

**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

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**OPENING BRIEF**

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## I. Introduction

This is the second lawsuit brought by Petitioner Botany Unlimited Design & Supply (Botany) against the Respondent Washington State Liquor & Cannabis Board (LCB). The first suit challenged the LCB's denial of Botany's application to renew its I-502 license to produce and process cannabis<sup>1</sup>. This second case is substantially affected by the outcome of Botany's first lawsuit<sup>1</sup> against LCB—still on appeal. The claims in this appeal, however, focus on the damages resulting from the LCB's failure to renew.

Pursuant to RAP 2.2(a), Botany appeals to this Court for relief from the lower court's overbroad Order of Dismissal—*with prejudice*—of Botany's yet-to-be-filed claims with unexpired statutes of limitations.

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<sup>1</sup> *In re License Application of Botany Unlimited Design and Supply, LLC*, 198 Wn. App. 90 (2017), *pet. rev. pending*, No. 94344-3.

## II. Assignment of Error & Issue Presented

Petitioner Botany's two assignments of error are:

- (1) The lower court erred in dismissing Botany's yet-to-be-alleged causes of actions *with prejudice*; and
- (2) The lower court erred in its hyper-technical misapplication of CR 59 and 60.

The Issues are:

- (a) Whether the lower court errantly dismissed with prejudice all of Botany's unexpired, unrepresented claims following Botany's voluntary dismissal of its land use claim, and
- (b) Whether the lower court violated the rules of construction by interpreting Botany's CR 60 Motion to Vacate in such a way that it resulted in form prevailing over substance, and effectively precluding the achievement of substantial justice.

*Standard of Review:* As this is an appeal from the interpretation and application of a court rule; the standard of

review 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). *But see Gutierrez v. Icicle Seafoods, Inc.*, 198 Wn. App. 549, 553 (2017, Div. I) (dismissals under CR 41 reviewed for abuse of discretion); *Escude v. King County Pub. Hosp. Dist.*, 117 Wn. App. 183 (2003, Div. I) (reviewing motion to dismiss for manifest abuse of discretion).

### **III. Statement of the Case**

#### *a. Introduction*

Following LCB's final agency action that resulted in the non-renewal of Botany's license to legally produce and process cannabis, Botany filed two lawsuits against LCB: (1) claiming LCB unlawfully declined to renew Botany's license, and (2) claiming that, under RCW 64.40.020, LCB damaged Botany in

failing to renew Botany's license. This appeal pertains to the second lawsuit regarding Botany's damages.

*b. Procedural facts pertaining to Botany's CR 41 Motion*

In 2014, LCB granted Botany a license to legally produce and process cannabis under Washington's I-502 system. In 2015, LCB decided to not renew Botany's license. In October 2015, in the abundance of caution, Botany filed to preserve its rights under RCW chapter 64.40 while it separately litigated the merits of LCB's decision to not renew Botany's license. *See* CP 1-6 (Botany's Complaint). *See also* RCW 64.40.020 (1982). Botany brought suit based on a land use cause of action that carries a thirty-day statute of limitations. *See* CP 5. *See also* RCW 64.40.030 (1982). By mid-June 2016, Botany decided to withdraw its land use claim and filed a motion for voluntary nonsuit. *See* CP 12 (CR 41 Motion), 14-15 (CR 41 Memorandum). *See also* CR 41(a)(1)(B) (2015).

Botany's CR 41 motion was intended to only dismiss Botany's land use claim, which had been filed to preserve a 30-day statute of limitations. Botany understood that its CR 41 voluntary dismissal of its land-use claim would be with prejudice because the 30-day statute of limitations has since expired. CP 44-45. *See* RCW 64.40.030. The motion was not intended to apply to Botany's yet-to-be-alleged tort claims, such as damages for Intentional Interference of Business Relations and damages for Equitable Estoppel. *See* CP 45-46. *See also* CP 5 (reserving additional causes of action). Claims based on these grounds have statutes of limitations ranging between two to six years. *See specifically* RCW 4.16.080(6) (three-year SOL tolls until discovery by aggrieved party of liable acts) (2011). *See generally* RCW 4.16.100 (1881) (actions limited to two years); 4.16.080 (2011) (actions limited to three years); 4.16.040 (2012) (actions limited to six years).

