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S. Ct. No. 90827-3

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondent,

v.

JERRY JASMAN, a single person,

Petitioner,

and

CRAIG MORRISON, Intervener,

Petitioner.

ANSWER TO PETITION FOR REVIEW

AND

CROSS PETITION FOR REVIEW

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 ORIGINAL

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I. IDENTITY OF CROSS-PETITIONER

D. Angus Lee, Grant County Prosecuting Attorney, by and through his attorneys, Pamela B. Loginsky and Ione S. George, Special Deputy Prosecuting Attorneys for Grant County, respectfully request that this Court deny Jerry Jasman and Craig Morrison's petition for review. If, however, this Court should grant Jerry Jasman and Craig Morrison's petition for review, Prosecutor Lee requests that the Court also accept review of the issue identified in part III of this cross-petition.

II. COURT OF APPEALS DECISION

The Court of Appeals affirmed the entry of a quo warranto order barring Jerry Jasman from serving as a deputy county coroner and from signing death certificates due to his conviction for disorderly conduct. The Court of Appeals also affirmed the trial court's denial of the appointment of a special prosecutor to represent Jasman and/or intervenor Craig Morrison. The Court of Appeals, however, declined to award sanctions for Jasman and Morrison's extra-record motion to dismiss for an alleged lack of jurisdiction. *See Lee v. Jasman*, ___ Wn. App. ___, 332 P.3d 1106, 2014 WL 4086304 (Aug. 19, 2014).

III. ISSUE PRESENTED IN THIS ANSWER/CROSS-PETITION

The Rules of Appellate Procedure are designed to facilitate the timely decision of cases on the merits. RAP 1.2(a). When a party files a motion post-oral argument that seeks to prevent a decision on the merits and that is

solely supported by extra-record documents and that raises an issue not presented to the trial court, should the responding party be awarded his actual attorneys fees for the time spent in preparing a response to the motion?

IV. RELEVANT FACTS

Jerry Jasman served as the Grant County Coroner for a number of years. *See* CP 141, ¶ 2. During that service, Jasman was charged with Unlawful Imprisonment in Grant County Superior Court Cause No. 09-1-00329-0. CP 64. The offense was committed while Jasman was driving the Grant County Coroner's Office's truck. CP 63. The victim of the crime was Jasman's subordinate. *Id.*

Jasman eventually resolved this matter by pleading guilty to the crime of disorderly conduct. CP 141, ¶ 3. As part of the plea, Jasman acknowledged the conviction would result in a forfeiture of his ability to hold public office. CP 141, ¶ 4. The judgment and sentence that was entered in Grant County Superior Court Cause No. 09-1-00329-0, included a statement that "Defendant acknowledges the forfeiture of his right to hold public office, as provided in RCW 9.92.120." CP 68, at page 6. Consistent with this understanding, Jasman resigned as the Grant County Coroner. CP 141, ¶ 6.

Following Jasman's resignation as coroner, the public elected Craig Morrison as the Grant County Coroner. CP 155, at ¶ 1-2. Coroner Morrison assumed office on November 22, 2010. *Id.* Immediately upon assuming office, Coroner Morrison hired Jasman as the Chief Deputy Coroner. CP

156, at ¶ 4. Jasman completed an oath of office as the Chief Deputy Coroner on November 22, 2010. CP 119.¹ This appointment expired when Coroner Morrison's initial term expired on December 31, 2010. CP 11-14.²

Coroner Morrison retained Jasman's services in his next term of office. Jasman's position, however, changed from that of Chief Deputy Coroner to that of the newly created "Coroner Chief Investigator." CP 80.³

While employed as a coroner investigator, Jasman engaged in conduct that, by law, may only be performed by the coroner or the coroner's deputies.⁴ Specifically, Jasman signed a number of death certificates that purported to determine the manner and mode by which the deceased came to his or her death. *See* CP 84-86. Jasman listed his title on these death certificates as

¹This oath of office was never filed with the Grant County Auditor's Office. No oath of office as a deputy coroner was on file with the Grant County Auditor's Office when the death certificates that forced the filing of the quo warranto were signed. CP 40.

