

FILED
COURT OF APPEALS
DIVISION II

APR 11 2006 11:06
STATE OF WASHINGTON

No. 34160-3-II

BY: *[Signature]* DEPUTY
COURT OF APPEALS, DIVISION II OF

THE STATE OF WASHINGTON

LORI MAZE, Petitioner

And,

DEBRA TSUGAWA, Petitioner

v.

COUNTRY MUTUAL INSURANCE COMPANY, Respondent

BRIEF OF PETITIONERS

Appellants, Pro Se

**Lori Maze
Debra Tsugawa
PO Box 2372
Battle Ground, WA 98604
(360) 521-1816**

PM 3-1-06

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Constitutional Provisions

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Regulations and Rules

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4 L. Orland, Wash.Prac., Rules Practice §5502, at 243 (3d ed. 1983) 6

**COURT OF APPEALS, DIVISION II OF
THE STATE OF WASHINGTON**

LORI MAZE AND DEBRA TSUGAWA,)	
Appellants)	
)	Court of Appeals
)	Cause No. 34160-3-II
v.)	
)	Clark County No.
)	. 02-2-02979-9
)	
COUNTRY MUTUAL INSURANCE)	
COMPANY,)	APPELANTS
Respondent)	OPENING BRIEF

A. ASSIGNMENTS OF ERROR

1. The Superior Court of Clark County erred in entering the order of September 23, 2005 denying Appellant’s Motion to Reinstate the Case entered on June 30, 2005.
2. The Superior Court of Clark County erred in entering the order of November 10, 2005 denying Appellant’s Motion for Relief from Order Denying Motion to Reinstate Case entered on July 29, 2005.

Issues Pertaining to Assignments of Error

1. Whether the meaning of the word “shall” in “CR 41(B)(2)(b) ... A party who does not receive the clerk’s notice shall be entitled to reinstatement

of the case, without cost, upon motion brought within a reasonable time after learning of the dismissal.: should be subject to the Superior Court's discretion or whether is should be a mandatory interpretation?

2. Whether the failure of the record to show that Lori Maze and Debra Tsugawa received either the notice of a dismissal hearing or notice of a final disposition of the case constituted a violation of our due process rights?

3. Country Mutual, respondents, filed their answer on August 28, 2002 with a certificate of Service listing our PO Box as our current address. We filed our Case Information Sheet on October 4, 2002, which also listed our PO Box as our current address. Whether, not being aware of a formal change of address requirement, in addition to current filings, may qualify as mistake or excusable neglect as provided in CR 60(b)(1)?

B. STATEMENT OF THE CASE

On 07/15/2002, Petitioners, Lori Maze and Debra Tsugawa filed an action against Country Mutual Insurance Companies for Breach of Contract, Bad Faith and Violation of the Consumer Protection Act. We were forced to bring the action after their refusal to pay for the covered loss of our home and personal belongings.

The attorneys for Defendant Country Mutual Insurance Company filed their Answer on August 28, 2002. The Certificate of Service was included, which listed our address as PO Box 2372, Battle Ground, WA. A copy is located at CP 12

On October 04, 2002, we filed a Case Cover Sheet with the clerk's office when inquiring if there was a requirement to file a copy of the interrogatories propounded to Country Companies, with the court. A copy is at A-1 and in the Motion for Discretionary Review at A-11. Our current address was on the Case Cover Sheet. We were unaware of the need to file a formal change of address.

The Clerk filed a Motion to Dismiss for Want of Prosecution on 06/18/2004. The Notices the Clerk sent to us at 8407 NE 164th Ave., the burned residence, were returned to the clerk undeliverable on 06/28/2004. The Order of Dismissal was entered pursuant to motion by the Clerk on 07/30/2004. A copy of the Order of Dismissal is at CP 19.

We have not been idle with this case, although we have not had contact with the defendant's counsel since about September of 2003, 9 or 10 months before the dismissal. As an example; we have had to spend a lot of time in trying to locate the defendant's witnesses; we just recently located one who has been living out of state for several years; and another refuses to talk. We just prepared a second set of Interrogatories and Requests for Production to

Defendant's, and were hoping to set our case for trial after defendants completed them. On 06/26/2005, while searching Superior Court cases we discovered the Clerk's Motion for Dismissal. We filed a Motion for Reinstatement of Case pursuant to CR 41(b)(2)(B), three days later on 06/29/2005. A copy of the Motion is at CP 22 and the supporting declaration is at CP 20. The Honorable Judge Woolard entered the order denying the motion on September 23, 2005. A copy of the order is at CP 47.

