

No. 89623-2
(COA No. 43899-2-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MARK OLLA, an individual,

Appellant,

v.

ROBERT H. WAGNER, as an individual and as Trustee of THE
ROBERT H. WAGNER MONEY PURCHASE PENSION PLAN
(aka "THE ROBERT H.W WAGNER PENSION PLAN") and DOES 3
through 50, Inclusive,

Respondents

FILED
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PETITION FOR REVIEW

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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TABLE OF CONTENTS

TABLE OF CONTENTSi-ii

TABLE OF AUTHORITIES..... iii - ix

INTRODUCTION 1-2

IDENTITY OF PETITIONER1

DECISION BELOW 1-2

ISSUES PRESENTED FOR REVIEW2-4

STATEMENT OF THE CASE5-15

 A. Statement of Facts5-8

 B. Trial Court Decision Below9-10

 C. Court of Appeals Decision Below.....10-15

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED AT THIS COURT5-41

 I. THE PETITION SATISFIES THE REVIEW CRITERIA IN RAP 13.4 (b)..... 5-41

 A. THE COA2 PANEL OF JUDGES ERRED BY AFFIRMING THE COMMISSIONER’S RULING WHICH HAD BEEN INCORRECT BECAUSE, PURSUANT TO RCW 4.12.010, THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OVER OLLA’S ACTON AND THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION BY DENYING OLLA’S CR 60 (b) (5) MOTION TO VACATE ITS JANUARY 15, 2010 JUDGMENT AND ORDERS WHOSE ENTRY CONSTITUTED AN ABUSE OF JUDICIAL AUTHORITY18-41

 1. In order to determine if OLLA’s Appeal was clearly without merit pursuant to RAP 18.14 (e) (1), the COA2 had an obligation to review *de novo* the trial court’s determination that it had possessed subject matter jurisdiction over OLLA’s action, given such determination provided the basis upon which the trial court denied OLLA’s CR 60 (b) (5) motion to vacate propriety.....18-25

2. The test approved by this Court in *In re Marriage of Brown* does not change the outcome where the trial court plainly lacked subject matter jurisdiction over the *action* as filed and in which case the trial court's proceeding on to adjudicate a substantive issue in the case would not only amount to a manifest abuse of judicial authority but would render judgment thereon void 25-29

3. The Commissioner Did Not Endeavor To Determine If The Trial Court Possessed Subject Matter Jurisdiction Over OLLA's Action As It Most Certainly Did Not Based Upon OLLA's Complaint Pursuant to RCW 4.12.010 and RCW 7.24 et seq.. 29-40

3a. The subject matter jurisdiction of the trial court could not be invoked with respect to those claims in OLLA's Complaint concerning the subject Washington real property according to Washington State courts' requirement that an action involving declaratory relief present justiciable claims in such regard both under RCW 7.24 (Uniform Declaratory Judgments Act) as well as ordinarily and otherwise. 29-36

3b. RCW 4.12.010 provides limitations upon Washington State superior court subject matter jurisdiction as constitutionally conferred, such that actions requiring the court to directly act with respect to real property are only within the jurisdiction of a court in the county in which such property be situate. 36-40

4. The Belated Nature Of OLLA's Collateral Attack Is Of No Moment Due To The Trial Court's Non-Discretionary Duty To Vacate A Judgment As Void For Lack Of Subject Matter Jurisdiction 40-41

CONCLUSION 41-43

TABLE OF AUTHORITIES

Cases

Allied Fid. Ins. Co. v. Ruth, 57 Wn. App. 783, 796 P.2d 206 (1990)
.....21

Allstate Ins. Co. v. Khani, 75 Wn. App. 317, 323, 877 P.2d 324
(1994) 20, 27

Branson v. Port of Seattle, 152 Wn.2d 862, 879, 101 P.3d 67
(2004).....24

Bresolin v. Morris, 86 Wash. 2d 243, 543 P.2d 325 (1975)
..... 24, 27

Burnside v. Simpson Paper Co., 66 Wn. App 510, 832 P.2d 537
(1992) 39

*Clallam County Deputy Sheriff's Guild v. Bd. Of Clallam County
Comm'rs*, 92 Wn. 2d 844 35

Cole v. Harveyland, LLC, 163 Wn. App. 199, 258 P. 3d 70
(2011)
.....22

Conom v. Snohomish County, 155 Wn.2d 154,157, 118 P.3d 344
(2005) 19

Crosby v. Spokane County, 137 Wn.2d 296, 301, 971 P.2d
(1999)
.....19

Cugini v. Apex Mercury Mining Co., 24 Wn. 2d 401, 165 P.2d 82 (1946)39, 41

Deaconess v. Wash. State Hwy Comm'n, 66 Wash. 2d 378, 403 P.2d 54 (1985)24

Department of Ecology v. Acquavella, 131 Wn.2d 746, 759-60, 935 P.2d 595 (1997) 26

DiNino v. State, 102 Wn.2d 370, 684 P.2d 1297 (1984). 35

Diversified Indus. Dev. Corp. v. Ripley, 82 Wash.2d 811, 815, 514 P.2d 13735

Dobbins v. Mendoza, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997).
...18

Dougherty v. Dept. of Labor & Indus., 150 Wn.2d 310, 315, 76 P.3d 1183 (2003)1, 22, 38

Haley v. Highland, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). . 26

In re Adoption of Beuhl, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976)23

In re Knutson, 114 Wn. App. 866 at 871, 60 P.3d 681 (2003). . 20

In Re Marriage of Brown, 98 Wn.2d 46, 653 P.2d 602 (1982). 4, 11,
12, 16, 25-29

In re Marriage of Burkey, 36 Wn. App. 487, 489, 675 P.2d 619 (1984). 20

In re Marriage of Furrow, 115 Wash. App. 661, 667, 63 P.3d 821
(2003) 26

In re Marriage of Kastanas, 78 Wash. App. 193, 201, 896 P.2d 726
(1995)..... 20, 23

In re Marriage of Major, 71 Wn. App. 531, 533, 859 P.2d 1262
(1993) 38, 40

In re Marriage of Ortiz, 108 Wn.2d 643, 649-50, 740 P.2d 843. . . .
.....26, 38

In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174
((2003)30, 34

In re Marriage of Robinson, Washington State Court of Appeals,
Division III, Appeal No. 27143-9-III (December 28, 2010).
.....23

In re Parentage of J.M.K., 155 Wn.2d 374, 386-87, 119 P.3d 840
(2005).....29

In re Sentence of Hilburn, 63 Wn. App. 102, 103, 816 P. 2d 1247
(1991)24

In re Schuoler, 106 Wn.2d 500, 512, 723 P.2d 1103 (1986) . .20

James v. Kitsap County, 154 Wn.2d 574, 587-588, 115 P.3d 286
(2005)38

<i>Kaye v. Lowe's HIW, Inc.</i> , 108 Wn. App. 320, 330, 242 P.3d 27 (2010)	32, 36
<i>Kizer v. Caufield</i> , 17 Wash. 417, 49 P. 1064.....	28
<i>Lubben v. Selective Service System Local Bd. No.27</i> , 453 F.2d 645 (1 st Cir. 1972).....	
<i>M.A. Mortenson Co., Inc. v. Timberline Software Corp.</i> , 93 Wn. App. 819, 970 P.2d 80 (1999), aff'd, 140 Wn.2d 568, 998 P.2d 305 2005.....	20, 27
<i>Marley v. Dep't of Labor & Indus.</i> , 125 Wn.2d 533, 540, 886 P.2d 189 (1994).....	21
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn.2d 677, 684, 132 P.3d 115 (2006).....	26
<i>Mitchell v. Kitsap County</i> , 59 Wash. App. 177, 797 P.2d 516 (1990).....	12, 21, 41
<i>Mueller v. Miller</i> , 82 Wn. App. 236, 251, 917 P.2d 604 (1996). . .	21
<i>Newlon v. Alexander</i> , 167 Wn. App. 195, 272 P.3d 903 (2012) . .	19
<i>Nollete v. Christianson</i> , 115 Wash.2d 594, 599, 800 P.2d 359 (1990).....	35
<i>Pasados Safe Haven v. Vanport Homes, Inc.</i> , 259 P. 3d 280, 162 Wash. App. 746 (2011).....	34
<i>Patrol Lieutenants Ass'n v. Sandberg</i> , 88 Wn.App. 652, 661-62, 946 P.2d 404 (1997).....	35

Petersen v The State of Washington, 16 Wash. App. at 79 (1976)....
.....24, 27

Ralph v. State of Washington Department of Natural Resources,
171 Wn. App. 262, 286 P.3d 992 (2012)
..... 12, 40

Shoop v. Kittitas County, 108 Wn. App. 388, 393, 30 P.3d 529
(2001), aff'd, 149 Wn.2d 29, 65 P.3d 1194 (2003). 22, 32

Silver Surprise, Inc., 74 Wn. 2d 519, 522, 445 P.2d 334 (1968)
.....30, 31, 37, 40

Skagit Surveyors & Eng'rs, LLC, 135 Wn.2d at 556, 958 P.2d at 962
..... 41

Snyder v. Ingram, 48 Wn. 2d 637, 638, 296 P. 2d 305 (1956)
..... 12, 39, 40

Spokane Airports v. RMA, Inc., 149 Wn. App. 930, par. 25, 206 P.3d
364, 369 (2009) 19, 32

State ex rel. Martin v. Superior Court, 101 Wn. 81, 94, 172 P. 257, 4
A.L.R. 572 (1918)..... 38-39

State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 207 (1984)31

State v. Phillips, 65 Wn.2d 239, 828 P.2d 42 (1992)26

State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995),
review denied, 129 Wn.2d 1003 (1996).....20

<i>To-Ro Trade Shows v. Collins</i> , 144 Wn.2d 403, 27 P.3d 1149 (2001).....	35
<i>Truck Ins. Exch. v. Vanport Homes, Inc.</i> , 147 Wn.2d 751, 766, 58 P.3d 276 (2002).....	30, 34
<i>Walker v. Munro</i> , 124 Wn.2d 402, 411-12, 414, 879 P.2d 920 (1994).....	34-35
<i>Washington State Bank v. Medalia Healthcare, LLC</i> , 96 Wash. App. 547, 984 P.2d 1046 (1999).....	37, 40
<i>Wiles v. Dept. of Labor & Indus. of State</i> , 34 Wn.2d 714, 723, 209 P.2d 462 (1949).....	32

State Statutes

RCW 4.12.010.....	3, 6, 10, 13, 14, 17, 29-31, 36-40, 41
RCW 7.24.010.....	
RCW 7.24.020.....	31, 34

Rules of Court

CR 60 (b).....	21
CR 60 (b) (5)	3, 4, 13, 14, 17, 18, 24-25
RAP 13.4 (b)	15-16, 41
RAP 13.4 (c) (9).....	4

