* RCW 36.24.020, 36.24.050. In order to “convene” the inquest procedure, the authorizing statute, RCW 36.24.020, requires that a coroner “shall notify the superior court to provide persons to serve as a jury of inquest to hear all the evidence concerning the death and to inquire into and render a true verdict on the cause of death.” *Id.* (emphasis added).

Such statutory notification did not occur here. Rather, the PCME attempted to obtain the special powers associated with inquests, without actually convening an inquest and ceding the PCME’s power to determine cause of death to the inquest jury.

Specifically, on March 14, 2017, Dr. Clark wrote to Chris Gaddis, the Pierce County Superior Court Administrator. CT 28. This letter makes the PCME’s efforts to bypass the statutory requirements patently clear. In it, the PCME states that he is “opening an inquest,” but then directs that “[u]ntil further notice, however, Superior Court is not requested to provide persons to serve as a jury of inquest, nor to schedule a courtroom or

related services, because my office is still gathering evidence concerning this matter.” *Id.* (emphasis added).

This memo is insufficient, under the express and mandatory terms of RCW 36.24.020, which requires that the PCME “shall notify the superior court *to provide* persons to serve as a jury of inquest to hear all the evidence concerning the death and to inquire into and render a true verdict on the cause of death” in order to initiate convening the “inquest.” While a coroner may “adjourn the inquest from time to time as he or she may deem necessary,” RCW 36.24.020, the existence of an actual proceeding (which cedes the power away from the PCME and to an inquest jury) is a fundamental prerequisite to any of the special rights afforded the inquest proceedings, including the limited right to subpoena witnesses. *See, e.g., State v. McGill*, 230 W. Va. 569, 741 S.E.2d 127 (2013) (trial court has no authority to issue a subpoena where there is no proceeding or action before it.); *In re Blake's Estate*, 51 Misc. 2d 42, 44, 272 N.Y.S.2d 597, 599 (Sur. 1966) (“nor can a court issue a subpoena where there is no proceeding or action before it . . .”); *Ex parte Peart*, 5 Cal. App. 2d 469, 476, 43 P.2d 334, 337 (1935) (“There being no case pending in this instance, the justice had no authority to issue a subpoena for a witness”); *Chambers v. Oehler*, 107 Iowa 155, 77 N.W. 853, 854

(1899) (“There being no case pending in this instance, the justice had no authority to issue a subpoena for a witness”).

The PCME cannot have his cake and eat it too. The legislature has not afforded a medical examiner a general subpoena power to compel witnesses. The legislature has not afforded such power as a means to investigate *whether* the PCME needs to convene an inquest, as a means to obtain evidence for his own cause of death determination, nor for any other purpose. Rather, the *only* time the PCME may actually issue a subpoena of any sort is where he has properly convened an inquest proceeding, and actually ceded his cause-of-death-determination authority to an inquest jury. RCW 36.24.020-36.24.100. The PCME’s attempts to issue a subpoena outside of this narrow circumstance is an errant abuse of power and a violation of private parties’ privacy and property rights.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN GRANTING BNSF’S WRIT OF PROHIBITION WHERE APPELLANT SOUGHT TO HAVE WITNESS APPEAR OUTSIDE THE PRESENCE OF THE JURY.

In his purported “inquest subpoena,” the PCME did not even pretend that the appearance he sought was for an inquiry jury. The express terms of the subpoena required an appearance outside the presence of the inquest jury. CP 63-65. This is impermissible. While an inquest subpoena may be “returnable forthwith or at such time and place as the coroner may

appoint,” such testimony must be for the inquest jury to consider and may not be for any other purpose. *See* RCW 36.24.020 (an inquest jury is empaneled “to hear *all* the evidence concerning the death and to inquire into and render a true verdict on the cause of death.”) (emphasis added).

C. THE COURT DID NOT ABUSE ITS DISCRETION IN GRANTING BNSF’S WRIT OF PROHIBITION WHERE APPELLANT LACKED STATUTORY AUTHORITY TO COMPEL PRODUCTION OF DOCUMENTS AND THINGS.

