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

HISTORICAL MILITARY SALES INC (UBI: 602078140) and
DAVID ROBINSON,

Appellants,

vs.

CITY OF LAKEWOOD,

Respondent

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This appeal follows an appeal to the superior court from a city hearing examiner's decision, which was itself an "appeal" from a Lakewood administrative decision, without opportunity for a hearing, to revoke the Appellants' Lakewood business license. Substantively, this appeal to this Court is based on a ruling of the superior court erroneously misunderstanding and misapplying subject matter jurisdiction.

This appeal is the epitome of form over substance. The necessity of this appeal is an excellent example of the necessity of RAP 1.2, CR 1, CR 8 (f), RCW 4.32.250, RCW 2.04.190 and a century of jurisprudence indicating that courts are to promote determinations of disputes on the merits.

II. IDENTITY OF APPELLANTS

David Robinson, a widowed military veteran, has owned and operated Historical Military Sales, Inc. for more than ten years in Lakewood, WA across the highway from Joint Base Lewis-McChord. Its primary business is the purchasing and selling of new and used military "surplus" and recreational items such as pocketknives, read-to-eat meals, sleeping bags, etc. from both civilian and military suppliers.

III. ASSIGNMENTS OF ERROR

1. The superior court erred in determining that it lacked subject matter jurisdiction over the case to entertain a motion to amend. Subject matter jurisdiction rulings are reviewed de novo. Crosby v. Spokane County, 137 Wash.2d 296, 301, 971 P.2d 32 (1999).

2. The superior court erred in denying without consideration the appellants' motion to amend "as moot." A motion to amend under CR 15 is reviewed as an abuse of discretion.

IV. STATEMENT OF ISSUES

1. Whether compliance with a statute of limitations for an inapplicable law is a requirement for a superior court to have subject matter jurisdiction over the type of case presented to it. **No, a statute of limitations is not a limitation upon a court's subject matter jurisdiction, furthermore the Administrative Procedures Act allows for file first, and serve later.**
2. Whether summarily dismissing a motion to amend "as moot" due to the court's erroneous ruling relating to subject matter jurisdiction was an abuse of discretion? **Yes, a denial of a motion without consideration is an abuse of discretion.**

V. STATEMENT OF THE CASE

This matter began with a decision by the City of Lakewood “Community Development Department” immediately, and without a hearing, declaring the appellants David Robinson and Historical Military Sales Inc. (“Appellants”) to be in violation of several local ordinances and to immediately revoke the Appellants’ Lakewood business license.¹ CP 1-4. Local ordinance allowed an “appeal” to a City Hearing Examiner who ultimately issued a ruling affirming the revocation. LMC 05.2.190. The decision was signed on August 5, 2013 outside the presence of the parties. Although the decision was e-mailed to the attorneys as advanced notice it was not mailed to the Plaintiffs (or Plaintiffs’ attorneys) until August 12th, 2013 (given the time for mailing it was put in the mail apparently on August 7, and 3 days later, not counting the day of mailing was August 11 (a Sunday)). CP 55.

The Appellants filed an appeal to the Pierce County Superior Court initially labeled “petition for judicial review of administrative decision” and invoked RCW 34.05 (the Administrative Procedure Act) as a basis for

¹ The particular factual reasons for the revocation are not relevant in this Court as this appeal is from the Superior Court’s order dismissing an appeal to it solely on subject matter jurisdiction grounds. Merely for informational purposes, this dispute began following a raid by military and local law enforcement officers of Historical Military Sales, Inc. that uncovered items alleged to be restricted by Department of Defense regulations or military regulations (which do not apply to civilians) such that the items should not exist on the civilian market despite their widespread availability.

appeal on September 4, 2013. CP 1-17. The petition requested *inter alia* “an order determining that the hearing examiner had jurisdiction” over a search and seizure issue, an order overturning the factual determinations of the hearing examiner, an order of remand with instructions to suppress illegally seized evidence, an order setting aside the hearing examiner’s decision, and “such other relief as the court deems just.” CP 5-6. The City of Lakewood (“Lakewood”) was not served until September 13, 2013 with a copy of the petition. CP 43. Lakewood moved to dismiss on September 18, 2013 arguing RCW 34.05 required filing *and* service of a petition for review and also arguing that RCW 34.05 did not apply to the decision of the city hearing examiner. CP 18-23.

