

FILED
10/30/2017 1:16 PM
Court of Appeals
Division III
State of Washington

NO. 350371

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

**BOTANY UNLIMITED DESIGN & SUPPLY, LLC,
Petitioner,**

v.

**WASHINGTON STATE LIQUOR & CANNABIS BOARD,
Respondent**

Franklin County Superior Court # 15-2-50903

REPLY BRIEF

Andrew R. Corsberg

Attorney for Petitioner

35 W. Main Ave., Ste. 300
Spokane, WA 99201
(509) 464-7601
WSBA No. 51152

Table of Contents

I. Argument.....4

a. Introduction.....4

b. Standard of Review for Interpretation and Application of Court Rules.....5

c. The lower court’s order of dismissal with prejudice should be applied only to Botany’s expired RCW 64.40 claim6

d. LCB takes unreasonably disorganized and contradictory positions8

 (i) LCB fails to recognize the expired 30-day SOL of Botany’s RCW 64.40 claim, therefore precluding Botany from refiling its “case” based on that single “claim”9

 (ii) Botany still has a “case” against LCB based upon the non-expired claims because they have never been adjudicated on the merits.9

 (iii) LCB mischaracterizes Botany’s appeal as requesting an advisory opinion.10

 (iv) LCB’s surprise, unbriefed opposition resulted in the excessive expenditure of resources for the courts and the parties11

II. Conclusion13

Table of Authorities

Cases	Page(s)
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484 (1997)	12
<i>Dewitt v. Mullen</i> , 193 Wn. App. 548 (2016, Div. II)	5
<i>In re Firestorm 1991</i> , 129 Wn.2d 130 (1996)	5
<i>Spokane County v. Specialty Auto & Truck Painting, Inc.</i> , 153 Wn.2d 238 (2004)	5

I. Argument

a. Introduction

Botany was required to file its damages suit to preserve one of its possible claims against LCB. That claim had a 30-day statute of limitations. Following the developments of the then-concurrent license renewal case, Botany decided to abandon its RCW 64.40 claim while it continued to flesh out other potential causes of action and legal theories arising from the same arbitrary agency action.

Respondent LCB provides an adequate restatement of the facts leading up to the lower court's original dismissal order.¹ Br. of Respondent at 2-3. That original order, however, was facially incomplete. CP 20. Rather than leaving the order incomplete, both parties filed their motions: LCB filed a Motion to Correct, CP 21-23, and Botany filed a Motion to Amend/Vacate, CP 35-36. After reading LCB's

¹ Note: While LCB was the party who scheduled the hearing for Botany's CR 41 motion, LCB fails to explain why it did not comply with LCR 7(b)'s requirement to file a brief in opposition, and instead argued, without briefing the court nor Botany, in opposition to Botany's motion.

response brief to this Court, it appears both parties wanted the same thing: a dismissal of Botany's then-expired RCW 64.40 claim.

For the sake of judicial economy, this Reply will be restricted to that true core issue submitted to this Court: whether the lower court's order of dismissal *with prejudice* applies only to Petitioner Botany's sole RCW 64.40 claim.

b. Standard of Review for Interpretation and Application of Court Rules

Petitioner Botany resubmits that the standard of review here is *de novo*. *Spokane County v. Specialty Auto & Truck Painting, Inc.*, 153 Wn.2d 238, 244 (2004) (interpreting and applying CR 41); *In re Firestorm* 1991, 129 Wn.2d 130, 135 (1996) (interpreting and applying CR 26); *Dewitt v. Mullen*, 193 Wn. App. 548, 555 (2016, Div. II) (interpreting and applying CR 40).

Respondent LCB does not distinguish its case authorities from the authorities submitted by Botany. In fact, LCB does not respond to Botany's argument at all. In an *ipse dixit* manner, without explanation or discussion, LCB suggests that there is a separate standard in the case law regarding the standard of review for interpreting and applying CR

41. *Compare* Br. of Petitioner at 6-7 *with* Br. of Respondent at 4-5. LCB provides no distinguishing explanation for why Botany's Supreme Court authorities do not apply, and LCB's Court of Appeals authorities do apply. Respondent seems to believe that opinions by Washington Supreme Court are superseded by Court of Appeals opinions. Such a position is gravely concerning, and wholly unreasonable position for a government agency to take.

c. The lower court's order of dismissal with prejudice should be applied only to Botany's expired RCW 64.40 claim.

