No. 96837-3

SUPREME COURT
OF THE STATE OF WASHINGTON

TED SPICE and PLEXUS DEVELOPMENT, LLC,

Appellants,

v.

PIERCE COUNTY, a political subdivision, and the CITY OF PUYALLUP, a municipal corporation,

Respondents.

RESPONDENT CITY OF PUYALLUP'S ANSWER TO PETITION FOR REVIEW

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I. THE UNTIMELY PETITION SHOULD BE DISMISSED

Petitioners (hereinafter may also be referred to collectively as "Spice") did not timely file their Petition for Review, and it should be dismissed. The Court Clerk stated in his letter of February 28, 2019, that "the motion to accept the petition for filing will be set for consideration by a Department of the Court alongside the petition for review." For more extensive analysis, please see the City's response to the Motion to accept the petition for filing. The Clerk accurately laid out the facts in his February 28th letter. The Petition was due to be filed in the Court of Appeals on February 11. Both the Court of Appeals and Supreme Court were closed, but the Court of Appeals' electronic filing portal was open, so it could have been filed on this date by Spice. Spice failed to file.

On February 12, the Court of Appeals was open regular business hours 9:00 am-4:00 pm. The Petition should have been filed on this date at the very latest. GR 21 is not applicable because the Court of Appeals was open regular business hours and the Petition should have been filed on this date. Petitioners did not file the Petition for Review until 4:57 pm on February 13 in the Supreme Court. This is not timely, thus review should not be accepted.

Spice has failed to provide this Court with any evidence of "extraordinary circumstances" to support late filing of the Petition under RAP 18.8, and this Petition should be dismissed for untimely filing.

II. INTRODUCTION

In the event this Court does consider the Petitioners' untimely

Petition for Review, it should still deny the Petition and dismiss the case.

This case has had a tortured path over 12½ years of litigation in now arriving at the doorstep of the State Supreme Court; however, one thing has remained constant throughout the life of this litigation: Spice has lost at every turn. Every court has rejected his claims. Starting at the Pierce County Superior Court, Spice has lost all relevant motions:

- Order Affirming Decision of Pierce County Hearing Examiner and Remanding Case for Further Proceedings (September 12, 2008), CP 666-669;
- Order Granting Summary Judgment, Dismissing Case with Prejudice and Awarding Attorneys' Fees (June 21, 2013), CP 1141-1145;
- Order on Motion for Reconsideration(September 10, 2013),CP 1365;
- Order Granting City of Puyallup an Award of Reasonable Attorneys' Fees and Costs (December 13, 2013), CP 2574-2590;
- Final Judgment (December 13, 2013), CP 2591-2592;
- Findings of Fact, Conclusions of Law and Decision Following Remand Hearing, and Order Granting City of Puyallup's Motion to Vacate and Motion for Summary Judgment, and Dismissing Case with Prejudice (July 20, 2015), CP 3409-3421;
- Order Granting City of Puyallup an Award of Reasonable Attorneys' Fees and Costs Pursuant to RCW Ch. 64.40 (April 15, 2016), CP 5521 – 5542, also CP 7480-7501;
- Findings of Fact, Conclusions of Law and Order Granting City of Puyallup CR 11 Sanctions Against Attorney Carolyn A. Lake (April 15, 2016), CP 7460 – 7479;
- Supplemental Order Correcting Order of April 15, 2016 Granting City of Puyallup an Award of Reasonable Attorney's Fees and Costs Pursuant to RCW Ch. 64.40 (May 20, 2016), CP 7528-7529;
- Final Judgment CR 11 Sanction Award (May 20, 2016) CP 7530-31;
- Final Judgment on RCW 64.40 Award (May 20, 2016), CP 7532-33;
- Opinion of Court of Appeals, (November 21, 2017) and
- Revised Opinion of Court of Appeals, (November 28, 2018).

Each and every one of these Orders, Judgments and Opinions were in favor of the City. Spice has never prevailed at any point in the litigation,

and should not prevail in this Court. The Petition provides no basis for reversing the decisions of either the Superior Court or Court of Appeals.