²A deputy coroner is appointed for a definite term of office that coincides with the term of the officer granting the authority, subject to the officer's ability to shorten the term at will. *Spokane County v. State*, 136 Wn.2d 644, 655, 966 P.2d 305 (1998) ("Unless a deputy's appointment is revoked, the term of office for a deputy prosecutor ends when the term of the elected prosecutor ends."); *State ex rel. Day v. King County*, 50 Wn.2d 427, 428 n. 1, 312 P.2d 637 (1957) ("[t]he term of a deputy sheriff expires with the term of the sheriff who appointed him"); RCW 36.16.070. Coroner Morrison's terms of office are set by statute. *See generally* RCW 36.16.020 (4 year terms); Former RCW 29A.20.040 (commencement of term of offices); RCW 36.16.110(1) (person appointed to serve a vacancy in a county office only holds the office until the next general election and the election and appointment of the person's successor).

³The duties of a coroner investigator differ from the duties of a deputy coroner. *Compare* CP 77 with CP 80. *See also* CP 105-06.

⁴Jasman took no oath of office as a deputy coroner after Coroner Morrison began his new term of office. *See* CP 40, CP 142, at ¶ 11, CP 147, CP 156, at ¶ 4.

“Chief Investigator.” *See* CP 84 and 86 at block 53.

The Grant County Prosecutor’s Office advised Coroner Morrison that Jasman could not sign death certificates as his conviction prevented Jasman from serving as a deputy coroner. CP 41, 91. In light of this advice, Coroner Morrison filed an affidavit of correction with respect to one of the death certificates signed by Jasman. *See* CP 88. On this form, Coroner Morrison identified Jasman’s title as “Chief Investigator.” *Id.*

Coroner Morrison disagreed with the legal opinion of the Grant County Prosecuting Attorney as to Jasman’s ability to serve as a deputy coroner. Coroner Morrison solicited legal opinions from a variety of other sources. *See, e.g.,* CP 90, CP 156, at ¶¶ 10-13. In his inquiry to the Washington Association of Coroners and Medical Examiners, Coroner Morrison acknowledged that he “employed Jerry as my Chief Investigator, an at-will employee, rather than deputizing him as an appointed official.” CP 90. Despite Coroner Morrison’s acknowledgment that Jasman was not a deputy coroner, Jasman continued to sign death certificates. On each death certificate, Jasman used the title “Chief Investigator.” *See* CP 91-94.

Unable to obtain Jasman’s voluntary compliance with the law, D. Angus Lee, the Grant County Prosecuting Attorney, filed a quo warranto action pursuant to RCW 7.56.010 and 7.56.020. CP 3. In this action, Prosecutor Lee sought entry of an order ousting, prohibiting and excluding Jasman from exercising the public office of Grant County Coroner or deputy

coroner. CP 7. Prosecutor Lee also sought a permanent injunction enjoining Jasman from performing the duties of the Grant County Coroner or of a deputy coroner, including the completion and/or signing of death certificates. *Id.*

Jasman filed an answer to Prosecutor Lee's complaint. In the answer, Jasman admitted that the Grant County Superior Court possessed subject matter jurisdiction. CP 108 at ¶ 1.1. Jasman's answer included a counterclaim seeking "declaratory judgment pursuant to RCW 7.24.010 and .050." CP 115 at ¶ 14.1. Jasman also requested the appointment of a specific attorney, George Ahrend,⁵ as a "special prosecutor" to defend Jasman in the quo warranto action. CP 115, at ¶ 15.1 C. Finally, Jasman contended that Coroner Morrison was the real party in interest in the quo warranto action. *See* CP 113, ¶¶ 7.1 and 8.1.