On October 24, 2013 Appellants moved to amend the petition to a petition with the same² factual allegations, but changed the legal theories to request constitutional and statutory writs of review and also a declaratory action relating to search and seizure allegations. CP 24-40. On October 29, 2013, a CR 4 summons was filed and served on Lakewood. CP 43.

On November 8, 2013 the superior court denied the motion to amend “as moot” and granted the motion to dismiss without prejudice. CP 45-46. The trial court specifically found that it “lacks subject matter jurisdiction

² Minor non-substantive grammatical changes were made.

[because Appellants] failed to serve the City of Lakewood within the time constraints of RCW 34.05.542.” CP 45-46. In its oral statements the trial court expressed that “[i]t makes sense to deny the motion [to dismiss], but the law says I should grant the motion . . . I don’t think I have jurisdiction here.” 1 RP 12. The court expressed its reservation in dismissing the matter as based, at least in part, on “judicial economy and everything else and what I think makes sense.” 1 RP 12. However, the judge indicated that “the problem” was that he believed the law did not provide for subject matter jurisdiction. 1 RP 12. This appeal followed.

VI. SUMMARY OF ARGUMENTS

Subject matter jurisdiction refers to a court’s authority to adjudicate a “type of controversy.” The type of controversy involved in this matter is one in which the court has express statutory authority and constitutional authority to adjudicate, and, because any alleged statute of limitation violation does not alter the “type of controversy,” the superior court had subject matter jurisdiction sufficient to consider the Appellants’ motion to amend.

The decision below was not harmless error because the Appellants’ motion to amend likely would have been granted had the superior court considered it. Furthermore, the amended causes of action would not be

time-barred, or the relation-back doctrine would cure any time-barred issues.

VII. ARGUMENT

- A. Legislative and judicial principles of pleading strongly disfavor technical procedural requirements and instead favor and promote requirements that allow for adjudications on the merits.

This matter was properly and timely initiated. The hallmark policy of all pleadings in Washington State is notice. See CR 8 (a) (short and plain statement) and (f) (construe pleadings for substantial justice); see also Conley v. Gibson, 355 U.S. 41, 48 (1957) (“the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome, and accept the principle that the purpose of pleading is to facilitate a proper *decision on the merits*.”

(emphasis added) *overruled on other grounds*³ by Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)

(Twombly itself was a Supreme Court case recognizing that the factual allegations of a complaint are looked to for determining the sufficiency of a complaint). The policy of notice pleading – of substance over form – is frequently repeated and found throughout applicable jurisprudence. See Pierce County Sheriff v. Civil Serv. Comm'n, 98 Wash.2d 690, 695, 658

³ Specifically, the “no set of facts” standard was found too limiting in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 562 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

P.2d 648 (1983) ("the central purpose of our pleading rules is to provide adequate notice"). Under RCW 4.32.250 any notice or other paper is valid and effectual even though the court, title, or party is mislabeled so long as it "intelligently refers" to the action. Indeed, that same statute allows that "any other defect or error in any notice or other paper or proceeding may be amended by the court, and any mischance, omission or defect relieved . . . and the court may enlarge or extend the time, for good cause shown, within which by statute any act is to be done, proceeding had or taken, notice or paper filed or served." Id. (Emphasis added). CR 8 (f) provides that "all pleadings shall be so construed as to do substantial justice." See also RCW 2.04.190 discussed *infra*.

By statute and by court rule the Courts of Washington State have abandoned the ancient game of name-your-writ-or-fail-trying jurisdiction. Washington State, like the Federal Rules of Civil Procedure, policy and rule is detailed in CR 8. Under CR 8 "a short and plain statement of the claim showing that the pleader is entitled to relief" is what is required. Alternative relief may also be requested. Id. Most importantly in that rule, CR 8 (f) provides that "all pleadings shall be so construed as to do substantial justice." The statutory grant of power for the courts to prescribe forms or rules for pleadings, notice of writ requirement, process, etc. is found in RCW 2.04.190, which provides that "[i]n prescribing such

rules the supreme court shall have regard to the *simplification of the system of pleading, practice and procedure* in said courts to promote the speedy determination of litigation *on the merits.*” (emphasis added).