Following the lower court's granting of LCB's motion to amend, an incomplete order became an ambiguous order. Such an ambiguous order results in the unclear determination regarding whether any *case* Botany might have against LCB is dismissed with prejudice, or any *claim* brought by Botany under RCW 64.40 is dismissed with prejudice. Botany simply requests that this Court resolve this ambiguity and provide the specificity both parties request: replacing "The case is dismissed with prejudice" with "Botany's RCW 64.40 claim is dismissed with prejudice".

Respondent LCB's opposition to such specificity appears to conflict with its motion to the trial court to correct clerical error. *Compare* CP 29-30 (requesting of language specifying "case is dismissed with prejudice") *with* Br. of Respondent at 1 (suggesting claim-specific language requires judicial speculation). LCB provides no argument against the inclusion of such specific language, but instead (incorrectly) interprets Botany's argument to be generally against the dismissal with prejudice. Br. of Respondent at 1. LCB then argues (at length) about the court's discretion in granting and the non-absolute nature of a CR 41 motion to dismiss. Br. of Respondent at 6-9. Therefore, while LCB's regurgitation of case law is not entirely inaccurate, it is wholly misplaced.

To reiterate, Botany's issue is not with the dismissal of its RCW 64.40 claim. Botany's issue is with the blanket dismissal *with prejudice* of Botany's entire case.

This issue is one of specificity, not generality. Yet LCB willingly conflates the legal distinction between the terms "case" and "claim". *Compare* BLACK'S LAW DICTIONARY (2nd ed. 1910), *Case*, <http://thelawdictionary.org/case/> (last visited Oct. 29, 2017), *with*

BLACK'S LAW DICTIONARY (2nd ed. 1910), *Claim*, <http://thelawdictionary.org/claim/> (last visited Oct. 29, 2017). Without a doubt, many *cases* are brought to court relying on a single *claim*. In those instances, such a dismissal as LCB demands would be appropriate. The case at issue here, however, involves more than one claim: one claim that was explicitly brought, and several that were contemplated but were not yet filed. Due to the lower court's blanket dismissal of Botany's "case", uncertainty remains as to whether such a dismissal would restrict Botany's ability to bring other non-expired claims arising from the same agency action. This uncertainty is easily resolved by specifically stating that the dismissal with prejudice applies only to Botany's now-expired RCE 64.40 claim.

d. LCB takes unreasonably disorganized and contradictory positions.

In its brief, LCB states that "there is no reason for the Board to face the potential burden of defending against another action should Botany choose to refile its case." Br. of Respondent at 13. This assertion highlights the disorganized and contradictory position taken by LCB in four distinct ways.

- (i) LCB fails to recognize the expired 30-day SOL of Botany's RCW 64.40 claim, therefore precluding Botany from refiling its "case" based on that single "claim".

LCB's concern for Botany refiling its case based on the same cause of action has no basis in law or fact, and is therefore unfounded. For the same reason LCB argued to the trial court to dismiss Botany's claim with prejudice, Botany would also be precluded from refiling: the 30-day statute of limitations had run. Botany has exhaustively acknowledged that its RCW 64.40 claim has expired. Botany also acknowledges that it cannot, and will not, refile its case against LCB under that same claim.

- (ii) Botany still has a "case" against LCB based upon the non-expired claims because they have never been adjudicated on the merits.

Botany's inability to refile its case based on one expired claim does not preclude its ability refile its case based on one or more unfiled claims. LCB appears to concede that the dismissal with prejudice does not apply to Botany's yet-to-be-alleged claims, but stubbornly and confusingly argues against Botany's appeal to this Court to make that (non)application unambiguously clear. *See* Br. of Respondent at 9 ("such claims were not raised prior to dismissal. Such a clarification by

this Court is therefore unnecessary and unjustified.”). Since LCB believes that the dismissal with prejudice does not apply to Botany’s yet-to-be-alleged claims, it should have no issue with Botany’s appeal. Despite acknowledging the existence of Botany’s other yet-to-be-alleged claims, and appearing to concede that the dismissal does not apply to those claims, LCB essentially argues that “there is no reason” for Botany to “refile its case.” Such a position is exceedingly disorganized and contradictory.

(iii) LCB mischaracterizes Botany’s appeal as requesting an advisory opinion.