Prior to Jasman filing his answer, Coroner Morrison e-mailed a letter to the Board of County Commissioners in which Coroner Morrison requested "funds to cover independent legal counsel to defend and indemnify my deputy and Chief Investigator Jerry Jasman to the extent that he was acting within the scope of his employment and in good faith, along with any other legal counsel needed by my office associated with this particular matter." CP 121. The

⁵The record is silent on whether George Ahrend is "qualified" to serve as a special prosecuting attorney. *See generally State v. Tracer*, 173 Wn.2d 708, 720-21, 272 P.3d 199 (2012) (an attorney is not "qualified" to serve as a special prosecuting attorney if the attorney is currently representing clients who are adverse to the county or state).

Board of County Commissioners rejected the request for counsel after obtaining legal advice. CP 122 and CP 235-241, 246.

Coroner Morrison filed a motion to intervene in the quo warranto case. He also requested the appointment of Jasman's attorney as a special prosecutor pursuant to RCW 36.27.030. CP 196. Coroner Morrison made the request for a special prosecutor because he opposed the filing of the quo warranto action. CP 205, at ¶ 5. Morrison's motion to intervene was granted and he was aligned as a defendant in the matter. CP 290. His motion for appointment of counsel, however, was denied. CP 292.

Both Prosecutor Lee and Jasman/intervener Morrison filed motions for summary judgment. *See* CP 249 and 262. The trial court granted Prosecutor Lee's motion and denied Jasman/intervener Morrison's motion. CP 292. The trial court order prohibits and enjoins Jasman from signing death certificates in Grant County. *Id.* No damages were awarded to Prosecutor Lee and Coroner Morrison retained the ability to employ Jasman. *Id.*

Coroner Morrison and Jasman filed a timely notice of appeal.⁶ The Court of Appeals heard oral argument in the appeal on February 5, 2014. The Court of Appeals affirmed the trial court in all respects in a published opinion. Resolution of the case, however, was delayed by Jasman and

⁶Prosecutor Lee filed a timely notice of cross-appeal. Prosecutor Lee withdrew the notice pursuant to RAP 18.2, as the issue became moot once substitute counsel appeared on behalf of Prosecutor Lee in both the superior court and the Court of Appeals.

intervenor Morrison's actions.

On March 10, 2014, Jasman and intervenor Morrison filed a "Motion to Vacate and Dismiss Based on Judicial Estoppel and Lack of Subject Matter Jurisdiction." This motion was supported by four uncertified, extra-record documents. The motion identified no authority by which the Court of Appeals could consider the four uncertified, extra-record documents, and no RAP 9.11 motion was ever filed. Although Jasman and Intervener Morrison claimed that the motion fell within RAP 2.5(a)(1)'s lack of subject matter jurisdiction, *Motion to Vacate and Dismiss*, at 6, the motion and the combined reply to the motion contain no argument as to the scope of the trial court's subject matter jurisdiction. Although Prosecutor Lee identified this deficiency in his response to the motion to dismiss and in support of his request for sanctions for the time spent responding to the motion to dismiss, the Court of Appeals elected to resolve the motion solely on grounds of judicial estoppel. *See Lee*, 2014 WL 4086304 at *22 ¶ 95. The Court of Appeals denied Prosecutor Lee's request for attorney fees on the grounds that the judicial estoppel argument in the motion to dismiss was not frivolous. *Id.* at 24 ¶ 105. The Court of Appeals did not hold, however, that the alleged lack of subject matter jurisdiction was not frivolous.

V. ARGUMENT

A. Review of Jasman and Morrison's Petition is Not Warranted Under RAP 13.4

RAP 13.4 discusses the considerations governing this Court's acceptance of review. Jasman and intervener Morrison contend that review of Division Three's published opinion conflicts with decisions issued by this Court. Jasman⁷ and intervener Morrison also contend that review of the majority's refusal to appoint a special prosecutor to defend the quo warranto action is warranted under RAP 13.4(b)(3). Prosecutor Lee disagrees with both contentions.