RAP 18.14 (e) (1)3, 18-19, 30, 42
RAP 18.14 (h).....4, 19

Constitutional Provisions

Wash. Const. art. IV, sec.64, 10, 17, 38

Miscellaneous

Restatement (SECOND) of Judgments, Sec.12 (1982)
.....11, 16, 25-26, 27, 28

14 KARL B. TEGLAND, WA PRACTICE: CIV. PRO.
Section 6:5 at 185 (2d ed. 2009).....40

TABLE OF AUTHORITIES

Cases

<i>Allstate Ins. Co. v. Khani</i> , 75 Wn. App. 317, 323, 877 P.2d 324 (1994)	20, 28
<i>Branson v. Port of Seattle</i> , 152 Wn.2d 862, 879, 101 P.3d 67 (2004)	24
<i>Burnside v. Simpson Paper Co.</i> , 66 Wn. App 510, 517, 832 P.2d 537 (1992)	
<i>Clallam County Deputy Sheriff's Guild v. Bd. Of Clallam County Comm'rs</i> , 92 Wn. 2d 844, 848, 601	
<i>Cole v. Harveyland, LLC</i> , 163 Wn. App. 199 ¹ at 209, 258 P. 3d 70 (2011)	
<i>Conom v. Snohomish County</i> , 155 Wn.2d 154, 157, 118 P.3d 344 (2005)	
<i>Crosby v. Spokane County</i> , 137 Wn.2d 296, 301, 971 P.2d (1999)	
<i>Cugini v. Apex Mercury Mining Co.</i> , 24 Wn. 2d 401, 165 P.2d 82 (1946)	
<i>Department of Ecology v. Acquavella</i> , 131 Wn.2d 746, 759-60, 935 P.2d 595 (1997)	
<i>Diversified Indus. Dev. Corp. v. Ripley</i> , 82 Wash.2d 811, 815, 514 P.2d 137	
<i>Dobbins v. Mendoza</i> , 88 Wn. App. 862, 871, 947 P.2d 1229 (1997)	
<i>Dougherty v. Dept. of Labor & Indus.</i> , 150 Wn.2d 310, 315, 76 P.3d 1183 (2003)	1, 22
<i>Haley v. Highland</i> , 142 Wn.2d 135, 156, 12 P.3d 119 (2000)	
<i>In re Adoption of Beuhl</i> , 87 Wn.2d 649, 655, 555 P.2d 1334 (1976)	
<i>In re Knutson</i> , 114 Wn. App. 866 at 871, 60 P.3d 681 (2003)	
<i>In Re Marriage of Brown</i> , 98 Wn.2d 46, 653 P.2d 602 (1982)	4, 16, 26, 28

¹ *Cole v. Harveyland, LLC*, 163 Wn.App 199, 205, 258 P.3d 70 (2011)[“We use caution in characterizing an issue as jurisdictional or a judgment as void, because the consequences of a court acting without subject matter jurisdiction “are draconian and absolute.”]

In re Marriage of Burkey, 36 Wn. App. 487, 489, 675 P.2d 619 (1984)

In re Marriage of Furrow, 115 Wash. App. 661, 667, 63 P.3d 821 (2003) 27

In re Marriage of Kastanas, 78 Wash. App. 193, 201, 896 P.2d 726 (1995) 23

In re Marriage of Major, 71 Wn. App. 531, 533, 859 P.2d 1262 (1993) 34

In re Marriage of Ortiz, 108 Wn.2d 643, 649-50, 740 P.2d 843

In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 ((2003) 30

In re Marriage of Robinson, Washington State Court of Appeals, Division III, Appeal No. 27143-9-III (December 28, 2010) 23

In re Parentage of J.M.K., 155 Wn.2d 374, 386-87, 119 P.3d 840 (2005)

In re Sentence of Hilburn, 63 Wn. App. 102, 103, 816 P. 2d 1247 (1991) 24

In re Schuoler, 106 Wn.2d 500, 512, 723 P.2d 1103 (1986) . . .

James v. Kitsap County, 154 Wn.2d 574, 587-588, 115 P.3d 286 (2005)

Kaye v. Lowe's HIW, Inc., 108 Wn. App. 320, 330, 242 P.3d 27 (2010) 32

Kizer v. Caufield, 17 Wash. 417, 49 P.

M.A. Mortenson Co., Inc. v. Timberline Software Corp., 93 Wn. App. 819, 970 P.2d 80 (1999), *aff'd*, 140 Wn.2d 568, 998 P.2d 305 (2005) 20

Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 540, 886 P.2d 189 (1994) 21

Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006)

Mitchell v. Kitsap County, 59 Wash. App. 177, 797 P.2d 516 (1990). 41

Newlon v. Alexander, 167 Wn. App. 195, 272 P.3d 903 (2012) . . . 20

Nollete v. Christianson, 115 Wash.2d 594, 599, 800 P.2d 359 (1990) 35

Pasados Safe Haven v. Vanport Homes, Inc., 259 P. 3d 280, 162 Wash. App. 746 (2011)

Patrol Lieutenants Ass'n v. Sandberg, 88 Wn.App. 652, 661-62, 946 P.2d 404 (1997) 35

Petersen v The State of Washington, 16 Wash. App. at 79 (1976)

Ralph v. State of Washington Department of Natural Resources, 286 P.3d 992 (2012) 40

Shoop v. Kittitas County, 108 Wn. App. 388, 393, 30 P.3d 529 (2001), aff'd, 149 Wn.2d 29, 65 P.3d 1194 (2003). 32

Silver Surprize, Inc., 74 Wn. 2d 519, 522, 445 P.2d 334 (1968). 31,

Skagit Surveyors & Eng'rs, LLC, 135 Wn.2d at 556, 958 P.2d at 962

Snyder v. Ingram, 48 Wn. 2d 637, 638, 296 P. 2d 305 (1956)

Spokane Airports v. RMA, Inc., 149 Wn. App. 930, par. 25, 206 P.3d 364, 369 (2009) 32

State v. Anderson, 58 Wn. App. 107, 110, 791 P.2d 547 (1990)

State ex rel. Martin v. Superior Court, 101 Wn. 81, 94, 172 P. 257, 4 A.L.R. 572 (1918)

State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 207 (1984) 31

State v. Phillips, 65 Wn.2d 239, 828 P.2d 42 (1992)

State v. Renquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), review denied, 129 Wn.2d 1003 (1996). 20

Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751, 766, 58 P.3d 276 (2002)

Walker v. Munro, 124 Wn.2d 402, 411-12, 414, 879 P.2d 920 (1994). 35

Washington State Bank v. Medalia Healthcare, 984 P.2d 1046 (1999)

Wiles v. Dept. of Labor & Indus. of State, 34 Wn.2d 714, 723, 209 P.2d 462 (1949) 32

State Statutes

RCW 4.12.010 16, 17

RCW 7.24.020 34

Rules of Court	
CR 60 (b) (5) RAP 13.4 (b)	21 3
RAP 13.4 (c) (9) RAP 14.04 (e) (1)	8 16, 19
Constitutional Provisions	
Wash. Const. art. IV, sec.6	38

Miscellaneous

Restatement (SECOND) of Judgments, Sec.12 (1982)	
14 KARL B. TEGLAND, WA PRACTICE: CIV. PRO. Section 6:5 at 185 (2d ed. 2009)	

“Jurisdiction exists because of a constitutional or statutory provision. A party cannot confer jurisdiction; all that a party can do is invoke it . . . subject matter jurisdiction typically refers to the authority of a court to provide relief as granted by the Constitution or the Legislature.” *Dougherty v. Dept. of Labor & Indus.*, 150 Wn.2d 310, 315, 76 P.3d 1183 (2003)

INTRODUCTION

IDENTITY OF PETITIONER

The Petitioner is MARK OLLA (“OLLA”), whom, as an individual, was the Plaintiff in the proceedings before the Kitsap County Superior Court (“trial court”) and Appellant for the subsequent subject appeal to the Court of Appeals, Division II, below. OLLA now, hereby, moves this Supreme Court pursuant to RAP 13.4 (b).

COURT OF APPEALS DECISION BELOW

OLLA seeks review, pursuant to RAP 13.4 (b) of the October 29, 2013 non-published Decision² (“Decision”), specifically *Olla v. Wagner Et Al.*, No. 43899-2-II, entered below at the Washington

² A true and correct copy of the subject Decision/Order designated as Order Denying Motion on the Merits, as was entered on October 29, 2013 at the COA2, is attached hereto as Appendix A.

State Court of Appeals, Division II ("COA2") on October 29, 2013.

The Decision was in denial of his RAP 17.7 Motion to Modify the COA2 Court Commissioner Eric B. Schmidt's August 29, 2013 Ruling³ ("Commissioner's Ruling") Granting the Motion on the Merits to Affirm ("MOTMTA") as was filed by Respondents, ROBERT H. WAGNER, as an individual and as Trustee of THE ROBERT H. WAGNER MONEY PURCHASE PENSION PLAN (aka "THE ROBERT H. WAGNER PENSION PLAN") and DOES 3 through 50, Inclusive ("WAGNER") on May 16, 2013 ("MTM"). In conformance with RAP 13.4 (c) (9), a copy of both the COA2 Decision and the Commissioner's Ruling are each attached hereto as Appendix A and B respectively.

ISSUES PRESENTED FOR REVIEW

1. Whether the COA2's panel of judges' Decision to deny OLLA's MTM is erroneous and presents issues which meet the criteria for granting review thereof by the Washington State Supreme Court pursuant to RAP 13.4 (b) (1) and/or (b) (2) and/or (b) (3) and/or (b) (4) ?
2. Whether the COA2 Commissioner's determination that OLLA's Appeal was clearly without merit as according to the requisite standard required by RAP 18.14 (e) (1) for granting

³ A true and correct copy of the subject Commissioner's Ruling Granting Motion on the Merits, as was entered on August 29, 2013, is attached hereto as Appendix B.

such a Motion is erroneous and an incorrect basis upon which to base his Ruling granting WAGNER's MOTMTA and dismissing OLLA's Appeal?

3. Whether the COA2 Commissioner's Ruling correctly affirmed the trial court's denial of OLLA's CR 60 (b) (5) motion to vacate its January 15, 2010 Judgment or was erroneously made by the Commissioner having incorrectly determined under RAP 18 (e) (1) (c) that the trial court did not abuse its judicial discretion in entertaining OLLA's action as filed and proceeding to enter such Judgment? Whether the January 15, 2010 Judgment, which OLLA's CR 60 (b) (5) motion sought for the trial court to vacate, was entered without subject matter jurisdiction and therefore constituted a manifest abuse of authority by the trial court, such judgment being clearly thus void?
4. Whether the determination of subject matter jurisdiction by the trial court as a basis for denying OLLA's CR 60 (b) (5) motion to vacate was erroneous as conflicting with
5. Washington State court precedents interpreting RCW 4.12.010 as in limitation on Washington State superior court subject matter jurisdiction, given that OLLA's action sought recovery of, imposition of a constructive trust on and damages for harm to real property located in the state of California and presented a justiciable controversy only as in regard to such real property?
6. Whether the Commissioner's Ruling, and therefore the COA2, were bound by this Court's decisions holding that any action seeking declaratory relief and/or any relief, present an actual controversy as established by legally justiciable claims, upon which such declaratory relief as sought may or may not be granted, in order for a Washington State trial court's subject matter jurisdiction to be properly invoked in regard to such claims?
7. Whether the Commissioner's Ruling's contention that "[t]he [trial] court plainly had subject matter jurisdiction over the enforceability of the settlement agreement" since "[t]he subject matter of the first trial was the enforceability of the settlement agreement" was a legally sufficient, let alone legally correct, basis on which to deem the trial court had not abused its authority by proceeding to adjudicate any substantive issue in the case?