Once a medical examiner commences a “coroner’s inquest” in conformity with the statutory requirements, which, as set forth above, the PCME did not do, the statute only affords the medical examiner the right to subpoena “*witnesses*” before the “inquest jury,” i.e., to compel testimony. The statutory grant conspicuously contains *no* right to compel production or inspection of documents, videos, or other private property. *See* RCW 36.24.050 (emphasis added). Specifically, the statutory authorization provides, in full:

Power to summon witnesses—Subpoenas: The coroner may issue *subpoenas for witnesses* returnable forthwith or at such time and place as the coroner may appoint, which may be served by any competent person. 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. A witness served with a subpoena may be compelled to *attend and testify*, or be punished by the coroner

for disobedience, in like manner as upon a subpoena issued by a district judge.

36.24.050 (emphasis added).

The term “subpoena” is defined as “[a] writ or order commanding *a person to appear* before a court or other tribunal, subject to a penalty for failing to comply.” *Subpoena*, Black’s Law Dictionary (10th ed. 2014) (emphasis added); *compare Subpoena Duces Tecum*, Black’s Law Dictionary (10th ed. 2014) (“subpoena ordering the witness to appear in court *and to bring specified documents, records, or things.*”) (emphasis added).

The statute authorizing a coroner or medical examiner to issue a subpoena for witness testimony *does not* include any reference to a subpoenas *duces tecum*, nor to any other authorization compelling a witness to produce documents or things.

This stands in stark contrast to countless other statutory grants of subpoena power in Washington State, which expressly afford the right to compel both “witnesses” *and* the production of “evidence” or “documents [and] tangible things.” *See, e.g.*, RCW 10.27.140 (grand jury subpoena: “[a] public attorney . . . may issue legal process and subpoena to compel [a witness’s] attendance *and the production of evidence.*”) (emphasis added); CR 45(a)(1)(c) (civil subpoena: “subpoena shall . . . command each person

to whom it is directed . . . to produce and permit inspection and copying of designated books, documents or tangible things . . .”) (emphasis added); CrR 4.8(b) (criminal subpoena: expressly providing for “a subpoena commanding a person to produce and permit inspection and copying of designated documents, tangible things, or premises.”) (emphasis added); RCW 42.17.360(5) (granting the Washington State Public Disclosure Commission authority to subpoena documents and things); RCW 74.04.290 (granting the Washington State Department of Social and Health Service the right to “compel the production of such papers, books, records and documents as they may deem relevant to the performance of their duties.”) (emphasis added); RCW 9.95.123 (granting the Indeterminate Sentence Review Board authority to “issue subpoenas for the compulsory attendance of witnesses and the production of evidence for presentation at such hearings.”) (emphasis added); RCW 20.01.170 (granting Washington State Department of Agriculture authority to “issue subpoenas to compel the attendance of witnesses, and/or the production of books or documents, anywhere in the state.”) (emphasis added); RCW 41.50.137 (granting authority to “issue subpoenas to compel the statement of witnesses and the production of any books, records, or documents necessary or relevant to the department's administration of duties under this chapter.”) (emphasis added); RCW 82.41.080 (granting Department of

Licensing authority to “require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the director deems relevant or material to the inquiry.”) (emphasis added).¹

It is long established 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.”); *City of Erie v. Cappabianca*, 879 A.2d 823, 828 (Pa. Commw. Ct. 2005) (“The reference in the Charter to the Council's authority to ‘otherwise investigate’ cannot be construed as a grant of subpoena authority.”) In deciding a nearly identical issue more than a century ago, the New York Court of Appeal held that where there was “nothing to indicate that the power was given to a justice of the supreme court to issue any other subpoena, or to require a witness to produce before a commissioner any books or papers, or to do anything else than appear and testify,” “respondents must show some ‘clear affirmative power’ conferred by the statute.” *In re Strauss*, 30 A.D. 610, 613, 52 N.Y.S. 392, 394 (App. Div. 1898). Given the lack of such statutory grant, the court found “such power

¹ In the interest of space, this is only a partial list of statutory grants in Washington State which expressly provide for compelling production of documents and things.

does not exist, that the subpoena was unauthorized, and should have been set aside.” *Id.* at 614. The same is true here.

To allow the PCME to compel documents under the color of law without authorization and without any judicial oversight² would present an untenable position in light of the privacy interests of the recipients of such subpoenas. *United States v. Thomas*, 320 F. Supp. 527, 529 (D.D.C. 1970) (“Absent specific statutory subpoena power, a prosecutor’s communication requesting a person to appear for an interview should be couched in terms of a request; it should not simulate a process or summons which the prosecutor does not have power to issue.”) This is particularly true, where, as here, the PCME is not only authorized to lead an inquest, but is also authorized, by a separate section, to act as Sheriff under certain conditions. *See* RCW 36.24.010 (“whenever the coroner acts as sheriff he or she shall possess the powers and perform all the duties of sheriff”).