A coroner is an elected officer, whose duties are established by the legislature. *See generally* Const. art. XI, § 5; RCW 36.16.030. An important duty performed by the coroner is the completion of death certificates when the deceased died without medical attendance. *See* RCW 70.58.170 and 70.58.180. A death certificate that is signed by someone who is not authorized by law to complete the document is inadmissible in court. *See State v. Bradfield*, 29 Wn. App. 679, 685-86, 630 P.2d 494, *review denied*, 96 Wn.2d 1018 (1981).

If the duties of coroner are greater than can be performed by the person elected to fill it, the coroner may employ deputies with the consent of the board of county commissioners. RCW 36.16.070. A deputy coroner may

⁷In the Court of Appeals, Jasman conceded at oral argument that there was no basis for providing him counsel at public expense and/or appointing a special prosecutor to represent him in this matter. Court of Appeals, Div. Three oral argument, *Lee v. Jasman*, No. 31519-3-III (Feb. 5, 2014), at 37 min, 38 sec., audio recording by Court of Appeals, available at http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a03&docketDate=20140205.

perform any act which the elected coroner may perform, with the elected coroner responsible for the actions of the deputy. *Id.*

1. Signing Death Certificates

A prosecutor is authorized to file a quo warranto action against any person who “unlawfully hold[s] or exercise[s] any public office . . . within the state.” RCW 7.56.010(1); RCW 7.56.020. In this case, Prosecutor Lee alleged that Jasman was unlawfully “exercising” a public office by signing death certificates as a “Chief Investigator.” Resolution of this claim did not require resolution of whether Jasman was holding public office or was serving as a public officer.

By statute, the only individuals who may complete a death certificate in Washington are chiropractic practitioners⁸, “the physician, physician's assistant, or advanced registered nurse practitioner last in attendance upon the deceased,”⁹ “the health officer, medical examiner, coroner, or prosecuting attorney having jurisdiction,”¹⁰ or “the physician, physician's assistant, advanced registered nurse practitioner, midwife, or other person in attendance at the fetal death.”¹¹ A deputy coroner or a deputy prosecuting attorney may also sign a death certificate. *See generally* RCW 36.27.040; RCW 36.16.070.

⁸RCW 18.25.080.

⁹RCW 70.58.170.

¹⁰*Id.*; RCW 70.58.180.

¹¹*Id.*

No statute, however, allows any other employee of a coroner's office to sign a death certificate.¹² See generally RCW 36.16.070.¹³

2. Serving as a Deputy Coroner

Ignoring Jasman's use of the title "Chief Investigator" on all four death certificates and Intervener Morrison's July 19, 2011, statement that he "employed Jerry as my Chief Investigator. . . rather than deputizing him as an appointed official," CP 90, the petitioners contend that Jasman was actually serving as a deputy coroner when he signed the death certificates and that his conviction while in office does not bar him from holding that position. Jasman and Intervener Morrison's sole support for their claim that a "deputy" is not an "officer" is this Court's opinion in *Nelson v. Troy*, 11 Wash. 435, 39 P. 974 (1895). See Petition for Review at 9. *Nelson*, however, dealt with a constitutional provision and this Court specifically acknowledged that there may be other circumstances where the term "officer" would include a deputy. *Nelson*, 11 Wash. at 440-41. The *Nelson* Court, moreover, strove to define the word "officer" as used in the Constitution consistently with the common law circa 1895. See *Nelson*, 11 Wash. at 441-42.

¹²If the office of coroner is vacant or the coroner cannot attend a death, the duties of the coroner's office may be performed by a district court judge. See RCW 36.24.160.