The Rules of Appellate Procedure and Rules of Appeal from Courts of Limited Jurisdiction similarly and expressly indicate the goal of an adjudication on the merits. RAP 1.2 (a) provides “[t]hese rules will be liberally interpreted to promote justice and facilitate the decisions of cases on the merits . . . issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands.” RALJ 1.2(a) mirrors the language of RAP 1.2 (a). In this matter the primary rules potentially at issue are RAP 5.4 and RALJ 2.4, which both permit filing before service absent prejudice.

B. Superior Courts simply do have subject matter jurisdiction over appeals under the Administrative Procedures Act

An analysis of the superior court’s jurisdiction begins with Article IV, Section 6 of the Washington Constitution that provides:

The superior court shall have original jurisdiction in all cases at law which involve . . . [and] for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court . . . They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed

by law . . . Said courts and their judges *shall* have power to issue writs of . . . review, certiorari. (emphasis added).

The word “jurisdiction” in the Washington Constitution is used “to describe the fundamental power of courts to act.” ZDI Gaming Inc. v. State ex rel. Washington State Gambling Com'n, 268 P.3d 929, 933 173 Wn.2d 608, 616 (2012). The Washington Constitution vests absolute “original jurisdiction in the categories of cases listed in the constitution” such as writs of review and certiorari. Id.

Subject matter jurisdiction is, unfortunately, “often confused with a court's ‘authority’ to rule in a particular manner [,which] . . . has led to improvident and inconsistent use of the term.” Marley v. Department of Labor and Industries of State, 886 P.2d 189, 125 Wn.2d 533, 539 (1994) (quoting In re Major, 71 Wash.App. 531, 534-35, 859 P.2d 1262 (1993)). The Marley Court relied, in part, on the definition contained in the Restatement (second) of Judgments that defines subject matter jurisdiction as “[a] judgment may properly be rendered against a party only if the court has authority to adjudicate the *type of controversy* involved in the action.” (emphasis added). The Court stated that it was “underscore[ing] the phrase ‘type of controversy’ to emphasize its importance. [a] court or agency does not lack subject matter jurisdiction solely because it may lack authority to enter a given order.” 125 Wn.2d at 539. Furthermore, the

Court determined the phrase should maintain its “rightfully sweeping definition.” Id.

When there is an issue as to subject matter jurisdiction the “focus must be on the words ‘type of controversy.’” Id. Thus, “[i]f the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to *something other than subject matter jurisdiction.*” Id. (emphasis added) (cited approvingly in ZDI Gaming Inc. v. State ex rel. Washington State Gambling Com’n, 268 P.3d 929, 173 Wn.2d 608, 618 (2012)).

A related and important consideration of subject matter jurisdiction issues is that “Jurisdiction does not depend on procedural rules.” Dougherty v. Department of Labor & Industries for State of Washington, 76 P.3d 1183, 150 Wn.2d 310, 315 (2003) (relying on 14 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: TRIAL PRACTICE CIVIL § 41, at 118 (5th ed.1996)).

The court below concluded quite specifically that it “lacks subject matter jurisdiction . . . [because Appellants] failed to serve the City of Lakewood within the time constraints of RCW 34.05.542.” In its oral statements the trial court expressed that “[i]t makes sense to deny the motion [to dismiss], but the law says I should grant the motion . . . I don’t think I have jurisdiction here.” 1 RP 12. This was error.

Taking the cited authorities into consideration the question becomes: is the type of controversy involved in the instant dispute within the subject matter jurisdiction of the superior court? The answer is yes.

The *type of controversy* presented to the superior court was whether a decision by an unelected municipal “hearing examiner” conducted the “appeal” in accord with applicable state and local laws, whether the hearing comported with constitutional protections, and whether the findings of fact and conclusions of law reached by the hearing examiner were supported by the record. The appeal to the superior court also requested an order determining that the city hearing examiner should have reached the constitutional search warrant issue and how that issue should be resolved. Whether the court lacked authority to enter an order under the Washington Administrative Procedures Act (“APA”)⁴ has no bearing on whether the court had subject matter jurisdiction over the *type of controversy*.

Even if the court were to be sitting solely as a reviewing court under the Washington APA, that is a type of controversy expressly conveyed by statute. See RCW 34.05.510 *et. seq.* Because the type of controversy is within the subject matter jurisdiction of a superior court any other alleged

⁴ Interestingly, Lakewood has maintained that the Administrative Procedure Act does not apply because the decision at issue was not made by a “agency” as the Act defines the term, but nevertheless asserts that the Act *does* apply for purposes of determining subject matter jurisdiction.

error or deficiency such as a statute of limitation must go to some other issue. See Marley v. Department of Labor and Industries of State, 886 P.2d 189, 125 Wn.2d 533, 539 (1994). Specifically, the error alleged goes to whether the claim is time barred, and if it is the remedy is a dismissal of the APA claim with prejudice.