III. STATEMENT OF FACTS

This action originally began on August 29, 2007, when the Petitioners filed a LUPA Petition and Complaint for declaratory judgment and damages under ch. 64.40 RCW ("Complaint"). CP 1-28**.** In the Complaint, three Plaintiffs are identified: Ted Spice; Plexus Development, LLC; and Doris E. Mathews. Ms. Mathews is identified as "the [100%] fee title property owner." The Appellants' attorney was (and remains) Carolyn A. Lake. The City of Puyallup and Pierce County are identified as "respondents." The property at issue in the case is identified as 11003 – 58th St. Ct. East ("Property"), owned by Ms. Mathews, and located outside of the Puyallup City limits, in unincorporated Pierce County. CP 1-28.

As discussed *infra*, two key points are: First, 100% fee title property owner Doris Mathews died in December 2009, and the deceased Ms. Mathews has never been removed as a named party to this litigation; nor did Petitioners' attorney, Ms. Lake, ever inform either the trial court or the Court of Appeals that she no longer represented Ms. Mathews (or her estate). Second, following a hotly contested trial between Ted Spice and Ms. Mathews' Estate in 2012, which involved the subject property, the court awarded 75% ownership of the Property to Ms. Mathews' Estate and 25% ownership to Spice. CP 3668, 3671. Ms. Lake never amended the Complaint to reflect this post-filing ownership adjustment, but she continued to represent Ms. Mathews's interests after her death.

A. Petitioners' only causes of action were for the LUPA appeal and ch. 64.40 RCW; there are no tort claims

It is important for the Court to understand how and why this litigation started, and exactly what Petitioners' complaints were and the relief they sought. Petitioners challenged the City's requirement that they agree to annex their property to the City as a condition to receiving City water service—both a change in service and a connection to the City's water system—to their property which is located outside of the City's corporate limits. At the time, City water service requirements for properties outside the City's corporate limits required that such outside property owners either be a part of an annexation process or agree to not challenge annexation at a later date. This was a very common requirement by many cities in the State, and well within the City's legal authority. *See, e.g.*, CP 1522-26.

This case began as a land use appeal of a decision by the Pierce County Hearing Examiner ("Examiner") who had, following several hearings, ruled in favor of the City on Petitioners' water service demands. The following summary facts are either not disputed or indisputable (they come from Petitioners' own pleadings or documents, or Court documents and decisions). Petitioners filed their lawsuit on August 29, 2007—a combined Land Use Petition Act ("LUPA") Petition, Complaint for Declaratory Relief, and RCW ch. 64.40 claim for damages. CP 1-28. Spice never brought any tort claims. Petitioners contested the Examiner's August 7, 2007, decision affirming the City's denial of water service to their property because the Appellants' property was not in the process of being

annexed to the City. In their LUPA Petition, Petitioners argued that the Examiner erred by failing to "firmly [require] Puyallup to affirmatively meet its duty to provide water service to Petitioner[s]," and that the Examiner erred by failing to "require the City of Puyallup to provide water service." Petitioners requested the following relief: "[r]emand to the Hearing Examiner with direction to require the City of Puyallup to carry out its duty to provide water service to Petitioners." CP 10-11.

The LUPA appeal was subsequently heard by the Superior Court and a LUPA Order, substantially in favor of the City (and Pierce County), was entered on September 12, 2008. Key rulings included:

1. ***The Court affirms the August 7, 2007 decision of the Pierce County Hearing Examiner, to wit: the Pierce County Hearing Examiner does not have the power to compel the City of Puyallup to provide water service to Petitioners' property.*** However, the Hearing Examiner does have the power to determine what reasonable pre-conditions the City of Puyallup may place upon the furnishing of water (Puyallup concedes that Petitioners are within its water service area) including whether Puyallup may require annexation of Petitioners' real property into the City as a pre-condition of providing commercial water service to Petitioners and/or ***to processing an appropriate application for water service or changes in water service (whether commercial or residential) in accord with pertinent Puyallup Municipal Code***.
2. ***This matter is remanded to the Pierce County Hearing Examiner for proceedings consistent with this ruling.***
3. ***If Petitioners do continue to pursue a change in their existing water service from the City of Puyallup, they have to comply with the application process set forth in pertinent Puyallup Municipal Code, except insofar as the Code is inconsistent with this order.***
4. This Department retains jurisdiction over this matter in the event of issues that bring this matter before the Superior Court.
5. ***With the entry of this order as to the LUPA matter, the declaratory judgment action is moot.***
6. ***Petitioner's cause of action for damages and attorney fees pursuant to RCW 64.40 shall be bifurcated from the LUPA appeal and set for trial.*** [Emphasis added.]

Order Affirming Decision of P. C. Hearing Examiner. CP 667-668.

Thereafter, nothing happened for nearly five (5) years. Due to Petitioners' own conduct and through no fault of the City, the Court's September 12, 2008 Order was left languishing without any compliance by the Petitioners. In part, the Order required (1) that the case be "remanded to the Pierce County Hearing Examiner for proceedings consistent with this ruling," (CP 668, ¶ 2) (never done), (2) that the Examiner "determine what reasonable pre-conditions the City of Puyallup might place upon the furnishing of water... including whether Puyallup may require annexation of Petitioners' real property into the City as a pre-condition of providing commercial water service to Petitioners and/or to processing an appropriate application for water service or changes in water service (whether commercial or residential) in accord with pertinent Puyallup Municipal Code" CP 667-68, ¶1 (never done), and (3) that Petitioners comply with the application process set forth in the City code if they want a change in their existing water service from the City. CP 667-68, ¶3 (never done). As discussed, *infra*, this non-compliance bars Petitioners' ch. 64.40 claims.

As of January 1, 2011, the Hearing Examiner lost jurisdiction to hear water service disputes, including Petitioners'. Pierce County Code 19.140.909.F.2, which provided that "unresolved timely and reasonable service disputes shall be referred by the Lead Agency to the P.C. Hearing Examiner for final resolution…" was eliminated. CP 1559. After this date, any remand was impossible, thus barring Spice's ch. 64.40 claims.

Additionally, as of July 18, 2011, the City of Puyallup eliminated

annexation as a condition for connecting to the City water service if a property was outside of the City. CP 1529-1530. By virtue of this Code change, Petitioners were granted the very relief they sought in their LUPA Petition and Complaint. *See*, CP 11-12. However, they still needed to make an application for water service to the City. CP 1529-1530. Petitioners never submitted an application for City water service. These undisputed facts also bar Petitioners' ch. 64.40 claims.

The time period for seeking any relief from the Hearing Examiner or requesting further review by this Court of the underlying water service or water condition issues raised by Petitioners expired many years ago. The Examiner's August 7, 2007 decision, which is in favor of the City, is final, binding and the law of the case. The bifurcated LUPA claim is also time barred, unassailable and its dismissal was properly affirmed by the Court of Appeals. For these and many other reasons, Petitioners' ch. 64.40 damage claims fail as a matter of law.

B. First summary judgment dismissal of case, ch. 64.40 fees and first judgment

On March 29, 2013, the City filed its (first) Motion for Summary Judgment, seeking dismissal of the case in its entirety. In response, Plaintiffs (Petitioners) entered a stipulated dismissal of Pierce County because the LUPA portion of the litigation had been "fully adjudicated." CP 1003-1006. This Motion was granted on June 21, 2013 after hearing argument by the attorneys for the parties. The Court also ordered that the City was entitled to attorneys' fees under RCW ch. 64.40 in an amount to

be determined at a later hearing. CP 1141-1144. The trial court held as follows in its Order Granting summary judgment:

> (1) there had been no compliance with the Court's September 12, 2008 Order and no remand to the Hearing Examiner; (2) Petitioner's signed a stipulation acknowledging that the LUPA matter 'had been fully adjudicated'; (3) the Pierce County Hearing Examiner's August 7, 2007 Decision is final and binding; (4) Petitioners have not complied with the City of Puyallup's water service requirements, and never submitted an application for water service or change of water service to the City; and (5) Petitioners cannot meet various predicate requirements for a cause of action under RCW ch. 64.40 and, therefore, Petitioners' RCW ch. 64.40 damage claim is not ripe and Petitioners lack standing to pursue that claim.