¹³"Employees" and "deputies" are different positions. Only "[a] deputy may perform any act which his or her principal is authorized to perform." RCW 36.16.070. The county 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." *Id.*

The common law is not an immutable doctrine, frozen in time and unaffected by a state's statutory scheme. *Senear v. Daily Journal-American, Div. of Longview Pub. Co.*, 97 Wn.2d 148, 152, 641 P.2d 1180 (1982); *State v. Fire*, 145 Wn.2d 152, 169, 34 P.3d 1218 (2001) (C.J., Alexander, concurring). The contemporary view is that deputies are public officers. *See, e.g., Smith v. Board of Walla Walla County Commissioners*, 48 Wn. App. 303, 309, 738 P.2d 1076 (1987) (relying upon dictionaries to conclude that a deputy exercises some or all of the functions of the office for the officer); 3 Eugene McQuillin, *The Law of Municipal Corporations* §12.33 at 234 (3d ed. 2001) ("And being legally authorized to act for and in place of the principal, the deputy is a public officer."). Even this common law view has limited applicability to the instant case. *See generally* RCW 4.04.01 (common law applies only so far as it is not inconsistent with our statutes); RCW 9A.04.060 (same).

The Court of Appeals recognized that it was dealing with a statute and that the meaning of the terms "public officer" and "public office" as used in RCW 9.92.120 requires a court to review the entire code. RCW 9.92.120 was initially enacted in 1909. *See* Laws of 1909, ch. 249, § 37. Section 51 of this same session law defined "public officer" as follows:

24. The words "officer" and "public officer" shall include all assistants, deputies, clerks and employees 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. This definition remained unchanged until 1975.

In 1975, the Legislature replaced the former criminal code. In Laws of 1975, 1st Ex. Sess., ch. 260, the Legislature simultaneously repealed Laws of 1909, ch. 249, § 51, and adopted an even broader definition for the words “officer” and “public officer.” See Laws of 1975, 1st Ex. Sess., ch. 260, § 9A.04.110(13), currently codified at RCW 9A.04.110(13);¹⁴ and Laws of 1975, 1st Ex. Sess., ch. 260, § 9A.92.010(1).¹⁵ This statutory definition of “officer” and “public officer” prevails over the common law definition contained in *Nelson* when dealing with crime or punishment. See *State v. Korba*, 66 Wn. App. 666, 670, 832 P.2d 1346 (1992); RCW 9A.04.090; RCW

¹⁴Laws of 1975, 1st Ex. Sess., ch. 260, § 9A.04.110(13), currently codified at RCW 9A.04.110(13), provides that:

(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;

¹⁵When the legislature replaced the former criminal code in 1975, it expanded upon this definition of public officer:

(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;

Laws of 1975, 1st Ex. Sess., ch. 260, § 9A.04.110(13), currently codified at RCW 9A.04.110(13).

9A.04.060.

Jasman and Intervener Morrison claim that the application of RCW 9A.04.110(13) to RCW 9.92.120 is improper because RCW 9.92.120 does not define a crime.¹⁶ Petition for Review, at 14. Jasman and Morrison may be technically correct, but the placement of RCW 9.92.120 in a chapter of the code that deals with punishment and the history of the adoption of RCW 9A.04.110(13) fully supports such reliance. Giving a broad definition to the term “officer” in RCW 9.92.120 is mandated, moreover, by RCW 1.16.065. RCW 1.16.065 provides that “Whenever any term indicating an officer is used it shall be construed, when required, to mean any person authorized by law to discharge the duties of such officer.” The position of deputy coroner easily satisfies this definition. *See* RCW 36.16.070 (“A deputy may perform any act which his or her principal is authorized to perform.”). Giving a broad definition to the term “officer” in RCW 9.92.120 is consistent with this Court’s own precedent. *See Lee*, 2014 WL 4086304 at ¶¶ 36-37 (discussing *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 847 P.2d 428 (1993)). Thus, there is no conflict to be addressed by this Court.

3. Appointment of a Special Prosecuting Attorney

¹⁶The civil definition of officer that appears in the Code of Ethics for Municipal Officers, chapter 42.23 RCW, expressly includes “deputies and assistants.” RCW 42.23.020. This ethics code and various other statutes seek to ensure that all officials perform their public responsibilities in accordance with the highest ethical and moral standards and to conduct people’s business in a manner that advances the public’s interest, rather than their own. *Hubbard v. Spokane County*, 146 Wn.2d 699, 712, 50 P.3d 602 (2002).