Statute of limitations questions relate to an issue “other than subject matter jurisdiction.” 125 Wn.2d at 439. In State v. Peltier, 309 P.3d 506, 511-14 176 Wn.App. 732 (2013) the court summarized the Washington jurisprudence on statute of limitations and subject matter jurisdiction as “for a decade, the law has been that a statute may not divest a superior court of subject matter jurisdiction unless it, at the same time, assigns that subject matter jurisdiction to some other court . . . a statute of limitation does not do this . . . decisional authority holding that a statute of limitation can deprive a superior court of subject matter jurisdiction no longer appears viable.”⁵ (relying on and summarizing In re Personal Restraint of Stoudmire, 141 Wash.2d 342, 5 P.3d 1240 (2000), In re Major, 71 Wash.App. 531, 536 859 P.2d 1262 (1993) (finding that a superior court

⁵ Similar to the point raised VII-b regarding the “often confused” and “improvident and inconsistent use of the term” subject matter jurisdiction referenced in Marley v. Department of Labor and Industries of State, 886 P.2d 189, 125 Wn.2d 533, 539 (1994) (quoting In re Major, 71 Wash.App. 531, 534-35, 859 P.2d 1262 (1993)) the Peltier court disagreed on the reading of the so-called “decisional authority” that the Washington Supreme Court overturned (or not) with Justice Cox concurring to note that the “decisional authority” explored by the court had not previously analyzed the subject matter jurisdiction issue differently. 309 P.3d 506, 515-17.

“clearly” had subject matter jurisdiction over the “class of actions” to which the case belonged (post-secondary support dispute modified after child support had ceased)), Marley v. Department of Labor & Indus., 125 Wash.2d 533, 539, 886 P.2d 189 (1994), Shoop v. Kittitas County, 149 Wash.2d 29, 37, 65 P.3d 1194 (2003)).

Obviously a defendant who successfully argues that a claim is time barred should be entitled to a judgment or order that the claim is time-barred by the applicable statute of limitations. If a statute of limitations did, contrary to law, divest a court of subject matter jurisdiction then a defendant could only obtain an order of dismissal “without prejudice” and the claim could be refiled. Such a situation also makes the “relation back” doctrine under CR 15 meaningless.

A hypothetical situation helps to illustrate this point. If a plaintiff files and serves an action in Washington in 2014 alleging in the factual section of the complaint that in 2000 the defendant entered into a written contract for the sale of an automobile, but after the contract was signed and agreed to the defendant assaulted the plaintiff causing personal injury.

If the legal theories in the complaint included *only* assault Lakewood’s argument below, as accepted by the superior court, would be that the court lacks subject matter jurisdiction because the statute of limitations is two years, and therefore must enter an order of dismissal “without prejudice.”

RCW 4.16.100. If the Plaintiff moves to amend the complaint to add a cause of action for breach of written contract (with a six year limitation), does the court have authority to entertain the motion or should the motion be moot as there is an alleged lack of subject matter jurisdiction? A civil assault is a *type of controversy* that the superior court has the authority to adjudicate, and thus the motion can be heard.⁶

C. Assuming arguendo the statute of limitations is a subject matter jurisdiction requirement, the Appellants did timely file and serve Lakewood

Even assuming that the statute of limitations is a subject matter jurisdiction issue (which it is not), and assuming that the Washington Administrative Procedures Act applies (which it likely does not), the Appellants still timely initiated and timely filed the petition for review under the APA.