8. Whether application of test *approved* by this Court *In re Marriage of Brown*⁴ for the purpose of evaluating the proper circumstances under which a final judgment may be vacated either alters or is in exception to the nondiscretionary duty of a trial court to vacate a void judgment as recognized in other cases subsequently decided by this Court?
9. Whether the Commissioner, before ruling to grant or deny WAGNER's MOTMTA, had a duty to conduct a de novo review as to whether the trial court's own determination of subject matter jurisdiction was erroneous?
10. Whether COA2 Commissioner's Ruling's analysis conflicts in any way with the rule that a Washington State trial court must first possess subject matter jurisdiction over an action, as determined from the Complaint in the action, before proceeding to engage any fact finding adjudication to resolve any substantive issue raised by such action?
11. Whether, in regard to its determination that the trial court possessed subject matter jurisdiction over the parties' Settlement Agreement, the COA2 Commissioner's Ruling granting WAGNER's MOTMTA satisfied the requirement under RAP 18.14 (g) that a decision granting a motion on the merits state supportive reasons in its decision regarding its determination?
12. Whether the issue of reasonableness of timing of OLLA's subject CR 60 (b) (5) collateral attack on the trial court's subject final judgment, and belatedly, had any bearing on the below courts' evaluation of grounds presented by OLLA's Appeal to reversal of the trial court's denial of such?

In conformance with RAP 13.4 (c) (9), a copy of the constitutional provisions, statutes, and court rules referenced in the above issue statement are attached hereto as Appendix C.

⁴ *In re Marriage of Brown*, 98 Wash. 2d 46, 50, 653 P.2d 602 (1982)

STATEMENT OF THE CASE

1. Statement of Facts

OLLA'S dispute concerns August 3, 2012 Judgment⁵ and Order entered below by the Kitsap County Superior Court ("the trial court") in re case no. 09 2 01654 4 [OLLA v. WAGNER ET AL.] following its July 20, 2012 Ruling⁶ in denial of his CR 60 (b) (5)⁷ motion to vacate⁸ its January 15, 2010 judgment and orders⁹ (judgment that a settlement agreement as executed by the parties on October 16, 2008 was in full resolution of their mutual obligations pursuant to the action's three subject mortgage installment loan agreements¹⁰ and as entered based upon January 15, 2010 Findings of Fact and Conclusions of

⁵ CP pages 2387-2388.

⁶ RP, pages 1-23, as transpired at the Kitsap County Superior Court on July 20, 2012 before the Hon. Judge Kevin D. Hull.

⁷ A true and correct copy of the court rule, CR 60 (b) (5), is attached hereto as Appendix C4.

⁸ CP, pages 1771-1798, OLLA's CR 60 (b) (5) motion to vacate as filed July 13, 2012.

⁹ CP, pages 1328-1330, and from which January 15, 2010 Judgment and Orders OLLA filed an appeal [No. 40367-6-II / OLLA v. WAGNER ET AL.] from such judgment at the COA2 on February 10, 2010 (CP, pages 1331-1338)

¹⁰ CP, pages 2-145, OLLA's Complaint at CP, 102, Real Estate Purchase and Sale Agreement; see also, CP, pages 2-145, OLLA's Complaint's Exhibits label C, H and M, and such Complaint's paragraphs 14, 15, 23 and 28.

Law findings that such Agreement to be legally enforceable)
as void for lack of subject matter jurisdiction over OLLA's action
as filed on June 25, 2009.

OLLA's motion to vacate argued that the RCW 4.12.010¹¹
provides limitations of on superior court subject matter jurisdiction
which indicate that the trial court was not the proper forum
to have exercised general jurisdiction over his action as filed on
June 25, 2009. OLLA's contention was that his action could have
only been properly heard in the superior court of the county in
which the action's only subject real property for which justiciable
claims were presented was located (in the state of California).

OLLA's Complaint¹² had sought judicial rescission of its
three subject installment loan agreements whereby WAGNER
loaned money to OLLA, against OLLA's equity¹³ in his

¹¹ A true and correct copy of such state statute is attached hereto in Appendix C as Appendix C2.

¹² CP, pages 2-145.

principal dwelling located at 6368 Sea Star Drive, Malibu, California 90265 [“the California real property”], to first purchase and then improve the house and real property located at 10305 NE Shore Drive, Indianola, Washington¹⁴ [“the Washington real property”], with an objective to “[r]escind the loan transactions transactions.....to terminate any security interest in Plaintiff’s MALIBU HOUSE property created under the transactions”¹⁵.

The Complaint also sought declaratory relief to such effect as well as for purpose of establishing grounds upon which to justify its other requested remedies including remedies for damages for harm to such California¹⁶ real property, wrongful occupation of such real property¹⁷, the imposition of a constructive trust¹⁸ on

¹³ CP, pages 1312-1327, January 15, 2010 Findings of Fact and Conclusions of Law at pages thereof

¹⁴ CP, 1595-1599, January 15, 2010 Findings of Fact and Conclusions of Law at CP pages 1595-1596, paragraphs 1 and 2.

¹⁵ CP, p.80, paragraphs 87 and 88, as pointed at page 9 of OLLA’s Opening Appellate Brief; see also, OLLA’s OAB, page 4, referencing CP, pgs. 1799-2250, supporting that his Complaint sought to affect the status of the California real property and not the Washington State real property already transferred under deed in lieu of foreclosure to WAGNER.

¹⁶ CP, pages 2-145, OLLA’s Complaint: for damages for wrongful occupation of such California real property at CP pages 60-63 at page 63 and also CP page 77 in the Complaint’s THIRD CAUSE OF ACTION.

such California real property, an injunction on ability to sell subject real property¹⁹ apart from seeking the return of and to possession of the same such California real property in addition to establishing a basis for the action's other requested remedies.

WAGNER opposed²⁰ by arguing that the COA2 had already in its September 13, 2011 Unpublished Opinion on OLLA's earlier and first Appeal in the case, determined that the trial had possessed subject matter jurisdiction over the action and that hence OLLA's collateral challenge was barred by res judicata.

¹⁷ CP, pages. 60-63 at page 63, OLLA'S Complaint's Second Cause of Action; see also CP page 77 in OLLA'S Complaint's Third Cause of Action; CP at page 80, OLLA'S Complaint's Fourth Cause of Action (for quiet title) which sought injunction restraining sale of properties and damages for such and also sought damages for wrongful occupation of real estate.

¹⁸ CP, page 77, OLLA'S Complaint's Second Cause of Action seeking imposition of a constructive trust over the subject California real property as the one subject property that had not been tendered to WAGNER as to qualify for tender according to the remedy sought for rescission of each subject loan; see also CP, page 80, OLLA'S Complaint's Third Cause of Action seeking also constructive trust

¹⁹ CP, 99, in OLLA'S Complaint's Twelfth Cause of Action (for Declaratory Relief) seeks an injunction and a temporary restraining order on the ability to sell the subject real estate on the basis of determination of the parties' rights in the properties based on their rights to be determined, as a matter of declaratory relief sought, as under the subject loans.

²⁰ CP, pages 2256-2269, WAGNER's Brief in Opposition to OLLA's CR 60 (b) (5) motion to vacate specifically at CP, page 2264, lines 3 through 25 (inclusive of footnotes 27 and 28).

2. Trial Court Decision Below

While the trial court did not agree that the COA2 had earlier determined the issue of the trial court's subject matter jurisdiction, on July 20, 2012, it nevertheless ruled²¹ to deny OLLA's CR 60 (b) (5) motion to vacate²² its January 15, 2010 judgment and orders, based upon determination²³ that it had possessed subject matter jurisdiction over OLLA's action by virtue of either exercise of in rem jurisdiction²⁴ over the subject Washington real property for which the Complaint's Fourth Cause of Action (for Quiet Title) included, in addition to the subject California real property, or through superior court of general jurisdiction exercise of subject matter jurisdiction over transitory causes of action for contractual rescission²⁵. On July 30, 2012 the trial court also denied²⁶ OLLA's

²¹ Appendix B

²² CP, pages 1771-1798, CR 60 (b) (5) motion to vacate; see also, CP, pages 1799-2250, Exhibits in support of OLLA's CR 60 (b) (5) motion to vacate; see also, CP, pages 1759-1770, Affidavit of Mark Olla in support of his CR 60 (b) (5) motion to vacate; see also, CP, pages 1617-1758, OLLA's Request for Judicial Notice pursuant to ER 201 in support of his CR 60 (b) (5) motion to vacate.

²³ RP, pages 18-20, and as specified on page 20, such determination the trial court effectively acknowledged to be a first time determination of such by any Washington State court to date in the case.

²⁴ RP, pages 18- 19.

Motion for Reconsideration of its denial of his CR 60 (b) (5) motion

3. Court of Appeals Decision Below

OLLA then appealed²⁷ the subject Judgment at the COA2 (Appeal No. 43899-2-II) below, assigning error to such August 3, 2012 Judgment as based upon the trial court's determination²⁸ of subject matter jurisdiction over OLLA's action to have proceeded to adjudicate the Settlement Agreement, which was a substantive issue raised by the Complaint. OLLA's OAB argued the determination was in conflict with this Court's and the various Washington State appellate courts' line of decisions interpreting RCW 4.12.010²⁹ as legislatively shaping the superior courts' subject matter jurisdiction as constitutionally conferred under Const. art. IV, sec.6 and under which statute OLLA's action was outside the

²⁵ RP, page 19; ; see also, CP, pages 2384-2386, Order Denying Reconsideration as entered at the trial court on July 30, 2013 at CP, page 2385, footnotes 1 and 3.

²⁶ CP, pages 2384-2386, Order Denying Reconsideration.

²⁷ On September 4, 2012, OLLA filed the instant subject Appeal (No. 43899-2-II) from the subject August 3, 2012 Judgment and Order.

²⁸ RP, pages 18-20.

²⁹ OLLA'S OAB, page 20 thereof, stating such fact and OAB, at pages 34-39 thereof arguing that the lower court misapplied the jurisdictional limitations embodied in RCW 4.12.010.

general jurisdiction of the trial court.

On May 16, 2013, WAGNER filed its MOTMTA argument that under the test approved by this Court in *In re Marriage of Brown*³⁰ for evaluating the proper circumstances under which a court must eschew favoring finality of a judgment over its validity and grant vacation of a final judgment for lack of subject matter jurisdiction.

OLLA opposed WAGNER's MOTM³¹ arguing that even under the Restatement (SECOND) of Judgments 12 (1982) test adopted in *In Re Marriage Of Brown*, 98 Wn.2d 46, 653 P.2d 602 (1982) the trial court's nondiscretionary duty to vacate a judgment as void was not altered given that the first alternate standard of such test was met³² for granting OLLA's motion to vacate and refuting³³ the lower court's subject Ruling and determination as to its subject matter jurisdiction both having been made in blatant disregard of the

³⁰ The Restatement (SECOND) Judgments, Sec. 12 (1982) test at approved in *In re Marriage of Brown*, 98 Wn.2d 46 at 50 (1982).