Public policy regarding the appointment of a special prosecuting attorney is made manifest through statutes. Those statutes only permit the appointment of a special prosecuting attorney when the elected prosecuting attorney or one of his or her deputies or special deputies is unavailable to perform the duties specified in RCW 36.27.020. *See generally State v. Heaton*, 21 Wash. 59, 61-62, 56 P. 843 (1899) (the court may only appoint a special prosecutor as authorized by statute).¹⁷

[A] court can appoint a special prosecutor to represent a party only when two conditions are met. First, the prosecutor must have the authority and the duty to represent that party in the given matter. Second, some disability must prevent the prosecutor from fulfilling the duty. If the prosecutor has no duty or authority to represent a party, the trial court cannot appoint special counsel.

Osborn v. Grant County, 130 Wn.2d 615, 624-25, 926 P.2d 911 (1996).

Accord RCW 36.27.030.

Here, the Court of Appeals correctly determined that Prosecutor Lee had no duty to represent Jasman in the quo warranto action. In fact, Jasman and Coroner Morrison conceded in their brief that no statute explicitly requires the prosecutor to defend a county officer in a quo warranto action. *See* Brief of Appellant at 31. Jasman conceded at oral argument in Division

¹⁷When another statute creates a mandatory duty in the prosecuting attorney, the failure of the prosecutor to act *can* create grounds for appointing a special prosecuting attorney. *See generally Nichols v. Snohomish County*, 109 Wn.2d 613, 619-20, 746 P.2d 1208 (1987) (attorney fees awarded pursuant to a statute, RCW 73.16.033, that required the prosecuting attorney of the county in which the employer is located to bring an action for compliance).

Two that no statute required the prosecutor to defend him in the quo warranto action. See note 7, *supra*. These concessions are consistent with RCW 7.56.130's prohibition upon the award of costs against a prosecuting attorney who brings a quo warrant action.

While the general statute that details the prosecuting attorney's duties, RCW 36.27.020, requires the prosecuting attorney to represent the county in civil proceedings, it does not demand that the prosecuting attorney represent an officer or deputy officer in litigation. *Hoppe v. King County*, 95 Wn.2d 332, 339, 622 P.2d 845 (1980); *Bates v. School Dist.*, 45 Wash. 498, 502-03, 88 P. 944 (1907) (the requirement to provide legal advice contained in the predecessor statute to RCW 36.27.020(3)¹⁸ does not include a requirement to defend a civil action brought in response to actions taken upon the given advice).¹⁹ The only exception is when the officer is being sued for money

¹⁸Bal. Code, § 468 (P.C. § 4190) provided that:

"The prosecuting attorney in each county is hereby required to give legal advice, when required, to all county and precinct officers, and directors and superintendents of common schools, in all matters relating to their official business, and when so required, he shall draw up, in writing, all contracts, obligations, and like instruments of an official nature, for the use of said officers."

Bates, 45 Wash. at 502.

¹⁹The legislature has the ability to write a statute that requires a government attorney to represent a government official in a lawsuit, regardless of the government attorney's legal judgment. See *Goldmark v. McKenna*, 172 Wn.2d 568, 259 P.3d 1095 (2011) (RCW 43.12.075 expressly requires the state attorney general to represent the commissioner of public lands in an appeal); RCW 43.12.075 ("It shall be the duty of the attorney general, to institute, or defend, any action or proceeding to which the state, or the commissioner or the board, is or may be a party, or in

damages which the county government is responsible for paying. *See* RCW 4.96.041(1). No damages are possible in a quo warranto action brought by the prosecuting attorney, *see* RCW 7.56.040, and Prosecutor Lee's complaint contained no request for damages. *See* CP 1-39. Finally, a quo warranto action is against the person named as the respondent—not against the office or the county. *See* RCW 7.56.010(1) (“when the person shall usurp, intrude upon, or unlawfully hold or exercise any public office”); 17 Eugene McQuillin, *The Law of Municipal Corporations* § 50.15, at 680 (3rd ed. 2004) (“The subject matter of the controversy is the right to the office for the term in controversy and the proceeding personal to the parties claiming the office. Therefore, the writ is never directed to the officer as such, but always to the person to determine whether he or she has the legal right to perform the duties and exercise the functions of the office.”).