On July 29, 2005 we filed a Motion for Relief From Order Denying to Reinstatement of Case pursuant to CR 60(b)(1) and CR 41(b)(2)(B). The Honorable Judge Woolard entered the order denying the motion on Nov. 10, 2005. A copy is at A-2 and in the Motion for Discretionary Review at A-22.

C. ARGUMENT

1. The trial court abused its discretion in not reinstating this case pursuant to CR 41(b)(2)(B), which states;

“ 41. DISMISSAL OF ACTIONS

(2) Dismissal on Clerk's Motion

(A) Notice. In all civil cases in which no action of record has occurred during the previous 12 months, the clerk of the superior court shall notify the attorneys of record by mail that the court will dismiss the case for want of prosecution unless, within 30 days following the mailing

of such notice, a party takes action of record or files a status report with the court indicating the reason for inactivity and projecting future activity and a case completion date. If the court does not receive such a status report, it shall, on motion of the clerk, dismiss the case without prejudice and without cost to any party.

(B) Mailing Notice; Reinstatement. The clerk shall mail notice of impending dismissal not later than 30 days after the case becomes eligible for dismissal because of inactivity. A party who does not receive the clerk's notice shall be entitled to reinstatement of the case, without cost, upon motion brought within a reasonable time after learning of the dismissal.”

The word “shall” in a statute imposes a mandatory requirement unless a contrary legislative intent is shown. See Philadelphia II v. Gregoire 128 Wn.2d 707, 911 P.2d 389. The use of the term “shall” in a statute creates a presumption that the Legislature intended to create a duty rather than to confer discretion. Crown Cascade, Inc. v. O’Neal 100 Wn.2d 256, 668 P.2d 585.

The provision in CR 41(b)(2)(B) that parties not receiving the clerk’s notice shall be entitled to reinstatement provides a protection of our due process rights. The notices of dismissal mailed to our burned residence were returned to the clerk, undeliverable. Copies are at CP 13 and 16.

CR 41(b)(2)(B) requires the motion for reinstatement to be brought

within a reasonable time after learning of the dismissal. We discovered the July 30, 2004 Dismissal on June 26, 2005. Three days later, we filed a Motion to Reinstate the Case.

The primary function of an involuntary dismissal by a clerk's motion is to clear the clerk's record of inactive cases, 4 L. Orland, Wash.Prac., Rules Practice §5502, at 243 (3d ed. 1983). It is an administrative provision that creates a "relatively simple means by which the court system itself, on its own volition, may purge its files of dormant cases." Miller v. Patterson, 45 Wn App. 450,455,725 P.2d 1016 (1986). Protecting litigants from dilatory counsel is only a secondary purpose of CR 41(b)(2). Because dismissals for want of prosecution serve an administrative function, allowing the court to clear inactive cases from its records. See Landberg v. State, 36 Wn App. 675,676, 676 P.2d 1027 (1984). Dismissals for want of prosecution are punitive or administrative in nature and every reasonable opportunity should be afforded to permit the parties to reach the merits of the controversy. See Yellam v. Woerner, 77 Wash.2d 604, 464 P.2d 947 (1970).

2. Giving notice is a requirement of CR 41(b)(2) and it protects the right to due process as provided by the 14th Constitutional Amendment, which states in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S.C.A. Const.Amend. 14.

3. CR 60(b)(1), provides in pertinent part:

“RULE 60. RELIEF FROM JUDGMENT OR ORDER

(b) Mistakes; Inadvertence; Excusable Neglect; Newly discovered Evidence; Fraud; etc. On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons.

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;”

We mistakenly believed the court would use the address on the Case Information Sheet as the most current address, if there were any matters it needed to contact us about. This is the same address that defendant’s counsel used when filing their Proof of Service documents with their Answer and all other documents filed with the court. We were unaware there was any requirement to file additional documents to keep the court informed of our current address as all filings with the court require our current address.

I called the Clark County Clerk’s office on two separate occasions and asked the person answering the phone, “If, you were to send documents to a litigator and there were different addresses on the Complaint and the Case Information Sheet, and they were filed months apart from each other, which address would you send the documents to? One answered, probably to the

one on the Complaint, as addresses are not usually on the Case Information Sheet. The other said probably whichever document that was most recent.”