The civil rules dictate that there is one form of action: a “civil action.” CR 2. The statutory writ of review and declaratory relief are both sought under title 7 “Special proceedings and actions.” RCW 7.16.340, which controls writs of review, expressly provides that where not inconsistent the “provisions of the code of procedure concerning civil

⁶ This hypothetical also illustrates that the relation-back doctrine under CR 15 (c) *must* be for purposes of removing statute of limitations concerns otherwise there would be no purpose in its existence.

actions are applicable to and constitute the rules of practice in the proceedings in this chapter.” Even if the Washington Administrative Procedure Act governed the rules in part, RCW 34.05.510 (2) provides that “[a]ncillary procedural matters before the review court, including intervention . . . consolidation, joinder, severance, transfer . . . are governed, to the extent not inconsistent with this chapter, by court rule.” See also Diehl v. Western Washington Growth Management Hearings Bd., 103 P.3d 193, 153 Wn.2d 207, 215 (Wash. 2004) (recognizing that RCW 34.305.510(2) was a specific authorization by the legislature that “the use of civil rules apply in certain sections of the APA, including ancillary procedural matters”). Under a writ of review (either statutory or constitutional), APA appeal, or other appellate-like review by a superior court it is “more appropriate” to look to the rules of appellate procedure. 153 Wn.2d at 216. Naturally, the RAPs will be more on point with potential procedural issues than CRs often will. In this matter RAP 5.4 is the most on point and, in essence, requires that a notice of appeal be filed within thirty days and be served on other parties in a “timely” matter.⁷

⁷ Specifically, RAP 5.4 requires service of the notice of appeal on the same day as filing, but recognizes that absent prejudice to an adverse party late service is not grounds for a dismissal of the appeal.

A petition for a statutory writ of review⁸ or a declaratory action is not procedurally unique. As such a complaint⁹ was filed in superior court well within thirty days of the decision by the City Hearing Examiner. Lakewood was served with the petition on perhaps the 31st day after the decision was actually served. Lakewood served with a summons, for the first time, on October 29, 2013¹⁰ along with the original complaint filed in this action.

The basic statutory framework and court rules apply here as in all other civil actions. RCW 4.28.020 governs *when* a court obtains “jurisdiction” by providing “[f]rom the time of the commencement of the action by service of summons, or by the filing of a complaint . . . the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings.” RCW 4.16.170 determines when an action has commenced or not commenced. That statute states that: “for the purpose of tolling *any* statute of limitations an action *shall be deemed commenced when the complaint is filed* or summons is served whichever occurs first. If service [of the summons] has not been had on the defendant prior to the

⁸ There is a statutorily determined framework for executing the actual writ, but the petition for the writ itself has no uniquely prescribed procedural rules.

⁹ Whether labeled a petition or a complaint the “petition for judicial review” here clearly identified the factual dispute at issue and challenged the legal conclusions of the city hearing examiner.

¹⁰ Whether Lakewood could have been served the summons at some prior time is irrelevant, as the actual service was well within the 90 days provided by statute. Under the Washington Administrative Procedures act a summons is not required to be served: proceedings for review shall be instituted by . . . filing *a petition* in the superior court.”

filing of the complaint the Plaintiff shall cause . . . [the defendant] to be served personally . . . within ninety days from the date of filing the complaint.” (emphasis added). See also CR 3 (“a civil action is commenced by service of a copy of a summons together with a copy of a complaint . . . or by filing a complaint”).

RCW 34.05.514 provides that judicial review under the APA “shall be *instituted* by paying the fee required under RCW 36.18.020 and filing a petition in the superior court.” (emphasis added) RCW 34.05.542 indicates the petition “shall be filed with the court *and* served on the agency . . . within thirty days after service of the final order.” To read the two statutes harmoniously with one another as well as with RCW 4.16.170 (allowing one to file and serve within 90 days), CR 3 or RAP 4.2 and the policy of liberal construction in favor of determinations of disputes on the merits discussed *supra*, the “instituted” language in RCW 34.05.514 should be understood toll the statute of limitations, and service should be done within the thirty days, but a court is not unable to rule, under the APA, if service is not effectuated within the thirty days on all parties. This reading is further enhanced by RCW 34.05.542 expressly providing that that section is “[s]ubject to other requirements of this chapter or of another statute.” In short, an agency that is served after 30 days *may* move the court to dismiss if it can demonstrate prejudice.

D. Amendment of the complaint should have been allowed or considered.

The superior court indicated that amendment would be permitted for reasons of judicial economy, but *could not* do anything other than dismiss the matter. 1 RP 12. The motion to amend was summarily denied “as moot” based entirely upon granting of Lakewood’s motion to dismiss. CP 45-46; see also 1 RP 2-3 (the court indicating the dismissal motion is dispositive of the motion to amend). It was not otherwise considered on its own merits. On remand the superior court should be instructed to consider the motion on its merits.

i. *Appellants’ motion to amend should have been granted.*

The overriding goal of CR 15 in accord with the overriding policy of Washington courts is to allow disputes between parties to be resolved on the merits without unnecessarily or unfairly prejudicing the substantial rights of litigants due to procedural or technical hurdles. See Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc., 105 Wn.2d 878 (Wash. 1986) citing Conley v. Gibson, 355 U.S. 41, 48 (1957) (overruled in part on other grounds Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). The purpose of the rule is “to facilitate a

proper decision on the merits.” Herron v. Tribune Publishing Co., 108 Wn.2d 162, 165 (1987) (internal quotations omitted).