Intervener Morrison stands in the same shoes as the appellant in *Hoppe*. Intervener Morrison received legal advise from Prosecutor Lee as required by RCW 36.27.020(2) regarding Jasman's legal disability prior to Prosecutor Lee filing the quo warranto action. *Lee*, 2014 WL 4086304 at ¶ 92; CP 41, 91. Morrison disagreed with Prosecutor Lee's advise and so intervened in the quo warranto action in order to seek a declaratory judgment

which the interests of the state are involved, in any court of this state, or any other state, or of the United States, or in any department of the United States, or before any board or tribunal, when requested so to do by the commissioner, or the board, or upon the attorney general's own initiative.”). The mandatory language found in RCW 43.12.075 does not appear in RCW 36.27.020.

pursuant to RCW 7.24.010 and .050, that Jasman may serve as a deputy coroner and that a chief investigator may sign death certificates. CP 115, ¶ 14.2. In *Hoppe*, this Court held that an officer's disagreement with the prosecuting attorney's advise does not entitle the officer to the appointment of a special prosecutor. If Morrison, like Hoppe, wishes "to second-guess the judgment of the prosecuting attorney" he must do it at his own expense. 95 Wn.2d 340. The denial of Intervener Morrison's demand that the tax payers fund his quixotic efforts to enable Jasman to perform duties for which he is statutorily unqualified to do, is consistent with both prior case law and public policy. *Accord Colby v. Yakima County*, 133 Wn. App. 386, 136 P.3d 131 (2006) (both an action to defend the right to hold office and an action to defend a charge of official misconduct fall outside the scope of RCW 4.96.041).

B. Review of Prosecutor Lee's Cross-Petition is Warranted Under RAP 13.4

Following oral argument, Intervener Morrison and Jasman filed a motion to dismiss the entire action. The motion was based upon documents from outside the appellate record. Prosecutor Lee requested actual attorney fees for responding to this untimely motion which, contrary to the petitioners' representation, did not establish a lack of either trial court or appellate court jurisdiction. The Court of Appeals denied the request finding that the judicial estoppel claim was not totally frivolous. *Lee*, 2014 WL 4086304 at ¶ 105.

The Court of Appeals' consideration of the judicial estoppel claim prior to resolving whether the claim was properly before it pursuant to RAP 2.5(a)(1) conflicts with this Court's precedent and presents an issue of substantial public interest.

One of the most fundamental principles of appellate litigation is that a party may not assert on appeal a claim that was not presented at trial. *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944); *State v. Davis*, 41 Wn.2d 535, 250 P.2d 548 (1953). The Rules of Appellate Procedure recognizes three exceptions to this rule, only one of which was asserted by Jasman and Morrison.

RAP 2.5(a)(1) allows a challenge to the trial court jurisdiction to be raised for the first time on appeal. Such a challenge, however, must be supported by the record on appeal. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995) (RAP 2.5(a)(3) claim can only be heard if the facts necessary to resolve the matter appear in the appellate court record); *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) (same).

The composition of the record on appeal is limited by RAP 9.1(a) to a report of the trial court proceedings, the papers filed with the Superior Court Clerk, and any exhibits admitted in the trial court proceedings. *State v. Hughes*, 106 Wn.2d 176, 206, 720 P.2d 838 (1986). Matters referred to in a brief but not included in the record cannot be considered on appeal. *State v. Stevenson*, 16 Wn. App. 341, 345, 555 P.2d 1004 (1976), *review denied*, 88

Wn.2d 1008 (1977). None of the documents attached to Jasman and Morrison's post-oral argument motion to vacate were part of the record. None of the documents attached to Jasman and Morrison's post-oral argument motion to vacate were subject to judicial notice. *See, e.g., In re the Adoption of B.T.*, 150 Wn.2d 409, 414-16, 78 P.3d 634 (2003) (an appellate court may not take judicial notice of the record of another independent and separate judicial proceeding; rule applies even when the separate proceedings involve the same parties). The Court of Appeals, therefore, erred by considering the documents at all.