*c. Procedural facts pertaining to the CR 41 Hearing*



approximately the same time, Botany filed a motion to vacate under CR 60, and a response in opposition, pursuant to LCR 7(b)(1)(B), to LCB's Motion to Correct. *See* CP 35-53. LCB replied to Botany's motion and opposition by requesting that the lower court ignore Botany's argument, construe Botany's CR 60 motion to vacate as a CR 59 motion to reconsider, and find that Botany's motion to "reconsider" was untimely filed. CP 59. The lower court ruled in favor of LCB and signed LCB's proposed order that denied Botany's "motion for reconsideration", CP 62, and overbroadly ordered "the case [to be] dismissed with prejudice." CP 64. Botany sought to clarify the court's "with prejudice" language; specifically, Botany sought language in the order to clarify that the prejudice only applied to the then-expired land use claim under RCW chapter 64.40. It remains unclear as to whether the dismissal pertains just to Botany's RCW 64.40 claim and any other expired claims, or whether the order pertains to *all* of Botany's possible claims:



**Rule.** The rule in Washington is that a plaintiff may unilaterally obtain a voluntary dismissal, and such dismissal must be granted by the court. *Specialty Auto*, 153 Wn.2d at 246, 250; *Gutierrez v. Icicle Seafoods, Inc.*, 198 Wn. App. 549, 554-555 (2017, Div. I) (citing *Greenlaw v. Renn*, 64 Wn. App. 499 (1992)). See CR 41(a)(1)(B) (“any action *shall* be dismissed by the court”) (emphasis added); RAP 1.2(b) (“shall” means a requirement of the trial court). See also *Bulk FR8, LLC v. Schuler*, 2017 Wn. App. LEXIS 677, 7 (2017, Div. I) (unpublished opinion) (“The rule state that voluntary dismissals ‘shall’ be granted . . . ‘shall’ is mandatory.”)<sup>2</sup>; *Sorreles v. Macfarlane*, 2015 Wn. App. LEXIS 440, 9 (2015, Div. II) (unpublished opinion) (highlighting the importance of filing motion and bringing it to the court’s attention)<sup>2</sup>. But see *Escude*, 173 Wn. App. at 191-92 (discussing dismissals with prejudice under CR 41(a)(4) when claims have been conceded).

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<sup>2</sup> Cited pursuant to GR 14.1 (Citation to unpublished opinions)

**Examination of Rule.** In *Greenlaw*, a plaintiff brought suit against a physician for malpractice. 64 Wn. App. 499, 500. The defendant physician answered, counterclaimed, and moved for summary judgment. *Id.* The day before the hearing for summary judgment, the plaintiff filed with the court and served upon the defendant a motion for voluntary nonsuit. *Id.* The parties proceeded to the hearing where counsel for plaintiff notified the court of the motion for voluntary nonsuit. *Id.* at 501. The court declined to grant the plaintiff's motion for voluntary nonsuit, and instead granted the defendant's motion for summary judgment. *Id.*

The appellate court in *Greenlaw* highlighted the importance of the case posture when deciding whether to grant a motion for voluntary nonsuit. *Id.* at 502 (citing *Elliot v. Peterson*, 92 Wn.2d 586, 588 (1979)). There, the court stated that the right to voluntary nonsuit is absolute, until after a plaintiff rests his or her case. *See id.* (discussing the application of CR 41(a)(1)(B)). The appellate court in *Greenlaw* held that when a motion for

voluntary nonsuit is filed before the dispositive hearing is conducted, “the motion must be granted as a matter of right.” *Id.* at 504. The appellate court then reversed the lower court, and remanded with the direction to enter an order dismissing the plaintiff’s complaint *without prejudice*. *Id.*

Similarly, in *Gutierrez*, the plaintiff brought an action against his employer for negligence and other claims. *Gutierrez*, 198 Wn. App. at 552. Following discovery, the defendant employer moved for summary judgment. *Id.* The plaintiff responded to summary judgment, then later filed for voluntary nonsuit under CR 41. *Id.* The trial court dismissed the plaintiff’s claims without prejudice, except for the claims withdrawn via plaintiff’s summary judgment response. *Id.*

The appellate court in *Gutierrez*, finding the circumstances similar to those in *Greenlaw*, noted that the hearing on the matter had not yet began, nor had the trial court indicated its decision on the motion. *Id.* at 555. Because the

summary judgment hearing had not yet began, the *Gutierrez* court upheld the trial court's dismissal of the plaintiff's claims without prejudice. *Id.* at 554-55.

The appellate court in *Gutierrez* again reiterated the importance of case posture in deciding whether to grant motions for voluntary nonsuits "as a matter of right." *Id.* (citations omitted). In finding for the plaintiff, the *Gutierrez* court stated that dismissals with prejudice under CR 41(a) "should be exercised only in limited circumstances where dismissal without prejudice would be pointless . . . [such as] when the statute of limitations has run or plaintiff has conceded the claim." *Id.* at 557 (citations omitted).