CP 1143. Reconsideration of this Order was denied by the Court on September 10, 2013. CP 1365. On October 10, 2013, Petitioners filed their first Notice of Appeal. CP 1369-1381.

The City's Motion for Attorneys' Fees was granted and fees in the amount of $132,790.65 were assessed against Plaintiffs Ted Spice, Plexus Development, LLC and Doris E. Mathews, "jointly and severally." CP 2574-2590; CP 2591-2592. Counsel for Petitioners allowed this Order and Judgment to be entered against their client, Doris Mathews, even though she had been dead for four years. Petitioners filed their Second Appeal after this Order. CP 2593-2613.

C. 75% Property owner Doris Mathews died December 8, 2009, with no substitution of the estate or P.R. for Ms. Mathews

Ms. Mathews died on December 8, 2009 in Pierce County. At the time of her death she was 81 years old and was widowed. CP 3807. Ms. Mathews' will was admitted to probate on January 8, 2010, and Donna

DuBois, her daughter, was appointed as the personal representative ("P.R.") of the Estate of Doris Mathews. *Id.* at ¶ 4. At no time after Ms. Mathews' death did anyone, including Mr. Spice and attorney Carolyn Lake, attempt to arrange for a substitution of parties in this case—namely, a substitution of the Estate or the P.R. for the decedent, Doris Mathews. CP 3808, ¶7; CP 3810, ¶13. The Estate of Doris Mathews currently owns 75% of the property, and Mr. Spice owns only 25%. CP 3668, 3671**.**

D. In response to the Court of Appeals' Remand Order, the City brought a motion to vacate, motion for summary judgment and motion for CR 11 fees and costs

The Court of Appeals remanded the case to the trial court in an order dated June 4, 2014 in order to determine the implications of Ms. Mathews's death in December 2009. In response, the City brought a Motion to Vacate all Orders Entered by the Court following the death of Doris Mathews, as well as a new Motion for Summary Judgment for Failure to Join an Indispensable Party and a Motion for CR 11 Fees due to the wasted expenditure of time, expenses and fees incurred in this matter that arose from Spice's and attorney Lake's failure to advise the City's attorneys and the Court of the death of Doris Mathews.

The Honorable Jack Nevin of Pierce County Superior Court held three thorough and probing fact-finding hearings (on January 9, 2015, June 5, 2015 and July 20, 2015) regarding these motions; and, after requiring the P.R. of the Estate Mathews to attend, Judge Nevin orally granted both Motions and set a hearing for the City's CR 11 Motion.

On July 20, 2015, after holding his third fact-finding hearing to comply with the Appellate Court's Remand Order, Judge Nevin entered *Findings of Fact and Conclusions of Law, and an Order* granting the City's Motion to Vacate and Motion for Summary Judgment:

> 28. Once Ms. Mathews died December 8, 2009, her then attorneys, Carolyn Lake and—later—associated attorney Stephen Hansen, lost legal ability to do anything for or take any action regarding Ms. Mathews or her interest in the subject property in this litigation. Accordingly, when Ms. Mathews died, the attorney-client relationship between her and her attorneys, Carolyn Lake and Stephen Hansen, ended and those attorneys were without authority to take any action or do anything in the case regarding her claims or her interest in the subject property;
>
> 29. The Estate of Doris Mathews, which currently holds a 75% interest in the subject property, is a necessary and indispensable party to this litigation. The litigation cannot proceed without the Estate in the case, and the Estate refuses to join in the litigation and wants no part of it. Additionally, the Court is without authority to and cannot compel the Estate to be a party to this litigation against its wishes; ***
>
> 30. All decisions, orders and the judgments following Ms. Mathews' death must be vacated ab initio; and, even if this Court could compel the Estate to be a party it would refuse to do so;
>
> 31. Because there is an absence of a necessary and indispensable party to this action—the Estate of Doris E. Mathews which holds a 75% interest in the subject property—there is no legal relief this Court can grant, and no authority to allow this matter to proceed. Accordingly, due to the absence of the Estate as a necessary and indispensable party to this litigation and for the reasons set forth in the City of Puyallup's October 9, 2014 Motion for Summary Judgment, summary judgment is required, and dismissal of this case with prejudice is warranted.