The graver error committed by the Court of Appeals, however, was its failure to address the threshold jurisdiction question of RAP 2.5(a)(1). *See Lee*, 2014 WL 4086304 at ¶95. Absent Jasman and Morrison's establishment that their belatedly raised extra-record claim impacted jurisdiction, the judicial estoppel motion was improperly raised.

Jurisdiction is the power of a court to hear and determine a case. *In re Marriage of Buecking*, 179 Wn.2d 438, 447, 316 P.3d 999 (2013). "Subject matter jurisdiction refers to a court's ability to entertain a type of case, not to its authority to enter an order in a particular case." *Id.* at 448. Determining whether a quo warranto action is within the subject matter jurisdiction of the superior court requires a review of the Washington Constitution and of statutes. *Id.*, at 449.

Under Washington Const. art. IV, § 6, superior courts have the "power to issue writs of . . . quo warranto" and "original jurisdiction in all

cases and of all proceedings as are not otherwise provided for.” The legislature has also determined that a quo warranto action filed by the prosecuting attorney shall be heard by the superior court. *See* RCW 7.56.020. Jasman not only acknowledged the trial court’s jurisdiction in his answer, *see* CP 108, ¶ 1.1, he also sought a declaratory judgment. *See* CP 115 at ¶ 14.1. The superior court possessed subject matter jurisdiction over the declaratory judgment action pursuant to RCW 7.24.010 and Const. art. IV, 6.

Jasman and Morrison’s post-oral argument, extra-record, judicial estoppel motion to vacate was frivolous because, even if successful, it would not strip the superior court of the power to hear a quo warranto action or a declaratory judgment action. Their utter failure to satisfy RAP 2.5(a)(1) precluded consideration of their motion and merited an award of attorneys fees to Prosecutor Lee.

VI. CONCLUSION

Prosecutor Lee respectfully requests that this Court deny Jasman and Morrison’s petition for review. If this Court should grant Jasman and Morrison’s petition for review, Prosecutor Lee respectfully requests that the Court also accept review of the issue raised in this answer/cross-petition.

DATED this 13th day of October, 2014.

Respectfully submitted,



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Special Deputy Pros. Attorney



PAMELA B. LOGINSKY
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Special Deputy Pros. Attorney

PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 13th day of October, 2014, I deposited in the mails of the United States of America, postage prepaid, a copy of the document to which this proof of service is attached in an envelope addressed to:

George M. Ahrend
Ahrend Albrecht PLLC
16 Basin St. SW
Ephrata, WA 98823

On the 13th day of October, 2014, I e-mailed a copy of the document to which this proof of service is attached to

George M. Ahrend at gahrend@trialappeallaw.com

Ione S. George at Igeorge@co.kitsap.wa.us

D. Angus Lee at dlee@co.grant.wa.us

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed this 13th day of October, 2014, at Olympia, Washington.



PAMELA B. LOGINSKY
WSBA NO. 18096

OFFICE RECEPTIONIST, CLERK

To: Pam Loginsky; Derek Lee; lone George; gahrend@trialappeallaw.com
Subject: RE: Lee v. Jasman, No. 90827-3

Received 10-13-14

From: Pam Loginsky [mailto:Pamloginsky@waprosecutors.org]
Sent: Monday, October 13, 2014 10:32 AM
To: Derek Lee; lone George; OFFICE RECEPTIONIST, CLERK; gahrend@trialappeallaw.com
Subject: Lee v. Jasman, No. 90827-3

Dear Clerk and Counsel:

Attached for filing is Prosecutor Lee's answer to Mr. Jasman's petition for review. Please let me know if you should encounter any difficulty in opening the document.

Sincerely,

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