

**FILED**

SEP 06 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 291561-III

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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DANIAL L. NEWLON  
Petitioner/Appellant

v.

NICOLE (fka NEWLON) ALEXANDER  
Respondent

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APPEAL FROM THE SUPERIOR COURT  
FOR SPOKANE COUNTY

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HON. GREGORY D. SYPOLT  
Trial Court

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APPELLANT'S REPLY BRIEF

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**Mary Schultz Law, P.S.**  
Mary Schultz  
Attorney for Appellant  
111 S. Post Street, Penthouse 2250  
Spokane, WA 99201  
(509) 458-2750

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## I. REPLY

Respondent Nicole Alexander (“Nicole”) fails to provide any support for the June 18, 2010 order of the trial court declining to vacate an earlier August 8, 2008 order determining which parent should receive the right to bury their child’s remains. The appeal should be granted, and the order vacated.

A. **The CR 60 vacate action was a proper means of addressing the theories raised here.**

Danial Newlon (“Danial”) acknowledges that the standard of review for the denial of a motion to vacate is abuse of discretion. He acknowledges that a CR 60(b) motion is not a substitute for an appeal. But the case law cited by Nicole do not support her claim that a vacate motion is improper here.

Matters that affect the regularity of the proceedings are handled through CR 60(b). *See CR 60(b)(1)*. Precedent cited by Nicole do not address similar issues. *See, e.g.,* her cites at *Burlingame v. Consolidated Mines*, 106 Wn.2d 328, 722 P.2d 67 (1986) (where a vacate action was brought on the theory of insufficient evidence – *not* voidness and lack of subject matter jurisdiction); and *Port of Port Angeles v. CMC*, 114 Wn.2d 670, 790 P.2d 145 (1990) (also addressing errors of law within a

proceeding). Void orders are also to be addressed through CR 60(b)(5).

**B. The CR 60 vacate action was timely.**

Nicole then argues that the CR 60(b) motion was not filed within a “reasonable time.”

But Danial’s CR 60(b)(5) motion asserting that an order is void is not subject either to the one year time for filing or the “reasonableness” within that time frame. A motion to vacate a judgment because it is void may be made at any time. *Ellison v. Process Systems Inc. Const. Co.*, 112 Wn.App. 636, 642, 50 P.3d 658, 661 (Wn.App. Div. III, 2002), citing *State ex rel. Turner v. Briggs*, 94 Wn.App. 299, 305, 971 P.2d 581 (1999); and see *Doe v. Fife Municipal Court*, 74 Wn.App. 444, 449, 874 P.2d 182 (1994), cited in Appellant’s opening brief.

Danial’s motion under CR 60(b)(1), i.e., for irregularity, must be brought within a year, *and* within a “reasonable time” within that year. *See Lockett v. Boeing Co.*, 98 Wn.App. 307, 310, 989 P.2d 1144 (1999). It is conceded that the motion was brought within a year of the order challenged. And the trial court made no findings that Danial’s motion was not brought “within a reasonable time.” *CP 596-597*. The trial court made no findings at all. *Id.* Absent a finding that Danial’s motion was *not* within a reasonable time, the motion is timely.

C. **No new theories are presented. Even if they presented, they are properly before the court.**

Nicole argues that Danial's "new theories" on appeal were not argued to the trial court. But Danial argued to the trial court that the 2008 order was void and arose from irregularity. *CP 293*. Moreover, when issues are raised affecting fundamental constitutional rights or jurisdiction, such claims may be raised (even for the first time) on an appeal. *See State v. Santos*, 104 Wn.2d 142, 145-46, 702 P.2d 1179 (1985) (citing, e.g., RAP 2.5(a) and *State v. Dictado*, 102 Wn.2d 277, 286-87, 687 P.2d 172 (1984)).

Here, both subject matter jurisdiction and constitutional claims are at issue.

D. **This state's constitution does not grant Superior Courts the authority to determine exclusive burial rights between the parents.**

Nicole acknowledges that this state's constitution provides for judicial power vesting in the Superior Court only via that power which the Legislature has provided. *See Washington State Constitution, Art. IV, § 1*. But Nicole argues original jurisdiction is granted to the Superior Court to determine the controversy presented here – i.e., which RCW

68.50.160 surviving parent has the priority burial over human remains—through language discussing “such special cases and proceedings not otherwise provided for.” *Id.*

This argument first concedes that no statutory authority exists for the actions of the trial court here. Second, RCW 68.50 specifically addresses and limits Superior Court jurisdiction over human remains and limits that jurisdiction. RCW 68.50.010 vests exclusive jurisdiction over the human remains at issue here in the coroner, given the circumstances of this child’s death. There is no evidence this jurisdiction was released—in fact, the record reflects no concern for, or over, the jurisdictional issue raised within the record.