CR 15(a) expressly incorporates the intent: “leave shall be freely given when justice so requires.” The rule is to be liberally applied. Sanwick v. Puget Sound Title Ins. Co., 423 P.2d 624, 70 Wn.2d 438, 445 (1967); see also Adams v. Allstate Ins. Co., 58 Wash.2d 659, 671, 364 P.2d 804 (1961). Denial of a motion to amend is reviewed by abuse of discretion. Herron, 108 Wn.2d at 165.

Amendments relating to new legal theories, as opposed to new factual allegations, should generally be permitted. See id. at 165-66. The courts discretion should consider whether an amendment is unfair to the adverse party, the status of the litigation, and the prejudice an amendment may cause. Id. at 165-66 citing Tagliani v. Colwell, 10 Wn.App. 227, 233 (1973) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)); 6 C. Wright & A. Miller, at § 1487. See also Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc., 105 Wn.2d 878, 888(Wash. 1986). Thus the true test has been for at least 60 years: “Is the opposing party prepared to meet the new issue?” Hendricks v. Hendricks, 211 P.2d 715, 35 Wn.2d 139, 148 (1949).

The liberal policy in favor of permitting amendments applies not only to amendments themselves, but also relating those claims back to the

original filing date. See Olson v. Roberts & Schaeffer Co., 25 Wn.App. 225, 227 (Div. 2 1980) (citing Grant v. Morris, 7 Wash.App. 134 (1972)). In Olson court recognized that “[t]here is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the” original filing. 25 Wn.App. at 228; see also Culpepper v. Snohomish County Department of Planning and Community Development, 59 Wn. App. 166, 168 (1990) , review denied, 116 Wn.2d 1008 (1991) (there the court noted “no purpose whatsoever is served by the hyper technical application of a rule which would have no effect other than to deny Culpepper his day in court”).

The addition of new issues or theories of law has been frequently addressed and nearly universally permitted where there is not a substantial prejudice to the party opposing the motion to amend. See Gregory v. Fidelity and Cas. Co., 7 Wn.2d 645 (1941) (allowing amendment of legal theory that did not “create a fatal variance” under previous court rules); see also Matthews v. Calhoun, 192 Wash. 544, 545 (1937) (“an amendment to a complaint may introduce a new or different cause of action”) (citing McGuirk v. Gazzam, 150 Wash. 554, 274 P. 176 (1929) and White v. Million, 175 Wash. 189, 27 P.2d 320 (1933)). See also In re Campbell, 19 Wn.2d 300, 307 (1943) (“The mere fact that an amendment

to a pleading may introduce a new issue is not itself sufficient ground for denying it . . . the true test is found in the answer to the question, is the opposing party prepared to meet the new issue?) (citing Bowers v. Good, 100 p. 848, 849 (Wash. 1909). In Federal Rubber Co. v. M.M. Stewart Co., 180 Wash. 625 the Washington Supreme Court, relying again on CR 15's antecedent rule, stated "a cause of action which would not have been barred by the statute of limitations, if stated in the original complaint, shall not be barred if introduced by amendment at any later stage of the action." Id. at 630.

Those instances where prejudice has been recognized are particularly egregious and obvious (which is in line with the rule's explicit policy of favoring amendment). See Elliott v. Barnes, 645 P.2d 1136, 32 Wn.App. 88, 92 (Div. 2 1982) (affirming a denial to amend a complaint based on the undue delay of filing the motion more than a year after the original complaint and less than a week before trial); see also Ives v. Ramsden, 142 Wn.App. 369 (2008) (affirming a denial of a post-trial amendment that sought to add an affirmative defense and four other issues that was not addressed at trial).