In contrast, LCB proffered several authorities in its CR 60 Motion to Correct that a court has the discretion to dismiss all of a plaintiff's unrepresented and unexpired claims with prejudice. *See* CP 58. In replying to Botany's response, Respondent LCB cited case authority in such a way that obfuscated the true

meanings of those authorities. *See id.* LCB merely cites the cases as authoritative without any discussion or case analysis. *See* CP 58-59.

Despite its opposition to Botany's arguments for relief, LCB provides nothing in support of its assertions outside a single fleeting reference to some case authorities. *See* CP 58-59. A simple surface inspection reveals the case authorities proffered by LCB do not, in fact, stand for the propositions claimed. In reality, those cases actually support Botany's position that the lower court's dismissal should not have been with prejudice. In effect, LCB, intentionally or otherwise, led the lower court into error by citing authorities that did not in fact stand for the proffered propositions of the law.

LCB posits, without qualification or analysis, that *Escude* to stand for the legal proposition that a trial court has the complete discretion to dismiss a plaintiff's case under CR 41 with prejudice. *See* CP 58. This, actually, is only partially true;

the *Escude* court did find that a trial court may, under CR 41(a)(4), make a dismissal with prejudice. 117 Wn. App. 183, 187, 192. The *Escude* court, however, went on to state that such dismissals should “be exercised only in limited circumstances where dismissal without prejudice would be pointless.” *Id.* at 187.

In *Escude*, plaintiffs filed suit against health care providers for violations of the standard of care. *Id.* at 187. In responding to a motion for summary judgment brought by defendants, the plaintiffs made a number of concessions and admissions. *Id.* The plaintiffs soon thereafter filed a voluntary dismissal under CR 41(a)(1)(B), including those claims that were conceded in the response to summary judgment. *Id.* The trial court granted the voluntary dismissal of all the claims except those that were conceded in the summary judgment response. *Id.*

The appellate court in *Escude* upheld the trial court’s decision to dismiss the conceded claims with prejudice. *Id.* at

192. Discussing its decision the *Escude* court observed that the “with prejudice dismissal” only applied to those claims which the plaintiffs conceded, and not to the non-conceded claims. *Id.* Like the decisions in *Greenlaw* and *Gutierrez*, the court’s decision in *Escude* turned upon the posture of plaintiff’s case. *See id.*

LCB also proffered *Dewitt v. Mullen* as unqualified support for a trial court’s unilateral discretion to dismiss a plaintiff’s claims under CR 41 with prejudice. *See* CP 58-59. Looking to the analysis in *Dewitt*, the facts and circumstances are entirely distinct from those presented here. *See* 193 Wn. App. 548, 555-556. Specifically, *Dewitt* discusses CR 40(d) dismissals compared to CR 41(b) dismissals. *Id.* Neither of those rules or provisions are at issue here, and considering the lack of explanation or case analysis, Botany is at a loss for how it can explain LCB’s assertion that *Dewitt* is in any way applicable to

the circumstance here.<sup>3</sup> Outside of serving as a distraction or misdirection, there is virtually no merit or reason justifying LCB's reliance on *Dewitt* in its CR 60 Motion to Correct.

LCB's reliance on *Podrebarac v. GV*, 124 Wn.2d 288 (1994) is unclear. *See* CP 58 (to clarify, LCB mislabeled the case "*In Re Detention of GV*"). The issue in *Podrebarac* involved an attempt by the State of Washington to recommit three mentally ill individuals. *Id.* at 290. The central issue of that case was "the proper interpretation of a portion of Washington's involuntary treatment act." *Id.* As stated by that court, "our holding is limited to the facts of these cases". *Id.* at 297. Therefore, proffering this case as a relevant and applicable authority within CR 41(a) jurisprudence is wholly inappropriate and improper, especially since LCB provided no discussion or explanation as to how any rule in *Podrebarac* applies.

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<sup>3</sup> Botany acknowledges the relevance held by *Dewitt* for outlining the applicable standard of review for when a lower court interprets state court civil rules.