CP 3418-3419. That Order vacated all of the orders and judgments entered against Spice following Ms. Mathews' death, and granted summary

judgment in favor of the City for Spice's failure to join an indispensable party (the Estate). Appellants followed this with their third Notice of Appeal, filed on August 17, 2015. CP 3560-3561.

E. The City filed a renewed motion for CR 11 sanctions and the trial court imposed sanctions on attorney Lake

On April 15, 2016, the Court entered *Findings of Fact and Conclusions of Law and Order Granting City of Puyallup's CR 11 Sanctions* against Attorney Carolyn A. Lake (CP 7460-7479). Sanctions in the amount of $45,000 were entered "which the Court finds to be a fair and reasonable amount given the nature and extent of this litigation and how far it was allowed to proceed before the fact of Ms. Mathews' death was disclosed, for Ms. Lake's failure to make a reasonable inquiry into the death of her client, Ms. Mathews, and as a sanction for deterrence. This amount is a sanction award and not intended as attorneys' fees and costs incurred by the City."[1] *Id*. at 7474. The trial court continued: "Ms. Lake continued to vigorously litigate this case following the death of Plaintiff Mathews without legal authority to do so; and thus filed pleadings that were not well-grounded in fact and without legal effect." *Id*. at 7475.

[1] "Now, to say this matter was zealously litigated by all sides would be the understatement of the century. And throughout this litigation petitioner's [Appellants'] counsel, primarily Ms. Lake, represented Doris Mathews, only she was dead. And throughout this litigation, despite a direct inquiry from this court in hundreds of pages, at least over 100 pages, I still have not heard an explanation of why the court wasn't told that Ms. Mathews was dead. I don't know how many pleadings have been filed in this case, I stopped counting at about 80, but I think certainly 80 pleadings, but every pleading filed in this case until a footnote before the Court of Appeals, the plaintiffs purported to represent Doris Mathews." RP (December 11, 2015) at 20:10-23.

F. The Trial Court granted the City's renewed motion for attorneys' fees and costs pursuant to ch. 64.40 RCW

Also on April 15, 2016, *sua sponte,* Judge Nevin drafted and entered his own *Order Granting the City of Puyallup an Award of Reasonable Attorney Fees and Costs Pursuant to RCW Ch. 64.40* (CP 7480-7501). The attorney fee award was entered against Spice and Plexus in the amount of $132,790.65. This was the same amount that was previously entered against the Petitioners on December 13, 2013. CP 2574-2590. Appellants filed a Fourth Notice of Appeal, appealing both the CR 11 and RCW ch. 64.40 Orders.

On May 20, 2016, Final Judgments were entered on the CR 11 Award and on the ch. 64.40 RCW Award, from which Appellants filed their Fifth Notice of Appeal.

G. The Court of Appeals, Division II, affirms judgment in favor of the City on all issues twice, in opinions dated November 21, 2017, and November 28, 2018[2]

The Court of Appeals, Division II, held that "the superior court properly granted summary judgment to the City, did not abuse its discretion by imposing CR 11 sanctions against Spice's attorney, and did not err by granting the City's request for reasonable attorney fees and costs at trial. We also hold against Spice's appeal of the 2008 decision. Accordingly, we affirm the superior court." *Opinion of November 28,*

[2] The second Opinion expanded on the convoluted facts of this case, and further clarified the Court's reasoning for affirming the trial court in all respects.