Here the amended complaint alleged causes of action completely and wholly related to a raid on his store by various law enforcement agencies and the City of Lakewood's subsequent decisions to revoke his business

license, and the City Hearing Examiner's decision to uphold that decision. The facts alleged not only "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading" they are, aside from minor grammatical or structuring changes, the exact same facts. CF CP 1-17 (original complaint), CP 33-40 (proposed amended complaint). It is unquestionable that the proposed amended complaint raises claims that "arose out of the same conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." CR 15 (c).

It is difficult to determine a way in which the City of Lakewood would be harmed by an amendment alleging statutory and constitutional writs of review and a declaratory action regarding the constitutional validity of the search at issue. Trial was not yet scheduled. Lakewood had actual notice of a lawsuit against them arising out of a dispute relating to the same alleged facts. The City Hearing Examiner's decision expressly invited court review of the search ("If within one year of the date of this order a court of competent jurisdiction rules that the . . . [search warrant] was improperly issued . . . the appellant may move for reconsideration.") See CP 15-16 (City Hearing Examiner's decision).

ii. The relation back doctrine should apply in this matter.

CR 15(c) provides that “[w]henver the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.” There is little point in the existence of this rule other than to cure alleged missed filing deadlines.

Here Lakewood could not demonstrate prejudice. Trial was not scheduled and aside from having to defend on the merits Lakewood has no prejudice.

To the extent Appellants’ negligence is alleged to have created this delay that legal rule is invalid in this context. Inexcusable neglect under CR 15(c) prohibits the relation back of an amended complaint that adds new parties (not claims) when the delay in adding the new parties is caused by the plaintiff’s inexcusable neglect. S. Hollywood Hills Citizens Ass'n v. King County, 101 Wash.2d 68, 78, 677 P.2d 114 (1984); see also Stansfield v. Douglas County, 43 P.3d 498, 146 Wn.2d 116, 122 (2002) (where the Washington Supreme Court recognized that “[t]he inexcusable neglect rule does not apply to amendments adding claims.”). Even in Caruso v. Local Union No. 690 of Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 670 P.2d 240, 100 Wn.2d 343 (Wash. 1983) amendment was permitted where the plaintiff, without good

any reason for the delay, sought an amendment adding a claim five years and four months after the original claim, and just a month before trial. The Washington Supreme Court there said “once litigation involving particular conduct has been instituted, the parties are *not* entitled to the protection of the statute of limitations against the later assertion by amendment of claims that arise out of the same conduct as set forth in the original pleading.” 100 Wn.2d at 351 (emphasis added).

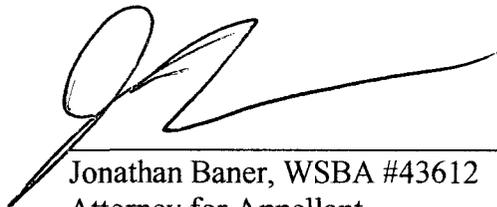
Undeniably, the Plaintiffs proposed amended complaint arises from the same set of facts. The proposed complaint is nearly verbatim a resuscitation of the facts originally plead. The relation-back doctrine must apply.

VIII. CONCLUSION

A superior court has subject matter jurisdiction to hear appeals under the APA, writs of review, and declaratory actions. A statute of limitation defense is not a subject matter defense, and in this instance the court had subject matter jurisdiction to consider Appellants motion to amend the complaint. Furthermore, the APA’s statute of limitations of thirty days is satisfied by instituting an action in superior court and filing later than thirty days is not grounds for dismissal for lack of subject matter jurisdiction (but may be grounds if prejudice can be shown).

The superior court should have considered the Appellants' motion to amend, and had it been considered it likely would have been granted. A motion to amend should generally be allowed and the relation-back doctrine should also generally apply to promote adjudications on the merits. Here, Appellants meet the requirements favoring amendment.

DATED this 12th day of May, 2014.



Jonathan Baner, WSBA #43612
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing on:

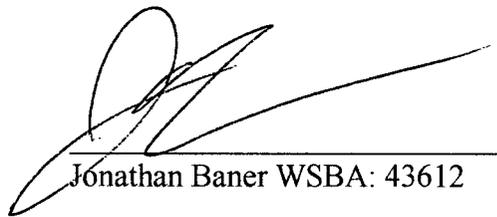
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By the following indicated methods:

- Electronic mail (e-mail).

The undersigned hereby declares under penalty of perjury under the laws of the state of Washington that the foregoing statements are true and correct.

EXECUTED this 12th day of May, 2014.



Jonathan Baner WSBA: 43612