**Application of Rule.** Despite superficial distinctions within the case law, all of them are fundamentally analogous to the circumstances at issue here. The sole difference between the discussed cases and the issue before this court is that the lower court here expanded its dismissal with prejudice to include the “reserved” unexpired and unrepresented claims of the plaintiff, Botany. Compare CP 5-6 and CP 63-64, with *Gutierrez*, 198 Wn. App. at 553 (dismissals with prejudice should be only in limited circumstances) and *Escude*, 117 Wn. App. at 192 (only conceded claims were dismissed with prejudice). Such a departure from established CR 41 jurisprudence is a clear manifest error and demonstrably unreasonable.

Further, the above cited authorities support Botany’s argument that the lower court improperly applied CR 41 by dismissing all of Botany’s claims with prejudice. This is especially true when CR 41(a)(1)(B) is read in the light of CR 8(f), “[a]ll pleadings shall be construed as to do substantial justice.” Therefore, the state court Civil Rules are to be construed

and applied to do “substantial justice”, not to simply provide the government “substantial convenience”.

Like in *Greenlaw* and *Gutierrez*, here the plaintiff moved for voluntary nonsuit before the court heard arguments for summary judgment. In fact, here, summary judgment was not yet filed, neither was any other type of dispositive motion. The only pleading filed after LCB’s Answer to Botany’s Complaint was Botany’s CR 41 Motion. *See* CP 10-11, 12.

Unlike the lower court in *Escude*, here the lower court dismissed all of Botany’s claims with prejudice, rather than restricting such dismissal specifically to the sole claim Botany conceded, its claim under RCW chapter 64.40, nor generally to Botany’s claims with expired statutes of limitations.

**Conclusion.** The mandatory nature of a CR 41 motion turns on the posture of the case, specifically as to whether the motion is brought to the court’s attention before the plaintiff has rested. Additionally, the presence of a dispositive motion could

dispel the mandate that comes with motions under CR 41(a). Since the plaintiff in this case, Botany, had not yet rested, nor had LCB filed a dispositive motion such as summary judgment, it follows that Botany fulfilled the requisite conditions to exercise its rights to a voluntary nonsuit under CR 41(a) *without prejudice*.

***b. The lower court errantly and unreasonably applied CR 59 to Botany's CR 60 Motion to Vacate.***

**Sub-Issue.** Whether the lower court violated the rules of civil procedure by applying CR 59 to Botany's pleading under CR 60.

**Rule.** In the State of Washington, "[a]ll pleadings shall be so construed as to do substantial justice." CR 8(f) (2015). Finally, "whenever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form." *Specialty Auto*, 153 Wn.2d at 245 (quotations omitted).

**Application of Rule.** Here it is clear that the lower court construed the rules of civil procedure, at LCB's insistence, in such a way that precluded substantial justice, prevented litigation of the merits, and effectively valued form over substance. By granting LCB's request to construe Botany's CR 60 Motion to Vacate as a CR 59 Motion to Reconsider, the lower court effectively violated both CR 8(f) and the Substance Over Form rule discussed in *Specialty Auto*. Because the lower court granted LCB's request to misconstrue Botany's CR 60 Motion, LCB successfully led the lower court into error.

It is unclear whether this was the result of intention or mere negligence as LCB does not provide any examination of those authorities. *See* CP 58-59. Additionally, rather than respecting the spirit or letter of CR 8(f), LCB argument runs against all of CR 8(f), and successfully persuaded the lower court to disregard it entirely as evidenced by its willingness to construe Botany's motion to vacate into an untimely CR 59 motion. *See* CP 61-62. Such a practice not only runs afoul of the rules of civil

procedure, but also runs afoul of established case law valuing substance over form. *See Specialty Auto*, 153 Wn.2d at 245.

**Conclusion.** The rules of civil procedure are required to be interpreted in such a way that achieves substantial justice, allows litigation of the merits, and values substance over form. Because LCB effectively convinced the lower court to disregard these foundational rules of civil procedure, and because substantial injustice was the result, it follows that the lower court committed reversible error when it applied CR 59 to Botany's CR 60 Motion to Vacate.

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## V. Conclusion

For the above reasons, Petitioner asks that this Court to hold that only Botany's land use claim under RCW 64.40.020 is dismissed with prejudice, while Botany's remaining claims with unexpired statutes of limitations are dismissed without prejudice thereby reversing the lower court's sweeping general order of dismissal, and to provide any other relief this Court deems just.

DATED this 31 day of July, 2017.



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## CERTIFICATE OF SERVICE

I, Danette Lanet, certify that on the 31 day of July, 2017, I electronically file, via Washington State Appellate Courts' Secure Portal the foregoing *OPENING BRIEF*, which will send notification of such filing to the following:

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DATED this 31 day of July, 2017.



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Danette Lanet

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