2018,[3] at 1. This thorough, well-reasoned decision should be upheld by this Court and the Petition for Review should be dismissed.

IV. WHY REVIEW SHOULD NOT BE ACCEPTED

Knowing that review is only accepted by this Court in limited circumstances, Petitioners weakly attempt to manufacture issues that attempt to fit within the framework of RAP 13.4(b). In reality, the Court of Appeals' Opinion is not in conflict with any published Washington State cases and no significant questions under the Washington State or federal constitutions have been raised, nor does the Petition involve an issue of substantial public importance. The Petition should be rejected.

A. *Maytown Sand and Gravel* is not aapplicable and does not conflict with the Court of Appeals' Opinion

The Maytown Sand and Gravel case, relied on so heavily in the Petition, is factually distinguishable and wholly inapplicable. First, the egregious acts of City employees documented in *Maytown* (and *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998)), are palpably not present in this case. Not even close.

Second, in order to try to make *Maytown* seem applicable, Petitioners play fast and loose with the facts. For example, they never filed a water service application which the City "refused to process" (*Petition*, at 5) ("Spice, however has not shown that he has submitted a request for water service that satisfied the requirements of Puyallup's city code as

[3] The November 28, 2018 is the Opinion of record in this case, since the November 21, 2017 Opinion was withdrawn by the Court of Appeals.

required by the remand order in the 2008 [Superior Court] decision. Satisfying these requirements was a prerequisite to the provision of water service by the City under the 2008 decision." *Opinion*, at pp. 20-21). Also, they never exhausted their administrative appeal by pursuing a remand with the Hearing Examiner pursuant to the 2008 decision (CP 666-669). And they never alleged causes of action in tort for Puyallup's alleged breach of its duty to provide water service. CP 1-12.

Maytown is not applicable because it never addressed ch. 64.40 claims. Ch. 64.40 claims are not tort claims. "The statute expressly states the remedies provided are in addition to any other remedies provided by law.[4] RCW 64.40.040. *See Pleas v. Seattle*, 49 Wn. App. 825, 841 n.3, 746 P.2d 823 (1987)(stating RCW 64.40 "is a clear break with the past").

There are strict deadlines and requirements for bringing an action under ch. 64.40. RCW 64.40.030 provides that "[a]ny action to assert claims under the provisions of this chapter ***shall be commenced only within thirty days after all administrative remedies have been exhausted***." [Emphasis added.] Thus, in order to bring a ch. 64.40 claim—Spice's only damages claim in this litigation—administrative remedies, which include the LUPA appeal, must have been exhausted. Because Spice failed to do this, his ch. 64.40 damages claim was properly

[4] *Wilson v. City of Seattle*, 122 Wn.2d 814, 823 (distinguishing between ch. 64.40 claims and tort claims); *Westmark v. Burien,* 140 Wn. App. 540, 548-549 (2007) (distinguishing between ch. 64.40 and tort claims and holding "the plain language of chapter 64.40 RCW provides that it is a remedy 'in addition' to 'other remedies provided by law"); *Blume v. City of Seattle*, 134 Wn.2d 243, 250-251, (holding "Petitioners' tortious interference claim is separate from their claim for damages pursuant to RCW 64.40.020").

dismissed by the trial court and affirmed by the court of appeals.

The only claim for damages in the Complaint was pursuant to ch. 64.40. CP 10-11. No torts were alleged. No "tortious acts" were ever committed by any City employees. In short, the *Maytown* case is completely irrelevant and inapposite because ch. 64.40 damages claims were not addressed or at issue in that case.

B. Spice never filed a water service application with the City

It is indisputable that neither Mr. Spice nor any of the Petitioners ever submitted an application for water service, or otherwise satisfied the requirements of Puyallup's City Code for water service outside City limits.[5] Petitioners have never submitted a written application for water service or a change in water service; nor did they request a pre-application meeting with the City, paid any application fee, asked for City staff review of any proposed application, requested a City Council hearing or review of any proposed application or submitted plans for water service or change of water service—all as required by City Code. *Id*.; s*ee*, PMC ch. 14.22.