Our Civil rules favor disposition of cases on their merits, rather than on procedural technicalities. Allowing trial courts to vacate subsequently those dismissals caused by mistake, inadvertence, excusable neglect, or other good reasons is not inconsistent with a mandatory procedure for dismissing cases. Vaughn v. Chung, 119 Wash 2d 273, 830 P2d 668 (1992).

D. CONCLUSION

The Court of Appeals should— Accept review for the reasons stated in the Argument and grant the relief from the Order Denying to Vacate Dismissal, and Reinstate the Case as a pending action on the Court’s docket.

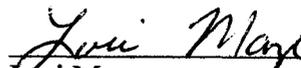
E. APPENDIX

October 4, 2002 Case Information Sheet	A-1
November, 10, 2005----Order Denying Motion for Relief	A-2

Respectfully submitted this 28th day of February, 2006.



Debra Tsugawa
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Lori Maze
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SUPP CP

FILED
OCT 04 2002
JoAnne McBride, Clerk, Clark Co.

CASE TYPE 2
CLARK COUNTY SUPERIOR COURT
CASE INFORMATION COVER SHEET

Case Number 02A 024999 Case Title L. Maze & D. Tsugawa v. Catalog House Int'l Co.
Attorney Name PLS SE Bar Membership Number _____

Please check one category that best describes this case for indexing purposes. Accurate case indexing not only saves time in docketing new cases, but helps in forecasting needed judicial resources. Cause of action definitions are listed on the back of this form. Thank you for your cooperation.

APPELLATE

- ___ Administrative Law Review (ALR 2)
- ___ Appeal of a Department of Licensing Revocation (DOL 2)
- ___ Civil, Non-Traffic (CA 2)
- ___ Civil, Traffic (CT 2)

CONTRACT/COMMERCIAL

- ___ Breach of Contract (COM 2)
- ___ Commercial Contract (COM 2)
- ___ Commercial Non-Contract (COL 2)
- ___ Third Party Collection (COL 2)

RELATIONSHIP

- ___ Marital/Relationship (MER 2)

DOMESTIC VIOLENCE/HARASSMENT

- ___ Civil Harassment (HAR 2)
- ___ Domestic Violence (DVP 2)
- ___ Foreign Protection Order (FPO 2)
- ___ Vulnerable Adult Protection (VAP 2)

JUDGMENT

- ___ Abstract Only (ABJ 2)
- ___ Foreign Judgment (FUJ 2)
- ___ Judgment, Another County (ABJ 2)
- ___ Judgment, Another State (FUJ 2)
- ___ Tax Warrant (TAX 2)
- ___ Transcript of Judgment (TRJ 2)

OTHER COMPLAINTS

- ___ Action to Compel/Confirm Private Binding Arbitration (MSC 2)
- ___ Change of Name (CHN 2)
- ___ Deposit of Surplus Funds (MSC 2)
- ___ Emancipation of Minor (EOM 2)
- ___ Injunction (INJ 2)
- ___ Injunctive (MSC 2)

- ___ Malicious Harassment (MHA 2)
- ___ Minor Settlement (No guardianship) (MST 2)
- ___ Petition for Child Commitment (Sexual Predator) (PCG 2)
- ___ Seizure of Property from Commission of Crime (SPO 2)
- ___ Seizure of Property Resulting from a Crime (SPR 2)
- ___ Subpoena (MSC 2)

PROPERTY/REAL ESTATE

- ___ Condemnation (CON 2)
- ___ Easements (FOR 2)
- ___ Land Use Petition (LUP 2)
- ___ Property Fairness (PFA 2)
- ___ Quiet Title (QIT 2)
- ___ Unlawful Detainer (UND 2)

TORT, MEDICAL/MALPRACTICE

- ___ Hospital (MED 2)
- ___ Medical Doctor (MED 2)
- ___ Other Health Care Professional (MED 2)

TORT, MOTOR VEHICLE

- ___ Death (TMV 2)
- ___ Non-Death Injuries (TMV 2)
- ___ Property Damage Only (TMV 2)

TORT, NON-MOTOR VEHICLE

- ___ Asbestos (PIN 2)
- ___ Other Malpractice (MAL 2)
- ___ Personal Injury (PIN 2)
- ___ Products Liability (ITP 2)
- ___ Property Damage (PRP 2)
- ___ Wrongful Death (WDE 2)

WRIT

- ___ Habeas Corpus (HNC 2)
- ___ Mandamus (MRM 2)
- ___ Restraint (MRR 2)

L. Maze & D. Tsugawa
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A-1

SUPP CP

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FILED

NOV 10 2005

JoAnne McBride, Clerk, Clark Co.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK**

LORI MAZE AND DEBRA TSUGAWA,

Plaintiffs,

v.