³¹ On May 20, 2013 OLLA filed a response brief opposing WAGNER'S motion on the merits.

³² See page 15 of OLLA's response brief opposing WAGNER's motion on the merits.

³³ See pages 14-18 of OLLA's response brief opposing WAGNER's MOTMTA.

exclusive jurisdiction over OLLA'S claims possessed by the Los Angeles Superior Court of the State of California at which OLLA'S prior commenced action was pending legal fact to support its conclusions of law³⁴.

On July 31, 2013 OLLA filed a Motion for Additional Authorities³⁵ and on August 14, 2013 oral argument was conducted on WAGNER'S MOTMTA following which, on August 29, 2013, the COA2 Commissioner, Eric B. Schmidt, entered his Ruling³⁶ granting WAGNER'S MOTM to Affirm in specific agreement³⁷ with WAGNER'S MOTM's argument that under the test approved by this Court in *In re Marriage of Brown* for evaluating the circumstances under which a court must eschew favoring finality of a judgment

³⁴ OLLA'S opening appellate brief, p. 20,22, and re priority at this court for fair and orderly review meriting waiver of appellate rules necessary to serve ends of justice at p. 41;

³⁵ OLLA'S Motion for Additional Authorities, was granted by the COA2 Commissioner on August 29, 2013, and so was presumably reviewed before the Commissioner's Ruling of even date with the filing of such and included as an additional authority the cases of *Ralph v. State of Washington Department of Natural Resources*, *Mitchell v. Kitsap County*, 59 Wash. App. 177, 797 P.2d 516 (1990) and *Snyder v. Ingram*, 48 Wash. 2d 638, 296 P.2d 305 (1956).

³⁶ A true and correct copy of such Ruling is attached hereto as Appendix B.

³⁷ See pages 5-5 of the Commissioner's subject Ruling as entered August 29, 2013, a true and correct copy of which is attached hereto as Appendix B.

over its validity and grant vacation for lack of subject matter jurisdiction. The Commissioner's Ruling contends that neither of such test's three alternate standards were met because the trial court possessed subject matter jurisdiction over the parties' Settlement Agreement to have proceeded to conduct a fact finding trial on the enforceability of such and because the trial court was capable of determining its own jurisdiction whence judgment and hence that the trial court did not abuse its discretion in denying OLLA's CR 60 (b) (5) motion to vacate, res judicata thus barring OLLA's motion to vacate. However the Commissioner's determination does not address the trial court's own determination of its subject matter jurisdiction but also does not address the issue of whether the jurisdictional limits of RCW 4.12.010 applied to OLLA's action to have barred the trial court's jurisdiction thereover. The Commissioner's Ruling also reasoned that res judicata also barred OLLA's CR 60 (b) (5) collateral challenge to subject matter jurisdiction because a trial on the merits had been held at which the

issue of lack of such jurisdiction could have been raised at any time³⁸.

However, the Ruling neither addressed the jurisdictional arguments relating to the jurisdictional limitation on superior court subject matter jurisdiction provided by RCW 4.12.010, as recapitulated and reiterated by OLLA in his OAB and Response Brief opposing such MOTMTA.

On September 30, 2013, OLLA filed the subject MTM the Commissioner's Ruling arguing such as well as the fact that such Ruling did not indicate a review de novo had been made of the trial court's determination of subject matter jurisdiction on which denial of OLLA's subject CR 60 (b) (5) motion to vacate was based and without which the Commissioner could not have conscientiously determined as he did that the trial court had not abused its discretion by denying such motion to vacate and entering the subject Judgment. The Commissioner could not have concluded that entering the subject judgment and orders for which vacation was sought was not a manifest abuse of authority by the trial court,

³⁸ See Appendix B, Commissioner's Ruling as entered August 29, 2013 at page 3 thereof.

upon which to conclude that OLLA's Appeal and opening appellate brief ("OAB"), as had been filed over-length April 19, 2013 by the COA2 Clerk based upon April 19, 2013 Ruling granting such.

[On October 1, 2013, OLLA filed a Notice of Errata in his September 30, 2013 filed RAP 17.7 MTM, in correction of three inadvertently made typographical errors contained such MTM.]

On October 29, 2013 the COA2 panel of three judges unanimously denied OLLA's motion to modify ("MTM")³⁹.

OLLA contends the COA2 further erred thereby, and, hence, his Petition for Review hereby.

ARGUMENT IN FAVOR OF REVIEW BY THIS COURT

I.

THE COURT OF APPEALS DECISION BELOW SATISFIES THE REVIEW CRITERIA IN RAP 13.4 (b)

The considerations governing acceptance of this Petition for Review are as follows:

A petition for review will be accepted by the Supreme Court only if: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

³⁹ Appendix A, COA2 Decision and Order Denying [OLLA's] Motion to Modify

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4 (b). This Petition satisfies each of the considerations above.

This Petition involves a decision of the COA2 that is in conflict with other Washington State appellate decisions as well as decisions of this Court, and presents significant questions of federal and state constitutional law that involve issues of substantial public interest and the COA2 decision affirming the Commissioner's Ruling conflicts both with decisions of this Court and decisions of the various courts of appeal. Specifically, while OLLA asserts herein that the Commissioner's Ruling's application of and emphasis on the Restatement (SECOND) of Judgments Sec. 12 (1982) test approved by this Court in *In Re Marriage of Brown*⁴⁰ was both legally incorrect given that the limitations of RCW 4.12.010 on constitutionally authorized superior court subject matter jurisdiction⁴¹ indicate that the trial court so plainly lacked subject matter jurisdiction over his action that its determination otherwise

⁴⁰ *In re Marriage of Brown*, 98 Wn.2d 46, 50, 653 P.2d 602 (1982).

⁴¹ Wash. Const. Art. IV, sec. 6, a true and correct copy of which constitutional provision is attached hereto as Appendix C as Appendix C1.

constituted a manifest abuse of authority.

Additionally, the COA2's denial of OLLA's MTM also conflicts with this Court's prevailing case law interpreting the limitations set forth by the Legislature in RCW 4.12.010 as further defining the subject matter jurisdiction of the various Washington State superior courts as derived in Wash. State Const. Art. IV, sec. 6 as well as this Court's decisions requiring that an action seeking declaratory relief present justiciable claims in such regard.

OLLA's Petition thus raises issues of substantial public interest in that firstly, any party contemplating filing a post-judgment CR 60 (b) (5) motion to vacate to vacate a judgment as void for lack of subject matter, and secondly any party challenging the subject matter jurisdiction of a Washington State superior court over an action seeking, inter alia, the recovery of, possession of, determination of interests in and damages for injury to real property.

A. THE COA2 PANEL OF JUDGES ERRED BY AFFIRMING THE COMMISSIONER'S RULING WHICH HAD BEEN INCORRECT BECAUSE, PURSUANT TO RCW 4.12.010, THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OVER OLLA'S ACTON AND THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION BY DENYING OLLA'S CR 60 (b) (5) MOTION TO VACATE ITS JANUARY 15, 2010 JUDGMENT AND ORDERS WHOSE ENTRY CONSTITUTED AN ABUSE OF JUDICIAL AUTHORITY

- 1. In order to determine if OLLA's Appeal was clearly without merit pursuant to RAP 18.14 (e) (1), the COA2 had an obligation to review *de novo* the trial court's determination that it had possessed subject matter jurisdiction over OLLA's action, given such determination provided the basis upon which the trial court denied OLLA's CR 60 (b) (5) motion to vacate propriety.**

RAP 18.14 (e) (1) provides that:

"(1) Motion To Affirm. A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making those determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law..."

The Commissioner's Ruling clearly indicates that no *de novo* review of the trial court's determination as to whether it possessed subject matter jurisdiction⁴² over OLLA's *action* was conducted as

⁴² Washington State appellate courts have a duty to conduct a review *de novo* of the trial court's decision to grant or deny a CR 60 (b) (5) motion to vacate a void judgment. *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997) as involving questions

the COA2 was obliged to do⁴³, and failed to state, pursuant to RAP 18.14 (h)⁴⁴, supportive reasons for its resolution of the issue of whether or not the trial court had manifestly abused its judicial authority by proceeding to adjudicate the substantive issue of the enforceability of the parties' Settlement Agreement. Without having endeavored in such regard, the Commissioner had no basis on which to conclude that the trial court's denial of OLLA's CR 60 (b) (5) motion to vacate was not an abuse of discretion and therefore that that OLLA's Appeal had been filed clearly without merit and thus justifying his granting WAGNER its MOTMTA pursuant to RAP 18.14 (e) (1)⁴⁵.

A recent Washington State Court of Appeals, Division III opinion⁴⁶ provides the operative guidelines to which the Commissioner was bound by legal precedent in endeavoring to rule

of law, including whether the [trial] court had jurisdiction. "A trial court's decision as to subject matter jurisdiction is a question of law that is reviewed de novo." *Conom v. Snohomish County*, 155 Wn.2d 154,157, 118 P.3d 344 (2005)

⁴³ See *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d (1999) (Whether a particular court has jurisdiction is a question of law reviewed de novo.); see also, *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, par. 25, 206 P.3d 364, 369 (2009).

⁴⁴ A true and correct copy of RAP 18.14 (h) is attached hereto as included in Appendix C8.

⁴⁵ A true and correct copy of RAP 18.14 (e) (1) is attached hereto as included in Appendix C8.

⁴⁶ *Newlon v. Alexander*, 167 Wn. App. 195, 272 P.3d 903 (2012).

on WAGNER's MOTMTA under the circumstances of OLLA's

appeal from a denial of a motion to vacate:

"Motions to vacate 'are addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of a manifest abuse of discretion.' *In re Marriage of Burkey*, 36 Wn. App. 487, 489, 675 P.2d 619 (1984). Discretion is abused where it is exercised on untenable grounds or for untenable reasons. *In re Schuoler*, 106 Wn.2d 500, 512, 723 P.2d 1103 (1986). We however review questions of law, including whether the court had jurisdiction, de novo. *In re Marriage of Kastanas*, 78 Wn. App. 193, 197, 896 P.2d 726 (1995)."

Newlon v. Alexander, 167 Wn. App. 195, 272 P.3d 903 (2012). See

also, *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 93 Wn.

App. 819, 970 P.2d 80 (1999), *aff'd*, 140 Wn.2d 568, 998 P.2d 305

2005). "A court acts on untenable grounds when its factual findings

are not supported by the record; it acts for untenable reasons if it

uses an incorrect standard of law or the facts do not meet the

requirements of the standard of law. *State v. Renquist*, 79 Wn. App.

786, 793, 905 P.2d 922 (1995), review denied, 129 Wn.2d 1003

(1996)⁴⁷ But a court has a mandatory nondiscretionary duty to

vacate a void judgment. *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317,

323, 877 P.2d 324 (1994).

⁴⁷ See also, *In re Knutson*, 114 Wn. App. 866 at 871, 60 P.3d 681 (2003).