Nicole thus consistently returns to her proposition that parties can stipulate to, and thereby create, subject matter jurisdiction in the trial court. She argues, e.g., that because the parties had the right to control the disposition of the remains of their child, then they had the right to hand that dispute over to the court to decide. But this is no more than arguing for stipulated subject matter jurisdiction in the trial court under the “special cases and proceedings” language of the Constitution. Parties cannot create this subject matter jurisdiction in the Superior Court. *In re Marriage of Murphy*, 90 Wn.App. 488, 496, 952 P.2d 624 (1998),

citing *Wampler v. Wampler*, 25 Wn.2d 258, 267, 170 P.2d 316 (1946). A court either has subject matter jurisdiction or it does not; if it does not, any judgment entered is void, and is, in effect, no judgment at all. *In re Marriage of Furrow*, 115 Wn. App, 661, 667, 63 P.3d 821 (2003), citing *Wesley v. Schneckloth*, 55 Wn.2d 90, 93-94, 346 P.2d 658 (1959). Lack of subject matter jurisdiction renders the Superior Court powerless to pass on the merits of the controversy brought before it. *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998). The parties cannot agree to vest the Superior Court with the subject matter jurisdiction required here.

**E. Federal injunctive rules do not apply here.**

Nicole cites a federal treatise on federal rule of civil procedure, citing “Federal Practice and Procedures, § 2962@331.” First, Danial’s motion is brought under Superior Court Civil Rule 60, not a federal rule. But second, the only “§ 2962” of the federal practice and procedure treatise appears to address FRCP 65 injunctive requests. *See 11A Fed. Prac. & Proc. Civ. § 2962 (2d ed.)*, (*entitled Appeals From Orders in Actions Involving Injunctive Relief*). Motions to vacate in the federal court are brought under FRCP 60(b)(4), not Rule 65. *11 Fed. Prac. &*

*Proc. Civ. CIV Rule 60 (2d ed.).*

Nicole suggests that if a party had an opportunity to contest subject matter jurisdiction, and failed to do so, then subject matter jurisdiction could not be further challenged. *See Nicole*, p. 18, citing “*Fed. Prac. and Procedures*, § 2962 at 331.” The citation produces no such source. But whatever the source of this citation, it cannot be discussing void orders. Under federal law, the rule is the same—subject matter jurisdiction is not subject to stipulation or waiver, *see, e.g., Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) (holding that the parties' stipulation cannot confer subject matter jurisdiction). Further, a party cannot waive its right to contest a court's subject matter jurisdiction; such right may be asserted at any time. *Stephenson v. Simon*, 427 F.Supp. 467 (D.C.D.C.1976); *Vishnesky v. U.S.*, 418 F.Supp. 698 (Wis.1976).

All subject matter jurisdiction, whether state or federal, is limited by the Constitution and the statutory authority within the bounds of that Constitution.

**F. Subject matter jurisdiction over human remains does not arise under the Marital Dissolution Act.**

Nicole argues that the 2008 trial court's order is not void as it was

entered under RCW Chapter 26.09—the dissolution of marriage act. Respondent is unable to cite any authority that dissolution statutes vest the court with authority to determine disputes over human remains.

Nicole’s attempt to distinguish *In re Marriage of Furrow*, 115 Wn.App. 661, 63 P.3d 821 (2003) seems to boil down to the idea that a court which may decide a parenting plan for a living child must also necessarily be allowed to order the remains of the child interred. But the statutes prove the contrary. A court operating under the marriage dissolution act—RCW 26.09—has no authority to address human remains. The permitted actions of a superior court as to the disposition of human remains are specifically addressed and limited under RCW 68.50, and vested in the coroner. *RCW 68.50.010*.

Nicole cites *Woods v. Woods*, 48 Wn.App. 767, 769, 740 P.2d 379 (1987) as support for the proposition a court may determine the controversies between estranged parents. The case supports Danial.

First, the *Woods* court confirms that the superior court’s authority to grant relief is subject to RCW 68.50 (at that time, RCW 68.08). *Id.* at 768-769. Further, the jurisdiction invoked in *Woods* was that of the disinterment procedure, not the internment procedure. *Id.* at 768. Removal of remains, i.e., “permission to remove remains”

authority *is* granted to the Superior Court under certain criteria. *RCW 68.50.200*. Finally, the *Woods* court confirms that its authority in such matters is only that given it by the legislature. As the then *RCW 68.08.160*'s priority statute vested both surviving parents with the right to control disposition of remains, and the parents did so by agreement, then the court would not get involved. *Id.* at 769.

Here, the parents did not agree to internment. They delivered that controversy to the Superior Court. The court's decision necessarily resulted in further "agreement" implementing its mandatory terms, but the *order* was the determining act from which further action necessarily arose. And no statute or constitutional provision vests any such order authority in the trial court.

In *Dependency of J.M.R.*, 160 Wn.App. 929 (2011), also cited by Nicole, the court also upheld the denial of the CR 60(b) motion. But again, the stipulation involved was a stipulation to allow the court to exercise its statutory authority (i.e., stipulations to voluntary terminations).