This is simply untrue. Botany requests specific judicial action towards its dismissed RCW 64.40 claim, but LCB mischaracterizes such a request as being speculative and advisory towards claims that have not yet been filed. In effect, an advisory opinion is exactly what the LCB acquired with the lower court’s clarified order. LCB requested the lower court to dismiss Botany’s voluntarily withdrawn and expired claim *with* prejudice. By requesting the dismissal to be “with prejudice”, LCB was effectively asking the trial court to “advise” that Botany’s withdrawn and expired claim could not be refiled. In contrast,

Botany requests that the dismissal order specifically state that Botany's RCW 64.40 claim is dismissed with prejudice, rather than "the case" in general. This requires no speculation or advisory opinions on the status of Botany's yet-to-be-alleged claims, and it is in alignment with the preferred "with prejudice" dismissal requested by LCB.

- (iv) LCB's surprise, unbriefed opposition resulted in the excessive expenditure of resources for the courts and the parties

If Botany's original CR 41 Motion to Dismiss was granted, and not opposed, the result would have been the same dismissal requested by LCB: Botany's RCW 64.40 claim would be dismissed, and its ability to refile that claim would be barred by the statute of limitations. Rather than allowing that motion to be heard unopposed, LCB instead argued in opposition, without briefing Botany or the court,² thereby surprising Botany that there was opposition to its voluntary motion to withdraw the now-expired RCW 64.40 claim. LCB's surprise opposition resulted in cascade of corrective measures requiring large expenditures of resources for both parties and the courts. Such expenditures included:

² And in violation of LCR 7(b)'s requirement to file motions in opposition by at least noon, one day before argument.

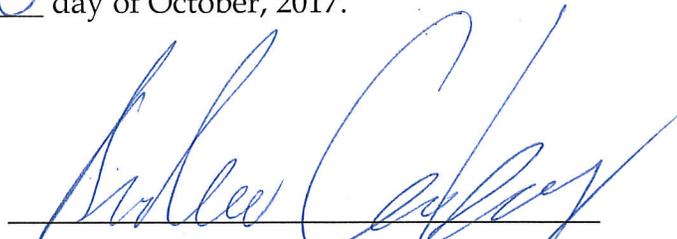
a facially incomplete dismissal order, dozens of hours of research and drafting, travel across several hundreds of miles during winter, two separate hearings in Franklin County, an overbroad and ambiguous dismissal order, and this appeal.

LCB acknowledges that a court has the “overriding responsibility [] to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action.” Br. of Respondent at 13 (quoting *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 512-13 (1997)). LCB appears to suggest that a “just determination” was achieved by the lower court’s dismissal as is. LCB, however, fails to explain how a “just determination” is not accomplished by granting Botany’s appeal for specificity. Should the dismissal order remain as written, a just determination is not achieved. In the event Botany refiles its case based upon unexpired causes of actions, considerably more resources will be demanded to resolve how the current dismissal applies to Botany’s newly filed claims. While that exact issue is not before this Court now, it is an issue that is a direct result from denying Botany’s appeal for specificity.

II. Conclusion

For the above reasons, Petitioner Botany requests this Court to reverse the lower court's sweeping general order of dismissal, hold that Botany's RCW 64.40 claim is dismissed with prejudice as opposed to Botany's case, and to provide any other relief this Court deems just, including attorney's fees and costs.

DATED this 30 day of October, 2017.



Andrew Corsberg
WSBA no. 51152
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Danette Lanet, certify that on the 30 day of October, 2017, I electronically file, via Washington State Appellate Courts' Secure Portal the foregoing *REPLY BRIEF*, which will send notification of such filing to the following:

Jong Lee, Assistant Attorney General
1125 Washington St. SE
P.O. Box 40100
Olympia, WA 98504-0100

DATED this 30 day of October, 2017.



Danette Lanet

LAW OFFICES OF AR CORSBERG

October 30, 2017 - 1:16 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35037-1
Appellate Court Case Title: Botany Unlimited Design & Supply, LLC v Liquor & Cannabis Board
Superior Court Case Number: 15-2-50903-1

The following documents have been uploaded:

- 350371_Briefs_20171030131527D3184514_4623.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Botany - Damages appeal - BU - Reply Brief - filed.pdf

A copy of the uploaded files will be sent to:

- Heather.Wulf@atg.wa.gov
- jeffry@finerwinn.com
- jongl@atg.wa.gov

Comments:

Sender Name: Andrew Corsberg - Email: andrew@corsberglaw.com
Address:
35 W MAIN AVE STE 300
SPOKANE, WA, 99201-0119
Phone: 707-322-0489

Note: The Filing Id is 20171030131527D3184514