Washington State Superior Court Civil Rule (CR) 60 (b) provides:

“ . . . (b) . . . Fraud, etc. On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: . . . (5) The judgment is void.”

CR 60 (b) (5).

The Commissioner was faced thus with a duty to determine if the judgment for which vacation was sought at the trial court was void⁴⁸. If the judgment was void, then the trial court’s refusal to vacate that void order is abuse of discretion. Washington State courts all recognize the rule that a judgment entered by a court lacking personal or subject matter jurisdiction is to be held void⁴⁹. Moreover, a court enters a void order only when it lacks personal jurisdiction or subject matter jurisdiction over a claim.

Marley v. Dep’t of Labor & Indus., 125 Wn.2d 533, 540, 886 P.2d

⁴⁸ See also, *Mitchell v. Kitsap County*, 59 Wash. App. 177, 797 P.2d 516 (1990), a decision by the COA2 citing to *Allied Fid. Ins. Co. v. Ruth*, 57 Wn. App. 783,790, 790 P.2d 206 (1990) (“ . . . when the trial court is faced with a void judgment, it has no discretion and the judgment must be vacated whenever the lack of jurisdiction comes to light. We must, therefore, determine whether the judgment entered. . . is void.”); see also, *Mueller v. Miller*, 82 Wn. App. 236,251, 917 P.2d 604 (1996)

⁴⁹ See also, *Lubben v. Selective Service System Local Bd. No. 27*, 453 F.2d 645 (1st Cir. 1972) [“A court must vacate any judgment entered in excess of its jurisdiction.”]; see also, *Summers v. Superior Court* (1959) [“A judgment is void on its face if the trial court exceeded its jurisdiction by granting relief that it had no power to grant. Jurisdiction cannot be conferred on a trial court by the consent of the parties.”]

189 (1994).

In such regards, Washington State courts consider subject matter jurisdiction to be “a tribunal’s authority to adjudicate the type of controversy involved in the action.” *Shoop v. Kittitas County*, 108 Wn. App. 388, 393, 30 P.3d 529 (2001), *aff’d*, 149 Wn.2d 29, 65 P.3d 1194 (2003). “[T]he critical concept in determining whether a court has subject matter jurisdiction is the type of controversy. *Cole v. Harveyland, LLC*, 163 Wn. App. 199⁵⁰ at 209, 258 P. 3d 70 (2011).

In Washington State courts, following the holding in *Dougherty v. Dept. of Labor & Indus.*, 150 Wn. 2d 310, 315, 76 P.3d 1183 (2003), “Jurisdiction exists b/c of a constitutional or statutory provision. A party cannot confer jurisdiction; all that a party can do is invoke it. . . subject matter jurisdiction typically refers to the authority of a court to provide relief as granted by the Constitution or the Legislature.”⁵¹

⁵⁰ *Cole v. Harveyland, LLC*, 163 Wn.App 199, 205, 258 P.3d 70 (2011)[“We use caution in characterizing an issue as jurisdictional or a judgment as void, because the consequences of a court acting without subject matter jurisdiction “are draconian and absolute.”]

“Subject matter jurisdiction is the authority of the court to hear and determine the type of action that is before it,” *In re Adoption of Beuhl*, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976) in which this Court long ago noted that subject matter jurisdiction of the trial court may be attacked where the court has no power to entertain the controversy before it [“Jurisdiction over the subject matter of an action is an elementary prerequisite to the exercise of judicial power. It is the authority of the court to hear the class of actions to which the case belongs.”]. “Although a court may ultimately decide that it lacks subject matter jurisdiction, a court always has the jurisdiction to determine if jurisdiction is proper.” *In re Marriage of Kastanas*, 78 Wash. App. 193, 201, 896 P.2d 726 (1995). “[S]ubject matter jurisdiction is a question of law. Courts must have subject matter jurisdiction in order to proceed. There is no presumption that courts have jurisdiction unless it is proven otherwise.” *In re Marriage of Robinson*, Washington State Court of Appeals, Division III, Appeal No. 27143-9-III (December 28, 2010).

⁵¹ See also, *In re Marriage of Maddix*, 41 Wn.App. 248,251-52, 703 P.2d 1062 (1985) [which held that not conferred unlike personal jurisdiction, subject matter jurisdiction cannot be determined by the consent of the parties]

Lack of subject matter jurisdiction renders the superior court powerless to pass on the matters before it. *Deaconess Hosp. v. Washington State Hwy Comm'n*, 66 Wash. 2d 378 at 409, 403 P.2d 54 (1965). "When a court lacks subject matter jurisdiction, dismissal without prejudice is the limit of what a court may do." *In re Sentence of Hilburn*, 63 Wn. App. 102, 103, 816 P. 2d 1247 (1991); *Branson v. Port of Seattle*, 152 Wn. 2d 862, 879, 101 P.3d 67 (2004).

Proceeding along these lines and with foregoing firmly established principles in mind, it follows a priori that if the judgment which OLLA's CR 60 (b) (5) motion sought to have vacated by the trial court was issued despite a lack of subject matter jurisdiction over OLLA's action as filed plainly evident, the trial court could not properly deny such motion to vacate without improperly obeying its nondiscretionary duty to vacate⁵² such judgment as void.

Certainly, OLLA had the right to appeal⁵³ the subject trial court

⁵² See page 28 of OLLA'S OAB, stating a judgment is void when the court does not have personal or subject matter jurisdiction, or lacks the inherent power to enter the order involved, citing to *Petersen v The State of Washington*, 16 Wash. App. at 79 (1976) (citing *Bresolin v. Morris*, 86 Wash.2d 243,245, 543 P.2d 325 (1975), which held that a void judgment is always subject to collateral attack).

Judgment in denial of his CR 60 (b) (5) motion to vacate such the Commissioner had an obligation to determine if the trial court's determination of its own subject matter jurisdiction over OLLA's action was correctly made.

2. The test approved by this Court in *In re Marriage of Brown* does not change the outcome where the trial court plainly lacked subject matter jurisdiction over the *action* as filed and in which case the trial court's proceeding on to adjudicate a substantive issue in the case would not only amount to a manifest abuse of judicial authority but would render judgment thereon void

Given the above, in any case, if the trial court plainly lacked subject matter jurisdiction over an action as filed yet proceeds to entertain it to adjudication of any substantive issue or fact and onto judgment and regardless that such signals the trial court's manifest abuse of authority in satisfaction of the first of the three alternate standards for vacation of a final judgment for lack of subject matter jurisdiction under the Restatement (SECOND) of Judgments, Sec.

⁵³ Civil Rule (CR) 2.2, enumerating the decisions of the superior court that may be appeal provides that: "(a) Generally. Unless otherwise prohibited by statute or court rule. . . a party may appeal from only the following superior court decisions: (1) Final Judgment. The final judgment entered in any action or proceeding. . . (10) Order on Motion for Vacation of Judgment. An order granting or denying a motion to vacate a judgment."

12 (1982) test approved by this Court in *In re Marriage of Brown*⁵⁴,
such judgment as void must be vacated as subject to the
nondiscretionary duty of the trial court to vacate a void judgment.

While such Restatement (SECOND) of Judgments Sec.12 (1982)
test provides an approach to evaluating a claim that the court
lacked subject matter jurisdiction when the challenge is made after
a judgment has been entered such that:

“When a court has rendered a judgment in a contested action, the
judgment precludes the parties from litigating the question of the
court’s subject matter jurisdiction in subsequent litigation except if:

- (1) The subject matter of the action was so plainly beyond the
court’s jurisdiction that its entertaining the action was a manifest
abuse of authority; or
- (2) Allowing the judgment to stand would substantially infringe the
authority of another tribunal or agency of government; or
- (3) The judgment was rendered by a court lacking capability to
make an adequately informed determination of a question
concerning its own jurisdiction and as a matter of procedural
fairness the party seeking to avoid the judgment should have the
opportunity belatedly to attack the court’s subject matter
jurisdiction.”

In re Marriage of Brown, 98 Wn.2d 46, 50, 653 P.2d 602 (1982).

“A judgment procured without subject matter jurisdiction is void.”

⁵⁴ *In re Marriage of Brown*, 98 Wn.2d 46, 653 P.2d 602 (1982), and whether or not such
the applicability of the Restatement (SECOND) Judgments Sec.12 (1982) test, approved in
the case, to OLLA’s CR 60 (b) (5) motion to vacate could even be addressed as ripe for
review since not decided by the trial court is questionable. See, *Department of Ecology v.*
Acquavella, 131 Wn.2d 746, 759-60, 935 P.2d 595 (1997); see also, *State v. Anderson*, 58
Wn. App. 107, 110, 791 P.2d 547 (1990); *State v. Phillips*, 65 Wn.2d 239, 828 P.2d 42
(1992).

In re Marriage of Ortiz, 108 Wn.2d 643, 649-50, 740 P.2d 843 (1987); see also, *In re Marriage of Furrow*, 115 Wash. App. 661, 667, 63 P.3d 821 (2003)⁵⁵.

Motions to vacate “are addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of a manifest abuse of discretion”⁵⁶ such that while generally an appellate court reviews the trial courts denial of a CR 60 (b) motion for a manifest abuse of discretion [*Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000)] such that a trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds [*Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)]⁵⁷ and that this standard is also violated when a trial court bases its decision on an erroneous view of the law [*Mayer v. Sto Indus., Inc.*, 156 Wn.2d,

⁵⁵ Washington State courts concur judgment is void when the rendering court does not have personal or subject matter jurisdiction, or “lacks the inherent power to enter the order involved” [*Petersen v. The State of Washington*, 16 Wash. App.77 (1976) at 79 (citing *Bresolin v. Morris* (1975)86 Wash. 2d at 245;

⁵⁶ *In re Marriage of Burkey*, 36 Wn. App. 487, 489, 675 P.2d 619 (1984)

⁵⁷ See also, *In re Schuoler*, 106 Wn.2d 500, 512, 723 P.2d 1103 (1986); see also, *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 93 Wash. App. 819, 970 P.2d 803 (1999), aff'd 140 Wash. 2d 568, 998 P. 2d 305 (2000)

supra at 684.]⁵⁸ such principles intersect with this Court's binding rule that all Washington State courts have a mandatory, nondiscretionary duty to vacate void judgments. See, *Allstate Ins. Co. v. Khani*, 75 Wash. App. 317, 323, 877 P.2d 724 (1994).

The Commissioner's Ruling's analysis of whether the trial court properly denied OLLA's post-judgment motion⁵⁹ or abused its discretion in doing so because of a manifest abuse of authority in have entered the judgment for which vacation was sought, based upon the Restatement (SECOND) of Judgments, Sec.12 (1982) approved in *In re Marriage of Brown*⁶⁰ has bred the illusion, which must be dispelled by this court, that a judgment entered without subject matter jurisdiction can only be vacated upon a showing that

⁵⁸ The lower court's July 20, 2012 Ruling in which it determined that it had possessed subject matter jurisdiction over OLLA'S Complaint's claims sufficient to have entertained OLLA'S action would be without legal effect if that determination was legally incorrect. *Kizer v. Caufield*, 17 Wash. 417, 49 P. 1064 ["A void judgment may be attacked collaterally as well as directly. It is entitled to no consideration whatever in any court as evidence of right."]