Filing an application is a condition precedent to ripen an RCW ch.64.40 damages claim, and Petitioners' failure to do so is fatal to their claims. *See*, RCW 64.40.020(1) ("Owners of a property interest who have filed an application for a permit have an action for damages..."). Because Spice never filed a water service application, his ch. 64.40 claim was properly dismissed by the trial court and affirmed by the Court of Appeals.

C. Petitioners' claims have been rendered moot

[5] See, e.g., CP 1518-1519; CP 1723-1724.

Ordinances were adopted effective in 2011 that (1) removed the authority of the Pierce County Hearing Examiner to resolve water service disputes, and (2) eliminated the requirement that applicants for water services outside the City limits be in the process of annexation.

Under either of these two legislative actions, Petitioners' claims and this Appeal are moot. There is no meaningful relief this Court can provide at this time. First, the appeal is moot because the Hearing Examiner lost jurisdiction to hear the remand of the September 12, 2008 Order because of Pierce County Ordinance No. 2010-88s, which became effective on January 1, 2011. That Ordinance eliminated the Pierce County Hearing Examiner review of water system, water service and water boundary disputes. CP 1717 ¶6-7; 1551-60. There is no way for Petitioners to now comply with the 2008 remand requirement or to have the Hearing Examiner further review or decide the questions in the Order.

Further, the relief requested by Petitioners was for the ability to connect to and receive City water service. The City amended its Code effective July 18, 2011 eliminating the annexation requirement. Since that time Petitioners have been able to obtain what they requested in the original LUPA and thus the appeal was mooted. There is nothing left from which to appeal, and there is no basis for ch. 64.40 damages.

D. The Trial Court/Court of Appeals properly ruled that Doris Mathews's Estate is an indispensable party to this litigation

Both lower courts properly ruled that Doris Mathews' Estate was an indispensable party to obtain relief in this case:

> Spice contends that his ownership interest in the subject property in this case establishes that is an owner of a 'property interest' who may seek damages under RCW 64.40.020. Although Spice may have a property interest, he does not explain how that fact affects the superior court's determination that the Estate was a necessary and indispensable party under CR 19. Therefore this argument fails.

Opinion, at 18. Spice again cannot explain how his property interest impacts the trial court's determination that the Estate was a necessary and indispensable party under CR 19. He cites no case law interpreting CR 19 in support of his position. His argument once again must fail.

E. The Trial Court properly imposed CR 11 sanctions which were properly affirmed by the Court of Appeals

Petitioners devote barely one page of their Petition to this issue. The Court of Appeals went through an exhaustive discussion encompassing seven pages of its *Opinion* (pp. 21-28), and addressed each of Spice's 15 grounds upon which the CR 11 violation should have been reversed, yet rejected each of these points. Once again, Petitioners have failed to present this Court any law or basis upon which the Trial Court's holding of CR 11 violations by Petitioners' counsel can be reversed.

F. Petitioners' recently manufactured constitutional due process claims were never plead and should be disregarded

Petitioners now try to manufacture a "significant question of law under the Constitution of the State of Washington or of the United States" pursuant to RAP 13(b)(3), by asserting a federal or state due process claim. However, they never pleaded any such claims in their Complaint, nor did they raise these claims in their summary judgment opposition at

the Trial Court, nor did they raised them in the Court of Appeals. These claims are not properly before this Court. Petitioners attempt this last-minute "Hail Mary;" however the Court should disregard it out of hand: Pursuant to RAP 2.5(a)(3), to raise an error for the first time on appeal, the error must be "manifest" and truly of constitutional dimension.[6]

Petitioners have failed to meet the standard for raising an issue for the first time on appeal—that there is an error that is "manifest" allowing appellate review of the issue. Here, there is no manifest error. It was never raised by Petitioners, and never briefed or argued at any other point in this litigation. Petitioners' argument for appellate review must fail.