**COUNTRY MUTUAL INSURANCE
COMPANY,**

Defendant.

No. 02 2 02979 9

**ORDER DENYING PLAINTIFFS'
MOTION FOR RELIEF FROM ORDER
DENYING REINSTATEMENT OF CASE**

THIS MATTER having come before the undersigned Judge upon Plaintiffs' Motion for an order that provides the following relief:

1. Vacates the Court's 8/19/2005 Order Denying the Motion to Reinstate Case;
2. Issues an order to vacate the Court's Order of Dismissal on 7/20/2004.
3. Directs the Clerk to reinstate the case as a pending action on the Court's docket without costs to plaintiffs.

Plaintiffs' Motion for Relief From Order Denying Motion to Reinstate Case is made pursuant to CR 41(b)(2)(B) on the ground that Plaintiffs did not receive the Clerk's Notice of Dismissal for Want of Prosecution, and CR 60 (b)(1) for the reason of mistake or excusable neglect.

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A-2

1 Beth Cupani and Andrew Lauersdorf of Bullivant Houser Bailey appeared on behalf
2 of Defendant on November 4, 2005. Plaintiffs failed to appear for the hearing. The Court
3 considered the pleadings filed in this action and the following evidence:

- 4 1. The records and files herein;
- 5 2. Plaintiffs' Motion for Relief From Order Denying Motion to Reinstate Case;
- 6 3. Declaration in Support of Plaintiffs' Motion for Relief from Order Denying to
7 Vacate Dismissal; and
- 8 4. Defendant's Response in Opposition to Plaintiffs' Motion for Relief From
9 Order Denying Motion to Reinstate Case.

10 Based on the argument of Defendant's counsel, and the evidence presented, the Court
11 finds:

- 12 1. On June 18, 2004, nearly two years after Plaintiffs filed their first and last
13 pleading in the matter, the court filed the Clerk's Notice of Dismissal for Want
14 of Prosecution.
- 15 2. On July 29, 2004, the Court entered an order dismissing the action without
16 prejudice pursuant to the Clerk's June 18, 2004 Notice of Dismissal for Want
17 of Prosecution.
- 18 3. Plaintiffs did not file a single pleading since they filed Plaintiffs' Complaint on
19 July 15, 2002.
- 20 4. Plaintiffs had an obligation to keep the court informed of their current mailing
21 address.
- 22 5. Plaintiffs did not keep the court informed as to the current mailing address.
- 23 6. The Clerk properly sent the Notice of Dismissal for Want of Prosecution to the
24 mailing address Plaintiffs provided to the Court.

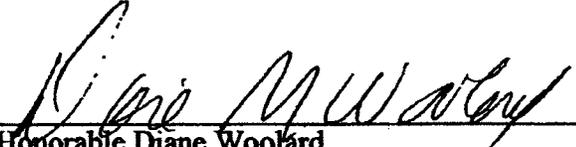
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1 Based on the above findings, IT IS HEREBY ORDERED that Plaintiffs' Motion for
2 Relief From Order Denying Motion to Reinstate Case is denied.

3 DATED this 18 day of November 2005.

4
5
6 
HONORABLE DIANE WOOLFARD
Superior Court Judge

7 Presented By:

8 BULLIVANT HOUSER BAILEY
A Professional Corporation

9
10 By 
11 Andrew C. Lauersdorf, WSBA #35418
12 Beth Cupani, *pro hac vice*
Attorneys for Defendant Country Mutual Insurance Company

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14 10201174.1

A-4

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

CAUSE No
34160-3-II

CERTIFICATE OF SERVICE

I certify that on the 28th day of February, 2006 I caused a true and correct copy of Appellants Opening Brief to be served on Country Mutual Insurance Company by sending it to their attorney, Beth Cupani in a prepaid envelope at:

Beth Cupani
c/o Bullivant|Houser|Bailey
300 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204-2089

[Signature]
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