⁵⁹ The ability of a trial court to consider a post-judgment motion to vacate, as void for lack of subject matter jurisdiction, any final judgment is provided for by RAP 12.2 which provides in pertinent part that: ". . . After the mandate has issued, the trial court may, however, hear and decide post judgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issues already decided by the appellate court."

⁶⁰ *In re Marriage of Brown*, 98 Wn.2d 46, supra at 50 (1982)

the rendering court so plainly lacked subject matter jurisdiction over the *action* that its entry of judgment amounted to a manifest abuse of authority without regard to this the considerable case law confirming a court's nondiscretionary duty to vacate a judgment as void and that a judgment is void if rendered without subject matter jurisdiction over the action. Moreover, the Ruling's emphasis on such test created a shadow over the fact that jurisdiction over the action, not the Settlement Agreement, was the proper authority upon which the trial court could only proceed to adjudicate any substantive issue and facts relating thereto even if bifurcated for such adjudicatory purposes.

3. The Commissioner Did Not Endeavor To Determine If The Trial Court Possessed Subject Matter Jurisdiction Over OLLA's Action As It Most Certainly Did Not Based Upon OLLA's Complaint Pursuant to RCW 4.12.010 and RCW 7.24 et seq.

The Commissioner was obligated to review de novo⁶¹ the trial court's determination of subject matter jurisdiction over OLLA's action as filed, as opposed to a determination jurisdiction over the

⁶¹ See *In re Parentage of J.M.K.*, 155 Wn.2d 374, 386-87, 119 P.3d 840 (2005).

parties' Settlement Agreement, to determine if the trial court's denial of OLLA's motion to vacate was an abuse of discretion and subject to reversal as opposed to alternatively granting WAGNER's MOTMTA for OLLA's Appeal having been determined to be clearly without merit pursuant to RAP 18.14 (e) (1), entailing a conscientious review of the Complaint:

"The nature of a claim for relief is determined by the facts alleged in the Complaint and as adduced thereunder, and by the relief requested." *Silver Surprise, Inc.*, 74 Wn. 2d 519, 522, 445 P.2d 334 (1968). See also, *In re Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.3d 1174 ((2003) (quoting *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002)) ("[W]e may properly affirm a trial court judgment on any basis established by the pleadings and supported by the record.")

Because OLLA's action involved declaratory relief in the context of primary causes of action for judicial rescission of the subject loans and their related agreements on the bases of which remedies were requested for damages for harm to, imposition of a constructive trust over, and an injunction preventing the sale of the action's only subject real property concerning which justiciable claims were presented, OLLA's action was not within the subject

matter jurisdiction of the trial court pursuant to the limitations on superior court subject matter jurisdiction contained in RCW 4.12.010⁶² and binding⁶³ precedent committing to and refining such as jurisdictional in nature, as well as by virtue of binding precedent requiring that claims for declaratory relief be justiciable in nature lest judgment thereon be void as opposed to merely voidable as in the case of a lack of standing.

3a. The subject matter jurisdiction of the trial court could not be invoked with respect to those claims in OLLA's Complaint concerning the subject Washington real property according to Washington State courts' requirement that an action involving declaratory relief present justiciable claims in such regard both under RCW 7.24 (Uniform Declaratory Judgments Act) as well as ordinarily otherwise

OLLA's action involved declaratory relief⁶⁴. The trial court had to

⁶² In *Silver Surprise v. Sunshine Mining Co.*, 74 Wash. 2d 519, 526 (1968) [holding an action to be transitory because the basis of the action was breach of contract "...even though a question of title to foreign land may be involved, and even though the question of title may constitute the essential point on which the case depends."] the Washington State Supreme Court began a series of cases which would refine the inroads that priorities that actions be deemed transitory in nature as much as possible in an age of commercial and population flux that a strict reading of RCW 4.12.010 local action rule might not entail.

⁶³ See *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 207 (1984) [{"(O)nce this Court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this Court."}]

⁶⁴The Complaint [CP, pages 2-145] sought a judicial declaration of the parties' rights pursuant to the TILA and fraud, upon which OLLA sought in the fourth cause of action thereof to quiet title to both the California real property and the Washington real To

have subject matter jurisdiction over those claims. "Subject matter jurisdiction is a tribunal's authority to adjudicate the type of controversy involved in the action." *Shoop v. Kittitas County*, 108 Wn. App. 398, 393, 30 P.3d 529 (2001).

The trial court's subject matter jurisdiction could not be invoked over OLLA's actions claims which did not present a justiciable controversy. *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 938-939, 206 P.3d 364 (2009). To the extent subject matter jurisdiction was exercised over any claims over which the court lacked subject matter jurisdiction or the power to grant relief, the ensuing judgment is void. See, *Kaye v. Lowe's HIW, Inc.*, 108 Wn. App. 320, 330, 242 P.3d 27 (2010); see also, *Wiles v. Dept. of Labor & Indus. of State*, 34 Wn.2d 714, 723, 209 P.2d 462 (1949).

As there were no set of facts attendant to OLLA's causes of action for rescission of the subject three loans which could result in the return of possession of the action's subject Washington real

such end the Complaint sought judicial declaration under its twelfth cause of action (p.5 of OAB, referencing Complaint, at CP pgs. 56-60)

property⁶⁵ or any other relief as requested in the Complaint with respect to such property, the subject matter jurisdiction of the trial court could not have been invoked with respect to any claims concerning such property based upon a declaratory judgment as to the parties' respective rights under the loans. The reason for such is that rescission of the agreements could neither result in any return of the Washington real property to OLLA nor provide grounds upon which, therefore, to provide any remedy of relief as requested inclusive of harm to such real property sustained by wrongful possession thereof nor provide a basis to request the imposition of a constructive trust thereon, given that rescission of the subject loans and agreements could only upon favorable outcome result in the return to OLLA of or otherwise require the court to act with respect to the action's subject California real property. Rescission of those agreements would result a return of OLLA to the position of his pre-loans status quo⁶⁶ as before the Washington real property

⁶⁵ See page 49 of OLLA's OAB.

was purchased from the proceeds of the first subject loan. RCW

7.24.020 provides that:

“[a] person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the instrument, statute. . .contract. . .and obtain a declaration of rights, status or other legal relations thereunder.”

RCW 7.24.020, and the power of the trial court to so determine

having been granted by RCW 7.24.010 such that:

“[c]ourts of record within their respective jurisdictions shall have the power to declare rights, status and other legal relations. . . and such declarations shall have the force and effect of a final judgment. . .”,

This Court has held that Washington courts are prohibited from entertaining cases that do not present a “justiciable controversy”⁶⁷:

⁶⁶ Incidentally, thus, all in rem aspects of OLLA’s Complaint respecting its Fourth Cause of Action (Quiet Title) are evanescent based upon the nature of the action’s underlying claims for such rescission that cannot affect the subject Washington real property under any circumstances since already out of OLLA’s possession and ownership prior to the action.

⁶⁷ OLLA’S OAB, page 53, citing to Walker v. Munro, 124 Wn.2d 402, 419, 870 P.2d 920 (1994); see also, OLLA’S OAB, page 52 noting that “. . .[T]he issue of justiciability is necessarily present in any declaratory judgment action . . . [and] authority to act is dependent upon whether a justiciable controversy exists. . . we may properly affirm a trial court judgment on any basis established by the pleadings and supported by the record.” *Pasados Safe Haven v. Vanport Homes, Inc.*, 259 P. 3d 280, 162 Wash. App. 746 (2011) citing to *In re Marriage of Rideout*, 150 Wn. 2d 337, 358, 77 P. 3d 1174 (2003) (quoting *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn. 2d 751, 766, 58 P.3d 276 (2002).

“For declaratory judgment purposes, a justiciable controversy is: (1) . . . an actual, present and existing dispute or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.”

Walker v. Munro, 124 Wn.2d 402, 411-12, 414, 879 P.2d 920

(1994); citing, *Nollete v. Christianson*, 115 Wash.2d 594, 599, 800

P.2d 359 (1990) (citing *Diversified Indus. Dev. Corp. v. Ripley*, 82

Wash.2d 811, 815, 514 P.2d 137 (1973), which case also requires

all four elements before a cause of action is justiciable. *Walker v.*

Munro, *id.*, quoting *Diversified Indus.*, 82 Wash.2d at 815, 514 P.2d

137. “The court may, and here should, decline to address issues

where there is no justiciable controversy.” *Patrol Lieutenants Ass’n*

v. Sandberg, 88 Wn.App. 652, 661-62, 946 P.2d 404 (1997)⁶⁸.

Clearly, OLLA's Complaint indicates that the first three of the elements of a justiciable cause of action so defined are lacking in

⁶⁸ See also, *DiNino v. State*, 102 Wn. 2d at 330-331, 684 P. 2d 1297 (1984) (quoting *Clallam County Deputy Sheriff's Guild v. Bd. Of Clallam County Comm'rs*, 92 Wn. 2d 844, 848, 601; see also, Washington State courts' require [as recognized by *To-Ro Trade Shows v. Collins*, 144 Wn. 2d 403, 411, 27 P. 3d 1149 (2001)]⁶⁸ that any action requiring declaratory relief under the Uniform Declaratory Judgments Act contain justiciable claims as according to the test enunciated by *DiNino v. State*, 102 Wn. 2d supra at 330, 684 P.2d 1297 (1984)

any and all claims relating to the action's subject Washington real property whose possession in hands other than OLLA, damages for harm sustained to such inclusive of wrongful occupation, injunction on sale of, and imposition of a constructive trust on could not be sought on the basis of grounds for rescission of the subject loans and related agreements which could not be obtained by any set of facts thus⁶⁹. As a result the trial court lack subject matter jurisdiction over the claims as they related to the subject Washington real property⁷⁰.

3b. RCW 4.12.010 provides limitations upon Washington State superior court subject matter jurisdiction as constitutionally conferred, such that actions requiring the court to directly act with respect to real property are only within the jurisdiction of a court in the county in which such property be situate

OLLA's action could not be deemed transitory as an action for rescission merely incidentally involving a question of foreign land as the Commissioner's Ruling incorrectly determined it to be, apparently in erroneous disregard of OLLA's Complaint⁷¹. As

⁶⁹ See OLLA's OAB at pgs. 49-50, discussing lack of justiciable claims with respect to the Complaint's subject Washington real property

⁷⁰ See, *Kaye v. Lowe's HIW, Inc.*, 108 Wn. App. supra at 330, 242 P.3d 27 (2010)

OLLA's Response Brief in opposition to WAGNER's MOTMTA his action was not merely incidentally involving real property foreign from the state of Washington or merely seeking damages to property on the basis of conversion which is equivalent to exclusive money damages without return of the property⁷². According to RCW 4.12.010, the action's California real property was plainly not within the jurisdiction of any Washington State court, as OLLA sought for the trial court to directly act on the subject California real property, while no claims concerning the subject Washington real property in such regard was justiciable and presented no controversy thus thereto.