Had the legislature wanted to grant the PCME the power to subpoena documents and things, as set forth above, it is well aware of how to do so. *See, e.g., State v. Larson*, 184 Wn. 2d 843, 853, 365 P.3d 740, 744 (2015) (“These statutes demonstrate that the legislature knows how to

² That the legislature, in its wisdom, did not authorize the PCME to compel documents is further supported by the lack of any means to challenge the scope or validity of such an “inquest subpoena.” As the PCME concedes, the only way to challenge either the validity or the scope of its inquest subpoena is by filing a writ of prohibition.

craft a broad statute when it wants to do so.”); *City of Auburn v. Gauntt*, 174 Wn. 2d 321, 331–32, 274 P.3d 1033, 1038 (2012) (“the legislature knows how to explicitly grant municipal courts concurrent jurisdiction as it has done for cities with populations over 400,000. [Citation.] If it wished to grant concurrent executive authority, we believe it would do so explicitly.”); *In re Det. of Hawkins*, 169 Wn. 2d 796, 803, 238 P.3d 1175, 1178 (2010) (“the express allowance of polygraph examinations in RCW 71.09.096(4) demonstrates that when the legislature desires to permit a compelled polygraph examination it knows how to do so . . .”).

However, the legislature, in its wisdom, has never afforded coroners or medical examiners authority to compel production of documents or things or otherwise search or seize private property. Such an invasion into long-established privacy and property rights must not be made by implication or speculation.

D. WHETHER THE PCME IS REQUIRED TO KEEP A PHYSICAL COPY OF VIDEO REVIEWED UNDER THE PUBLIC RECORDS ACT IS NOT AT ISSUE BEFORE THE COURT AND BEARS NO RELEVANCE TO THE ISSUES IN THIS APPEAL

Respondent devotes a substantial portion of his brief to the legal issue of whether or not he was allowed to review BNSF’s video, as repeatedly offered by BNSF, without explicitly retaining a copy under

Washington State's Public Record Act. Appellant's Brief at 16, 17, 26, and 27. This issue is not before the Court and has no bearing on whether or not the PCME had the *authority* to issue the subpoena above. As set forth *supra*, he did not.³

Moreover, as BNSF has no interest in the PCME's interpretation of the PRA, it is not the appropriate party to represent the various interests in such an important question of statutory interpretation. Accordingly, BNSF respectfully submits that this issue should be not be before the Court and should be disregarded. *See State v. Engle*, 50 Wn. 207, 210, 96 P. 1045, 1046 (1908) (Questions not directly involved, and not necessary to the decision, need not be considered.)

IV. CONCLUSION

The Pierce County Superior Court correctly granted BNSF's Petition for a Writ of Prohibition. In his zealous attempt to obtain documents and videos, the PCME grossly overstepped his authority, seeking to misuse the statutory inquest procedure. The PCME improperly feigned convening an inquiry, without actually ceding control of his investigation to an inquest jury. He purported to issue a subpoena, without

³ This premise that the PCME is required to maintain such video is also inconsistent with the PCME's actual practice, according to his prior statements to the press. In an April 22, 2017, article in the Tacoma News Tribune regarding this dispute, the PCME is quoted as saying "the footage is destroyed" once the PCME has reached his conclusion on the investigation. CP 104.

having convened an inquest. And he purported to compel production of documents without the statutory authority to do so, even had he properly convened an inquest. It is essential to require strict compliance when addressing the government's ability to compel production from private parties. Here, the PCME failed to do so and flagrantly overreached his authority. For each of the reasons set forth herein, BNSF respectfully requests that the Court affirm the Pierce County Superior Court's granting of BNSF's Writ of Prohibition.

Dated March 19, 2018.

Respectfully submitted,

s/Michael Chait

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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 *BRIEF OF RESPONDENT BNSF RAILWAY COMPANY* with the Clerk of the Court, and I delivered a true and accurate copy pursuant to the e-service agreement of the parties to :

Stephen Trinen: strinen@co.pierce.wa.us

Christina Smith: csmith1@co.pierce.wa.us

DATED this 19th day of March, 2018, at Seattle, Washington.

s/Pamela Ruggles
Pamela Ruggles, Paralegal

MONTGOMERY SCARP, PLLC

March 19, 2018 - 3:39 PM

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