G. The Division II November 28, 2018 Opinion does not conflict with any published Washington case law

1. The Opinion does not conflict with *Citizens to Preserve Pioneer Park v. City of Mercer Island*, 106 Wn. App. 461

In a continued attempt to manufacture some compelling issue upon which this Court can entertain this Petition, Spice incoherently argues that "in considering Spice's claims on Summary Judgment in 2008, the Trial and Appeals Court should have reviewed the administrative record before the body or officer in the local jurisdiction authorized to make the final determination." *Petition*, at 21-22. However, the Trial Court in 2008 remanded the case to the Hearing Examiner for additional proceedings

[6] ***The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review***." *State v. Kirkman*, 159 Wn.2d 918, 926-927 (2007) (emphasis added). *See also*, *In Re Detention of Law*, 146 Wn. App. 28, 44 (2008) ("[U]nless he raises a manifest error of constitutional magnitude, he may not assert this argument for the first time on appeal.")

(CP 666-669), something that Spice never pursued; and that appeal is now moot. The 2005 Hearing Examiner administrative hearing is irrelevant because Spice filed a LUPA appeal of this H.E. decision in 2006, ***and later withdrew that Petition***. *Opinion*, 3-4.

The Court of Appeals reviewed over 7,500 pages of clerk's papers and dozens of pages of transcripts. The Court was aware of all relevant facts. Both hearing examiner decisions were referenced in the Court of Appeals Opinion. The issues before the Court on this appeal were the 2008 LUPA and Trial Court orders appealed by Petitioners in their five (5) Notices of Appeal. CP 1369-1381; 3560-3576; 2593-2613; 5453-5496.

2. *Van Sant v. City of Everett*, 69 Wn. App. 641, 849 P.2d 1276 (1993) is inapplicable because the LUPA was rendered moot when the Hearing Examiner lost the ability to provide relief via changes to both the Puyallup City Code and Pierce County Code

Petitioners misunderstand the Court of Appeals' ruling as to the 2008 Superior Court Order (CP 666-669). The Court of Appeals held that "ordinances were adopted in 2011 that removed the authority of the Hearing Examiner to resolve water disputes under PCC 19D.140.090 and that eliminated the requirement that applicants for water services outside the City limits be in the process of annexation. Therefore, any challenge to the first two elements of the 2008 decision is moot." *Opinion*, at 20.[7]

[7] Further, "Spice has not shown that he has submitted a request for water service that satisfied the requirements of Puyallup's City Code as required by the Remand Order in the 2008 decision. Satisfying these requirements was a prerequisite to the provision of water service by the City under the 2008 decision." *Opinion*, at 20-21. Petitioners' failure to submit an application for water service is fatal to their claims.

H. The City does not have a duty to provide water service to property located outside of its City limits

When this lawsuit was filed, City requirements for water service to properties outside the City's corporate limits required that such outside property owners either be a part of an annexation process or agree to not challenge annexation at a later date. *See, e.g.*, CP 1522-26. This was a very common requirement by many cities in the State, and well within the City's legal authority.[8] Petitioners' property was located outside of City limits, thus no duty was breached to provide water service, and there is no "issue of substantial public interest" that warrants review under RAP 13.4.

V. CONCLUSION

The Petition for Review is untimely, and it should be dismissed on that ground alone. However, if the Court does consider the Petition, Petitioners have not satisfied any of the requirements of RAP 13.4 to warrant review by this Court. Dismissal is proper.

Respectfully submitted this 29th day of March, 2019.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.

By: */s/ Michael C. Walter*
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[8] As a general rule, a municipality does not have a duty to provide water or sewer service outside its corporate limits. *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wash.2d 371, 381-82 (1993)*; Brookens v. City of Yakima*, 15 Wn.App. 454, 465-66 (1976); *Harberd v. City of Kettle Falls*, 120 Wn.App. 498, 515-16 (2004).

DECLARATION OF SERVICE

I declare that on March 29, 2019, a true and correct copy of the foregoing document was sent to the following parties of record **via email**:

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