The Court of Appeals' denial of OLLA's MTM constituted in itself thus, a conflict with its own and other court of appeals' decisions and more importantly conflict with this Court's regarding

⁷¹ See OLLA's Response Brief in opposition to WAGNER's Motion on the Merits to Affirm, at pages 11-12 thereof, citing to this Court's distinction so drawn in its opinion in *Silver Surprise v. Sunshine Mining Co.*, 74 Wash. 2d 519, 526, 445 P.2d 334 (1968); see also, OLLA's Motion for Additional Authorities at page 11 inclusive of footnote no. 12.

⁷² OLLA's Response Brief in opposition to WAGNER's MOTMTA, at pages 11-12 thereof citing to *Washington State Bank v. Medalia Healthcare*, 984 P.2d 1046 (1999); see also, OLLA's Motion for Additional Authorities, as page 11 thereof inclusive of footnote no.12

RCW 4.12.010 and RCW 7.24.010.

Wash. Const. art. IV, sec. 6, qualifies its grant to the superior courts original subject matter jurisdiction with general jurisdiction by the proviso, "in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court," but nevertheless, such constitutionally provides in pertinent part that the superior courts are courts of "general jurisdiction" which can:

" . . . hear all legal and equitable matters unless these unless these powers have been 'expressly denied.'"⁷³

Wash. Const., art. IV, sec. 6., nevertheless consonant with the power of the legislature to shape and expand the grant of original jurisdiction to the Washington State superior courts thereunder⁷⁴.

This Court long ago noted the power of the superior courts to "hear and determine all matters, legal and equitable. . . except in so far as these powers have been expressly denied." See, *State ex rel.*

⁷³ See *In re Marriage of Major*, 71 Wn. App. 531, 533, 859 P.2d 1262 (1993); see also, footnote 70 herein below.

⁷⁴ *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 76 P.3d 1183 (2003); see also *James v. Kitsap County*, 154 Wn.2d 574, 587-588, 115 P.3d 286 (2005) ("Nothing in our constitution prohibits the legislature from creating procedural prerequisites to a court's exercise of jurisdiction") and *In re Marriage of Ortiz*, 108 Wn.2d 643, 649-50, 74 P.2d 843 (1987), both of which cases were cited to in OLLA's subject MTM at page 15 thereof.

Martin v. Superior Court, 101 Wn. 81, 94, 172 P. 257, 4 A.L.R. 572

(1918). RCW 4.12.010, as providing that: Revised Code of

Washington ("RCW") § 4.12.010 (1) (formerly RRS section 204)

pertinently provides for Washington State superior courts'

jurisdiction, in for all intents and purposes the State's courts' local

action rule, such that:

"Actions for following causes shall be commenced in the county in which the subject of the action, or some part thereof is situated: (1) For the recovery of, for the possession of. . . or for the determination of all questions affecting the title . . .to real property. . ."

RCW 4.12.010 has recently been refined building upon binding

decisions of this Court committing to its jurisdictional nature⁷⁵ and

as in limitation⁷⁶ on Washington State superior court subject matter

⁷⁵ In *Snyder v. Ingram*, 48 Wn. 2d 637, 638, 296 P. 2d 305 (1956) the Washington State Supreme Court reinforced the position established by it in *Cugini v. Apex Mercury Mining Co.*, 24 Wn. 2d 401, 165 P.2d 82 (1946) but articulating at page 639 a commitment to the view that RCW 4.12.010 (2) was jurisdictional in character under which actions involving title or injury to personal property are local in nature and must, pursuant to RCW 4.12.010 (2), be commenced in the county where the property is located (noting also that the Court's commitment to such local action rule of sorts as jurisdictional also applied equally to RCW 4.12.010 (1)).

⁷⁶ Washington State appellate courts do not stray from that principle such as that subject matter jurisdiction of a superior court may be attacked only under compelling circumstances such as when it is explicitly limited by the Legislature or Congress. See *Burnside v. Simpson Paper Co.*, 66 Wn. App 510, 517, 832 P.2d 537 (1992), review granted, 120 Wn.2d 1019 (1993) [noting that if a Legislature has shown no indication of its intention to limit jurisdiction, it should be construed as imposing no limitation. 21

jurisdiction and/or holding that RCW 4.12.010 (2) should apply equally to application of RCW 4.12.010 (1), and further interpreted as requiring actions for which the remedy requested requires the court to do directly act on or for the court to provide relief for the remedy requested of damages for harm to real property be brought within the county in which such real property be situate⁷⁷.

4. The Belated Nature Of OLLA's Collateral Attack Is Of No Moment Due To The Trial Court's Non-Discretionary Duty To Vacate A Judgment As Void For Lack Of Subject Matter Jurisdiction

Because a trial court has a non-discretionary to vacate a void judgment, the Commissioner Schmidt's contention, as expressed on page 4 of his subject Ruling, that OLLA should not ". . . be afforded the belated opportunity to attack the Washington court's [lower

C.J.S. Courts, section 13]; see also, *Matter of Marriage of Major*, 71 Wn. App. 531 (1993), 859 P.2d 1262.

⁷⁷ The synthesis applied in *Ralph v. State of Washington Department of Natural Resources*, 286 P.3d 992 (2012) by the Washington State Court of Appeals at Div. One, (Appeal Nos. 67515-0-1, 67704-7-1, October 15, 2012) where the plaintiff's Complaint included causes of action for injunctive and declaratory relief as well as general and specific damages alongside causes of action for tortious interference with contractual relation and business expectancy, conversion and negligence, builds upon the framework of the aforementioned Silver Surprise, Snyder and Washington State Bank cases, in its articulation of the rule that the requirements of RCW 4.12.010 should apply to actions seeking damages for harm to real property; see also, 14 KARL B. TEGLAND, WA PRACTICE: CIV. PRO. Section 6:5 at 185 (2d ed. 2009) (Actions seeking possession or partition of real estate and actions for injuries to real estate are . . . local ations.)"

court's] subject matter jurisdiction" is legally untenable. See *Mitchell v. Kitsap County*, 59 Wash. App. 177, 180-81, 797 P.2d 516 (1990) ["A trial court has no discretion when faced with a void judgment "whenever the lack of jurisdiction comes to light."] Moreover, "lack of subject matter jurisdiction is not subject to waiver." *Skagit Surveyors & Eng'rs, LLC*, 135 Wn.2d at 556, 958 P.2d at 962, because of which also held that a void judgment must be vacated even if the moving party actively participated in the Judgment and Orders. Moreover, as this Court has held, the jurisdictional requirement of the RCW 4.12.010 cannot be waived⁷⁸.

CONCLUSION

For the reasons stated above, the Commissioner's Ruling and the Decision of COA2 panel of three judges designated as "Order Denying Motion To Modify" which ratified it were made in error which this Court should properly rectify by granting review as warranted under RAP 13.4 (b) and/or **RAP 13.5 (b) (1)**. OLLA respectfully requests that upon review this Court decide anew

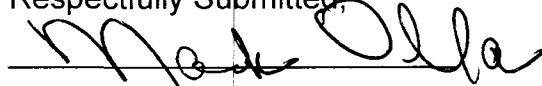
⁷⁸*Cugini v. Apex Mercury Mining Co.*, 24 Wn.2d supra at 409.

OLLA's MTM and its issues, including those before the COA2 in WAGNER's underlying MOTMTA and whether such was properly granted in accordance with the applicable standards for doing so pursuant to RAP 18.14 (e) (1), a determination which necessarily involves de novo review of the issue of the trial court's subject matter jurisdiction over OLLA's action from which may be concluded whether or not the procedures employed by the trial court entry of the judgment for which vacation was sought were inappropriate and constituted a manifest abuse of authority in any case because void for a lack of subject matter jurisdiction and in which case the trial court's denial of such motion to vacate would clearly be an abuse of discretion thereby subjecting the Judgment as entered by the trial court on August 3, 2012 to reversal on appeal and therefore the COA2 panel of three judges' October 29, 2013 Decision and the Commissioner's Ruling as entered August 29,

2013 should be disaffirmed and equally reversed at this Court.

Dated: November 29, 2013

Respectfully Submitted,



Pe	MARK OLLA
Petition	Petitioner Appellant Plaintiff Pro Se
N	P.O. Box 1213
Te	Newport, Oregon 97365
Em	Tel.: (541) 270-1422
	E-mail: markolla@aol.com

DECLARATION OF MAILING

I, Wendy Lee Maguire state declare as follows:

1. I am a citizen of the United States of America and a resident of the state of Oregon. I am over the age of 21 years.
2. I am neither a party to nor am affected in any way by the foregoing Appellant Mark Olla's Petition for Review nor am affected by underlying Kitsap County Superior Court action and/or Appeal as referenced in such Petition for Review document.
3. My business address is: Wendy Lee Maguire, 700 Helman Street, Ashland, Oregon 97520.
4. On this 29th day of November, 2013, I caused to be served on the following interested parties, and in the manner as indicated below, a true correct copy of the foregoing documents which can be individually accurately described as:

APPELLANT MARK OLLA'S PETITION FOR REVIEW BY THE WASHINGTON STATE SUPREME COURT OF THE ORDER ENTERED BY THE COURT OF APPEALS, DIVISION II IN DENIAL OF HIS RAP 17.7 MOTION TO MODIFY THE COMMISSIONER'S RULING WHICH GRANTED TO THE RESPONDENTS' THEIR MOTION ON THE MERITS TO AFFIRM

---Page 1 of 2---

Declaration of Mailing of Appellant Mark Olla's Petition for Review by The Washington State Supreme Court of the Order as Entered by the Court of Appeals, Division II in Denial of his RAP 17.7 Motion to Modify the Commissioner's Ruling which Granted Respondents' Motion on the Merits to Affirm in re Appeal No. 43899-2-II [OLLA v. WAGNER ET AL.]

[X] By placing a true and correct copy of such above described document in the mail by manner as indicated below, all postage thereon having first been prepaid by Mark Olla, and as addressed to the following recipient interested parties:

Isaac A. Anderson, Esq. in c/o
The Law Office of Issac A. Anderson
19717 Front Street
Poulsbo, Washington 98370
Tel.: (360) 779-4292
E-mail: isaac@isaacandersonlaw.com

[X] U.S. Postal Service Priority Mail

I declare the foregoing to be true and correct under penalty of perjury under the laws of the state of Washington on this 29th day of November, 2013 at Ashland, Oregon 97520.

Name print here:

Wendy Lee Maguire
Wendy Lee Maguire

---page 2 of 2---

Declaration of Mailing of the Appellant Mark Olla's Petition for Review by The Washington State Supreme Court of the Order as Entered by the Court of Appeals, Division II in Denial of his RAP 17.7 Motion to Modify the Commissioner's Ruling which Granted the Respondents' Motion on the Merits to Affirm in re Appeal No. 43899-2-II [OLLA v. WAGNER ET AL.]