The same occurred in *Sherry v. Finn Indemnification Co.*, 132 Wn.App. 335, 131 P.3d 992 (2006), also cited by Nicole. The issue in *Sherry* was that of general damages for personal injury—i.e., a monetary

judgment under an uninsured motorist claim. Arbitration was engaged in pursuant to the insurance contract. *Id.* at 359. A motion was then brought to confirm the arbitrator's award under RCW 7.04.150. An offset was also at issue. The Superior Court thus had specific jurisdiction for both requested forms of relief. *Sherry*, 132 Wn.App. at 361. The appellate court reversed only because it determined that since both forms of relief requested were authorized to the Superior Court, but simply under different statutory acts, the parties were essentially combining both forms of relief under one declaratory type judgment.

Again, here, the issue differs markedly. The Superior Court had no authority to decide the issue presented. Here, RCW 68.50.010 vested exclusive jurisdiction over these human remains in the coroner.

**G. Danial did not misrepresent anything.**

Nicole then argues that Appellant "misrepresented" something to the trial court in 2008, based on later interrogatory answers. He cites "CP 470—523, Ex. E," i.e., 123 pages of the record. It is unknown what record is being referenced. No "Exhibit E" exists to "CP 470-523."

**H. The lack of commencement of any proceeding is conceded.**

This action was never "commenced" by any means to vest jurisdiction in the court, even were a statute to exist granting that

authority. Nicole offers no response. She concedes the issue.

**I. Irregularity of the proceeding is conceded.**

In the 2008 trial court procedure, neither party received any civil rule rights to discovery, nor any proper trial processes and protections, nor benefits of any evidence rules, nor guidance nor assistance of counsel even at the hearing. No support is offered by Nicole as to the court's ex parte hearings conducted in chambers to obtain evidence, upon which the later ruling was based. Nicole fails to respond. The CR 60(b)(1) irregularity *basis* is conceded.

**II. ATTORNEY FEES.**

RAP 18.1 permits recovery of reasonable attorney fees or expenses on review if applicable law grants to that party the right to so recover. Attorney fees are recoverable when there is a contractual, statutory, or recognized equitable basis for such an award. *Hsu Ying Li v. Tang*, 87 Wn.2d 796–98, 557 P.2d 342 (1976).

Nicole argues that Danial is violating a contract and, therefore, is responsible for her fees. The document Nicole cites as a contract, however, is actually a court order, “CP 270-271,” and does not include any provision for attorney fees.

Nicole then relies on RCW 4.84.185, a statute designed to

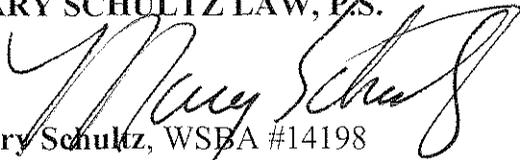
compensate the targets of frivolous lawsuits for fees and expenses incurred in fighting meritless cases. *See, e.g., Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994); *Reid v. Dalton*, 124 Wn. App. 113, 100 P.3d 349 (2004); *Highland School Dist. No. 203 v. Racy*, 149 Wn. App. 307, 316, 202 P.3d 1024 (2009). Under RCW 4.84.185, an action dismissed as frivolous must be considered as a whole prior to awarding attorney's fees. *Biggs*, 119 Wn.2d at 136.

But Danial's motion was not denied by the trial court as frivolous. No such finding or conclusion was made. And on appeal, Nicole has made no showing that the issues raised are frivolous or advanced without reasonable cause. Her motion on the merits was denied. And in her briefing, Nicole not only concedes the irregularity issues raised under CR 60(b)(1), but is likewise unable to support superior court subject matter jurisdiction over the internment of human remains by any precedent or statute. The appeal is sound, and should be granted.

DATED this 2 day of Sept., 2011.

Respectfully Submitted,

MARY SCHULTZ LAW, P.S.

  
Mary Schultz, WSBA #14198  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

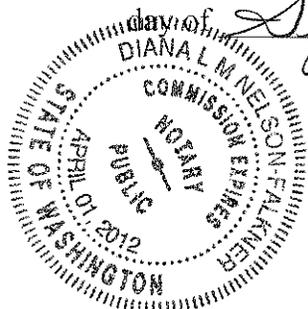
The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers.

That on the 2<sup>ND</sup> day of SEPT, 2011, she served a copy of the **APPELLANT's REPLY BRIEF** to the person hereinafter named at the place of address stated below which is the last known address via regular U.S. mail, postage prepaid.

<b>Mr. Charles Conrad</b> <b>Attorney for Respondent</b> 9011 E. Valleyway Spokane Valley, WA 99212	<input type="checkbox"/> E-Mail <input checked="" type="checkbox"/> <b>U.S. Regular Mail, postage prepaid</b> <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery/Messenger
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\_\_\_\_\_  
**KIM SIZEMORE**

SUBSCRIBED AND SWORN to before me this 2<sup>nd</sup> day of September, 2011.



  
\_\_\_\_\_  
**DIANA L.M. NELSON-FALKNER**  
**NOTARY PUBLIC** in and for the State of  
Washington, residing in Spokane.  
Commission Expires: 04/01/12