APPENDICES

Appendix A: *a true and correct copy of.*

COA2 Panel of Three Judges' October 29, 2013 Ruling/Order ("Decision") Denying OLLA's (Petitioner Appellant's) Motion to Modify ("MTM") the COA2 Commissioner's Ruling (as entered by COA2 Court Commissioner Eric B. Schmidt on August 29, 2013) Granting Motion on the Merits to Affirm ("MOTMTA") the August 3, 2012 Judgment and Order as entered by the Kitsap County Superior Court

Appendix B: *a true and correct copy of.*

COA2 Commissioner's Ruling (as entered by COA2 Court Commissioner Eric B. Schmidt on August 29, 2013) Granting Granting Motion on the Merits to Affirm ("MOTMTA") the August 3, 2012 Judgment and Order as entered by the Kitsap County Superior Court following its July 20, 2012 Ruling in denial of OLLA's (Petitioner Appellant's) CR 60 (b) (5) motion to vacate its January 15, 2010 judgment and orders as void for lack of subject matter jurisdiction

Appendix C: *as pursuant to RAP 13.4 (c)(9), true and correct copies, respectively, of those constitutional provisions, rules, statutes as variously referenced in the foregoing Petition's Issue Statement.*

C1: Wash. Const. art IV, sec. 6

C2: RCW 4.12.010

C3: RCW 7.24.020 and RCW 7.24.010

C4: Civil Rule ("CR") 60 (b) (5)

C5: RAP 2.2

C6: RAP 13.4

C7: RAP 17.7

C8: RAP 18.14

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARK OLLA,

Appellant,

v.

ROBERT WAGNER, ET AL,

Respondents.

No. 43899-2-II

ORDER DENYING MOTION TO MODIFY

FILED
COURT OF APPEALS
DIVISION II
2013 OCT 29 AM 9:12
STATE OF WASHINGTON
BY DEPUTY

APPELLANT filed a motion to modify a Commissioner's ruling dated August 29, 2013, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 29th day of October, 2013.

PANEL: Jj. Maxa, Quinn-Britnall, Hunt

FOR THE COURT:

Hunt P.J.
PRESIDING JUDGE

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Appendix A



Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> OFFICE HOURS: 9-12, 1-4.

August 29, 2013

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CASE #: 43899-2-II
Mark Olla, Appellant v Robert Wagner, et al, Respondents

Mr. Olla & Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

Appellant's motion to consider additional authorities is granted. The motion to take additional evidence is denied. Appellant does not demonstrate that the requirements of RAP 9.11(1)(2), (3) and (6) have been satisfied.

Very truly yours,

David C. Ponzoha
Court Clerk

Appendix B



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Beginning of Chapter << [4.12.010](#) >> [4.12.020](#)

RCW 4.12.010

Actions to be commenced where subject is situated.

Actions for the following causes shall be commenced in the county in which the subject of the action, or some part thereof, is situated:

(1) For the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the title, or for any injuries to real property.

(2) All questions involving the rights to the possession or title to any specific article of personal property, in which last mentioned class of cases, damages may also be awarded for the detention and for injury to such personal property.

[Code 1881 § 47; 1877 p.11 § 48; 1869 p.12 § 48; 1860 p.7 § 15; 1854 p.133 § 13; RRS § 204.]



Appendix C2
C1



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[7.24.010](#) << [7.24.020](#) >> [7.24.030](#)

RCW 7.24.020

Rights and status under written instruments, statutes, ordinances.

A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

[1935 c 113 § 2; RRS § 784-2.]

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C3



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Beginning of Chapter << [7.24.010](#) >> [7.24.020](#)

RCW 7.24.010

Authority of courts to render.

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

[1937 c 14 § 1; 1935 c 113 § 1; RRS § 784-1.]

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C3



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RULE 60
RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(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;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished--Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) Procedure on Vacation of Judgment.

C4

(1) Motion. Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) Statutes. Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.

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Courts Home > Court Rules



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RULE 2.2

DECISIONS OF THE SUPERIOR COURT THAT MAY BE APPEALED

(a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

(1) Final Judgment. The final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs.

(2) (Reserved.)

(3) Decision Determining Action. Any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action.

(4) Order of Public Use and Necessity. An order of public use and necessity in a condemnation case.

(5) Juvenile Court Disposition. The disposition decision following a finding of dependency by a juvenile court, or a disposition decision following a finding of guilt in a juvenile offense proceeding.

(6) Termination of All Parental Rights. A decision depriving a person of all parental rights with respect to a child.

(7) Order of Incompetency. A decision declaring an adult legally incompetent, or an order establishing a conservatorship or guardianship for an adult.

(8) Order of Commitment. A decision ordering commitment, entered after a sanity hearing or after a sexual predator hearing.

(9) Order on Motion for New Trial or Amendment of Judgment. An order granting or denying a motion for new trial or amendment of judgment.

(10) Order on Motion for Vacation of Judgment. An order granting or denying a motion to vacate a judgment.

(11) Order on Motion for Arrest of Judgment. An order arresting or denying arrest of a judgment in a criminal case.

(12) Order Denying Motion to Vacate Order of Arrest of a Person. An order denying a motion to vacate an order of arrest of a person in a civil case.

(13) Final Order after Judgment. Any final order made after judgment that affects a substantial right.

(b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

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Courts Home > Court Rules



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RULE 13.4

DISCRETIONARY REVIEW OF DECISION TERMINATING REVIEW

(a) How to Seek Review. A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must serve on all other parties and file a petition for review or an answer to the petition that raises new issues. A petition for review should be filed in the Court of Appeals. If no motion to publish or motion to reconsider all or part of the Court of Appeals decision is timely made, a petition for review must be filed within 30 days after the decision is filed. If such a motion is made, the petition for review must be filed within 30 days after an order is filed denying a timely motion for reconsideration or determining a timely motion to publish. If the petition for review is filed prior to the Court of Appeals determination on the motion to reconsider or on a motion to publish, the petition will not be forwarded to the Supreme Court until the Court of Appeals files an order on all such motions. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed. Failure to serve a party with the petition for review or file proof of service does not prejudice the rights of the party seeking review, but may subject the party to a motion by the Clerk of the Supreme Court to dismiss the petition for review if not cured in a timely manner. A party prejudiced by the failure to serve the petition for review or to file proof of service may move in the Supreme Court for appropriate relief.

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(c) Content and Style of Petition. The petition for review should contain under appropriate headings and in the order here indicated:

(1) Cover. A title page, which is the cover.

(2) Tables. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with reference to the pages of the brief where cited.

(3) Identity of Petitioner. A statement of the name and designation of the person filing the petition.

(4) Citation to Court of Appeals Decision. A reference to the Court of

26

Appeals decision which petitioner wants reviewed, the date of filing the decision, and the date of any order granting or denying a motion for reconsideration.

(5) Issues Presented for Review. A concise statement of the issues presented for review.

(6) Statement of the Case. A statement of the facts and procedures relevant to the issues presented for review, with appropriate references to the record.

(7) Argument. A direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument.

(8) Conclusion. A short conclusion stating the precise relief sought.

(9) Appendix. An appendix containing a copy of the Court of Appeals decision, any order granting or denying a motion for reconsideration of the decision, and copies of statutes and constitutional provisions relevant to the issues presented for review.

(d) Answer and Reply. A party may file an answer to a petition for review. A party filing an answer to a petition for review must serve the answer on all other parties. If the party wants to seek review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer. Any answer should be filed within 30 days after the service on the party of the petition. A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer. A party filing any reply to an answer must serve the reply to the answer on all other parties. A reply to an answer should be filed within 15 days after the service on the party of the answer. An answer or reply should be filed in the Supreme Court. The Supreme Court may call for an answer or a reply to an answer.

(e) Form of Petition, Answer, and Reply. The petition, answer, and reply should comply with the requirements as to form for a brief as provided in rules 10.3 and 10.4, except as otherwise provided in this rule.

(f) Length. The petition for review, answer, or reply should not exceed 20 pages double spaced, excluding appendices.

(g) Reproduction of Petition, Answer, and Reply. The clerk will arrange for the reproduction of copies of a petition for review, an answer, or a reply, and bill the appropriate party for the copies as provided in rule 10.5.

(h) Amicus Curiae Memoranda. The Supreme Court may grant permission to file an amicus curiae memorandum in support of or opposition to a pending petition for review. Absent a showing of particular justification, an amicus curiae memorandum should be received by the court and counsel of record for the parties and other amicus curiae not later than 60 days from the date the petition for review is filed. Rules 10.4 and 10.6 should govern generally disposition of a motion to file an amicus curiae memorandum. An amicus curiae memorandum or answer thereto should not exceed 10 pages.

(i) No Oral Argument. The Supreme Court will decide the petition without oral argument.

[Amended September 1, 1999; December 5, 2002; September 1, 2006; September 1, 2009; September 1, 2010 (format changes only)]

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RULE 17.7
OBJECTION TO RULING--REVIEW OF DECISION
ON MOTION

An aggrieved person may object to a ruling of a commissioner or clerk, including transfer of the case to the Court of Appeals under rule 17.2(c), only by a motion to modify the ruling directed to the judges of the court served by the commissioner or clerk. The motion to modify the ruling must be served on all persons entitled to notice of the original motion and filed in the appellate court not later than 30 days after the ruling is filed. A motion to the Justices in the Supreme Court will be decided by a panel of five Justices unless the court directs a hearing by the court en banc.

References
Form 20, Motion To Modify Ruling.

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[Back to Top](#) | [Privacy and Disclaimer Notices](#)

C7



Courts Home > Court Rules



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RULE 18.14
MOTION ON THE MERITS

(a) Generally. The appellate court may, on its own motion or on motion of a party, affirm or reverse a decision or any part thereof on the merits in accordance with the procedures defined in this rule. A motion by a party pursuant to this rule should be denominated a "motion on the merits." The general motion procedures defined in Title 17 apply to a motion on the merits only to the extent provided in this rule.

(b) Time. A party may submit a motion on the merits to affirm any time after the opening brief has been filed. A party may submit a motion on the merits to reverse any time after the respondents brief has been filed. The appellate court on its own motion may, at any time, set a case on the motion calendar for disposition and enter orders the court deems appropriate to facilitate the hearing and disposition of the case. The clerk will notify the parties of the setting and of any orders entered by the court.

(c) Content, Filing, and Service; Response. A motion on the merits should be a separate document and should not be included within a party's brief on the merits. The motion should comply with rule 17.3(a), except that material contained in a brief may be incorporated by reference and need not be repeated in the motion. A motion on the merits should not exceed 25 pages, excluding attachments. The motion should be filed and served as provided in rule 17.4. A response may be filed and served as provided in rule 17.4(e) and may incorporate material in a brief by reference. Requests for attorney fees are governed by rule 18.1.

(d) Who Decides Motion. A motion on the merits to affirm shall be determined initially by a judge or commissioner of the appellate court. A motion to reverse may be denied by a commissioner or judge or submitted with a recommendation to a panel of the appellate court.

(e) Considerations Governing Decision on Motion.

✓ (1) Motion To Affirm. A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly ~~without merit~~. In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency.

(2) Motion To Reverse. A motion on the merits to reverse will be granted in whole or in part if the appeal or any part thereof is determined to be clearly with merit. In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and clearly not supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly an abuse of discretion.

(f) Oral Argument. A motion on the merits may be denied without oral

overleaf file

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